Kipkoti & another v Chemelil & 4 others (Civil Suit 56 of 2018)
[2024] KEHC 14804 (KLR) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 14804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 56 OF 2018

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

WILSON KIPKEMBOI KIPKOTI ..... 1ST PLAINTIFF

LALLY FARM LIMITED ..... 2ND PLAINTIFF

AND

SAMUEL KIPTALA CHEMELIL ..... 1ST DEFENDANT

ALBERT KIMWATAN ..... 2ND DEFENDANT

ENDO INVESTMENTS LIMITED ..... 3RD DEFENDANT

SIRIKWA ELDORET HOTEL LIMITED ..... 4TH DEFENDANT

MAYFAIR SERVICES AND INVESTMENTS LIMITED ..... 5TH DEFENDANT

RULING

1. The description of the parties in this matter was well-captured by H. Omondi J (as she then was) in her Ruling delivered herein on 2/05/2019 pursuant to a Preliminary Objection filed by the Defendants seeking the striking out this suit for want of jurisdiction. This is how the Judge introduced the parties:

> "In citing a brief history of the parties, it is said that the 4th and 5th defendant are limited liability companies incorporated under the *Companies Act* where the 1st and 2nd defendants through their company (the 3rd Defendant) hold 70% of the shares in the 4th and 5th defendants while the 1st and 2nd plaintiff own 30% shares. The 1st plaintiff and the 1st & 2nd Defendants are therefore directors of the 4th & 5th defendants."

2. The Application now before Court is the 1st Defendant's Notice of Motion dated 13/05/2023 filed through Messrs Tororei & Co. Advocates. It seeks orders as follows:

1. That the suit be struck out with costs on the basis that:

    a. It is scandalous, frivolous or vexatious.

    b. It may prejudice and delay the fair trial of this matter.

    c. It is otherwise an abuse of the process of the Court.

2. That the costs of this Application and the struck out suit be borne by the Plaintiffs in any event.

3. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the 1st Defendant, Samuel Kiptala Chemilil.

4. In the Affidavit, the Defendant deponed that he has the express authority of the 2nd, 3rd, 4th and 5th Defendants to depose the Affidavit, that by the Ruling delivered on 2/05/2019, this Court, in dismissing a Preliminary Objection, stayed these proceedings pending hearing and determination of the Arbitration in a bid to empower the Agreement between the parties that any dispute between them be resolved by alternative means of dispute resolution, and that the Court also directed that the matter be mentioned within 60 days to confirm the status. He deponed further that it has been more than 2 years and the Plaintiffs have failed, neglected and/or refused to move the matter for dispute resolution as stipulated under Clause 9 of the Shareholder's Agreement dated 3/11/2011 and as per the directions of the Court vide its said Ruling delivered on 2/05/2019. He deponed further that upon referral of the matter to Arbitration, there no longer exists a cause of action pending hearing and determination before this Court under Section 10 of the *Arbitration Act*, that the Plaintiff's inaction to move for dispute resolution through Arbitration constitutes a delay in the fair trial of this matter, that the same ought to be struck out and that the pendency of the suit is designed to vex the Defendants.

Replying Affidavit

5. In opposing the Application, the Plaintiffs, through the firm of Messrs M. M. Gitonga & Co. Advocates, on 11/10/2021, swore the Replying Affidavit sworn by the 1st Plaintiff, Wilson Kipkemboi Kipkoti. He deponed that he is a director of the 2nd Plaintiff, that the Application does not disclose who the Applicant is except that he can only imply that it is the 1st Defendant as he is the party that depones the Affidavit in support thereof. He deponed that in the Ruling delivered on 2/05/2019, the Court declined to dismiss this suit but instead referred it to Arbitration, that in its ratio decidendi, the Court stated that "it is improper for a preliminary objection to be used as a sword for winning a case otherwise destined to be resolved judicially and on the merits". He deponed that it is the Defendants who had jointly applied for the suit to be dismissed on the grounds that the existence of the Arbitration Clause ousted the jurisdiction of this Court and that the argument was dismissed by the Court. He contended that the Defendants have jointly frustrated the attempts to refer the dispute to Arbitration and which makes the present Application disingenuous, a façade and outright abuse of the Court process. According to him, the Defendants have made a mockery of the order issued by this Court and they now seek to benefit from their own mischief to the detriment of the Plaintiffs.

6. He deponed further that the Court, in the said Ruling, confirmed that the Arbitration Clause does not oust the jurisdiction of the Court save that the parties must in the first instance, determine the dispute through mechanism provided under the Shareholders' Agreement, that in compliance with the order, vide their letter dated 23/01/2020, addressed to Messrs Tororei & Co. Advocates, the Plaintiffs' Advocates issued a declaration of dispute and notice to refer the same to Arbitration, that

in the letter, the Plaintiffs proposed 3 persons as Arbitrators and requested the Defendants to elect a sole Arbitrator from the 3 or give their counter-proposal. He deponed that on 27/01/2020, the Defendant's said Advocates communicated their rejection of all the 3 names proposed by the Plaintiffs and instead, proposed their own Arbitrator, that the Defendants also indicated that they would apply for stay of any Arbitral proceedings on the ground that the Plaintiffs have not exhausted all the dispute resolution mechanisms precedent (amicable negotiation) to the referral to Arbitration as stipulated in the Shareholders Agreement. According the 1st Plaintiff, the said position taken by the Defendants indicated their lack of good faith in having the dispute determined expeditiously through Arbitration as ordered by the Court, that the Defendants intended to backtrack the resolution to the negotiations yet they knew very well that the parties had previously attempted negotiations but the same were frustrated by the Defendants prompting the Plaintiffs to institute this suit, and that the Defendants were disinterested, spiteful and dismissive in their conduct and response to the multiple requests for negotiations.

7. He deponed further that sometime in October 2020 the Defendants proposed to refer the dispute to Mediation rather than Arbitration and even proposed a Mediator, that the Plaintiffs acceded to the request but again, it turned out that the Defendants had only made the proposal as a distraction as they were not keen as the Defendants refused to sign the letter of appointment for the Mediator. According to the 1st Plaintiff therefore, it is false and misleading for the Defendants to claim that the Plaintiffs have failed to take steps to have the dispute referred to Arbitration yet it is the Defendants who have frustrated the process. He therefore urged that the dispute be returned for determination by the Court. He averred that the 1st and 2nd Defendants have continued to oppress and humiliate him through arbitrary reduction of his allowances and which is remitted erratically at the whims of the Defendants, and that the Defendants have abused their majority shareholding position to impoverish the 1st Plaintiff and that is why they do want the dispute to be determined.

Hearing of the Application

8. Although there are other parties in this matter, they do not seem to have expressly participated in the instant Application. Be that as it may, it was then agreed that the Application be canvassed by way of written Submissions. Pursuant thereto, the 1st Defendant-Applicant filed his Submissions on 21/02/2023 whereas the Plaintiffs had filed theirs earlier on 19/09/2022.

Plaintiffs' Submissions

9. The Plaintiffs' Counsel reiterated the matters already set out in the Supporting Affidavit and termed the Application an abuse of the Court process. He cited the case of Muchanga Investment Limited vs Safaris Unlimited (Africa) Ltd and 2 Others, Civil Appeal No. 25 of 2002 [2009] KLR 229. He reiterated that H. Omondi J (as she then was), in her said Ruling, found that the Arbitration Clause did not oust the jurisdiction of this Court save that the parties must in the first instance determine the dispute through the mechanism provided under the Agreement. He again recounted the challenges and hurdles that the Plaintiffs have allegedly faced from the Defendants in their quest to comply with the order to refer the matter to Arbitration. According to him therefore, the 1st Defendant has approached the Court with unclean hands and cited the case of Stephen Somek Takweny vs David Mbuthia Githare & 2 Others, Nairobi (Milimani) HCCC No. 363 of 2009.

1st Defendant's Submissions

10. On the issue of alleged delay by the Plaintiffs to refer the dispute to Arbitration as directed by the Court and/or want of prosecution, Counsel cited the case of Naftali Onyango v National Bank of Kenya

[2005] e2005 eKLR which, he submitted, was cited in the case of Allan vs Sir Alfred MC Alphine and Sons Ltd [1986] 1 ALL ER 543. He also cited Order 17 of the Civil Procedure Rules and submitted that the Plaintiffs did not in any way move the Court for over 18 months to prosecute its case, that from 2/05/2019, the Plaintiff never referred the matter for Arbitration and neither did they take steps to comply with the orders issued on 2/05/2019. On this basis, he submitted that the delay of 2 years is inordinate

Determination

11. It is evident that the broad issue arising for determination in this matter is "whether this suit should be struck out on the ground of failure or inordinate delay to refer the dispute herein to Arbitration as ordered by the Court on 2/05/2019".

12. It is not in dispute that by her Ruling delivered on 2/05/2019, H. Omondi J (as she then was), ordered that the dispute be referred to Arbitration and that the suit be mentioned after 60 days to confirm the status thereof. It is equally not in dispute that to date, 5 years later, the dispute is yet to be so referred to Arbitration. In opposing the Application, the Plaintiffs have termed the 1st Defendant as being dishonest and misleading because, according to him, it is in fact, the Defendants who have vehemently frustrated and blocked the reference to Arbitration. To his credit, the 1st Plaintiff has produced copies of correspondence which appear to vindicate him. The borne of contention appears to be the choice of an Arbitrator agreed upon by the parties. While initially, after the Ruling, the Plaintiffs by their letter dated 23/01/2020, proposed 3 names and asked the Defendants to pick one, the 1st Defendant, by his Advocates letter dated 27/01/2020, rejected all 3 and proposed his own nominee. To be fair to the 1st Defendant, he was within his rights to reject the Plaintiffs' proposed Arbitrators and to suggest his own. He cannot be faulted for that since the Agreement gave him that right. However, what I find strange is the additional "provisos" communicated in the 1st Defendant's Advocates said letter. I say because, even after proposing a different Arbitrator, the letter proceeds to state that:

> "Take Notice however that our client shall stay the intended arbitration on the following grounds:
>
> a. The arbitration is preferred outside the 60 days window directed by Lady Justice H.A. Omondi in her Ruling dated 2nd May 2019
>
> b. The Plaintiff has not exhausted all the dispute resolution mechanism precedent to the referral to arbitration. To this extent, the provision of Clause 9.2 can only be invoked upon exhausting Clause 9.1 thereof."

13. The above conditions paint the 1st Defendant as out to frustrate the Arbitration process by erecting fresh roadblocks despite the fact that Omondi J had already expressly given the Arbitration the "greenlight" to commence. Be that as it may, again, the 1st Defendant was well within his rights to forewarn the Plaintiffs of what awaited them ahead. Ours being an adversarial legal system, I do not want to castigate the 1st Defendant for his action. I must however observe that the insistence that the Plaintiff had not exhausted the dispute resolution mechanism precedent to the referral to Arbitration to be mischievous. This is because perusing the record, I have come across substantial correspondence between the parties giving the indication that much time had already been spent in negotiations long before the suit was filed in Court and which never bore fruit. My scrutiny of the file left me with the impression that it is a result of the failure to resolve the dispute amicably that eventually led to the filing of this suit in Court.

14. The insistence that the order for Arbitration had lapsed simply because the Arbitration had not commenced within 60 days also appears mischievous. Such argument appears to be a misinterpretation of the orders of H. Omondi J. Evidently, there was no such timeline set by the Judge. In any event, in the absence of demonstration that the Plaintiffs, without just cause failed to take steps to initiate the Arbitration, that contention appears misplaced.

15. However, the Plaintiffs must also take some blame. While the Ruling was delivered on 2/05/2019, the Plaintiffs' letter listing the names of the 3 proposed Arbitrators is dated 23/01/2023, that is 8 months later. There is no allegation of there being any earlier correspondence or discussions in between nor has any explanation been given for this long "lull". Assuming that this was position, then it is evidence of serious lethargy on the part of the Plaintiffs to comply with or put in motion H. Omondi J's directions.

16. Further, after receipt of the 1st Defendant's Advocates letter rejecting the 3 names that they had proposed, the Plaintiffs do not seem to have aggressively pursued the issue further. Granted, their Advocates responded through the subsequent letter dated 3/02/2020 but then went back to their "slumber". Despite "threatening" to invoke the provisions of the Agreement and seek the appointment of an Arbitrator by other means, they never followed up on the same and appear to have gone back to sleep. This is what the Advocates stated in the letter:

> " Your client's proposal of Mr. Wilson Kalya is rejected. Accordingly, the parties having failed to agree on a single Arbitrator, we are instructed to invoke clause 9.2(b) of the Shareholders' Agreement dated 3rd November 2011 and request the Chairman

17. Indeed, Clause 9.2.(b) of the Shareholders Agreement dated 3/11/2011 provides as follows:

> " The tribunal shall consist of one arbitrator to be agreed upon between the parties failing which arbitrator shall be appointed by the Chairman for the time being, of the Institute of Chartered Arbitrators (Kenya Chapter) upon the application of either party"

18. The Agreement for Sale of Shares/Equity also has a similar provision, although the copy exhibited being illegible in some portions, I am unable to cite the Clause number. The relevant Clause however prescribes as follows:

> " ..... The Arbitrator shall be appointed by concurrence of both parties failing which, either of the parties may request the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter) to appoint a sole arbitrator"

19. There is no explanation why the Plaintiffs, even after correctly appreciating that they had the recourse to seek the appointment through the Institute of Chartered Arbitrators (Kenya Chapter) never pursued that option. There was also nothing stopping the Plaintiffs from returning to this Court for further orders geared towards breaking the stalemate to ensure compliance of H. Omondi J's orders.

20. My own opinion therefore is that despite being the Claimant, the Plaintiffs have themselves not demonstrated that they have been keen to initiate the Arbitration. The 1st Defendant therefore had justifiable reasons to seek the striking out of this suit on that ground. Further, the instant Application was filed on 17/05/2021 and has inexplicably remained unprosecuted till now. It is not clear why the 1st Defendant has taken this long to prosecute it. However, despite the pendency of the Application for 3 years now, still, the Plaintiff was not moved and still never bothered to mitigate the damage by at least appearing to take steps to comply with the order of 2/05/2019. The Plaintiffs' lethargy is therefore shocking. They appear reluctant to move the matter forward even when prompted. I would

have therefore not hesitated to strike out or dismiss the suit. However, in the interest of justice, I will not do so this time. Instead, I will, as provided in the said Agreement, direct the Chairman, Chartered Institute of Arbitrators (Kenya Chapter) to forthwith appoint a sole Arbitrator.

21. Even as I rule as aforesaid, I agree with the 1st Defendant that the dispute herein having been referred to Arbitration, there is nothing left to prosecute in this suit. As soon as the Arbitrator is appointed and the Arbitration formally commences, this file will therefore need to be closed. Upon conclusion of the Arbitration, or even in the course of the Arbitration, should there be need, the parties shall be at liberty to file Miscellaneous Applications for any necessary purpose, including for instance, adoption of the Arbitral Award, or challenging orders made by the Arbitrator or any other Application recognized under the *Arbitration Act*. There would therefore be no necessity to continue leaving this file opened.

Final Orders

22. In light of the above, I hereby order as follows:

    i. The 1st Defendant's Notice of Motion dated 13/05/2021 is hereby dismissed.

    ii. That however, the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter) is hereby directed, within a period of twenty-one (21) days from the date that he will be served with this order and upon receiving of the prescribed fees, appoint a sole Arbitrator to hear and resolve and/or determine the dispute herein in terms of the Agreement for Sale of Shares/ Equity dated 17/05/2011 and Clause 9 of the Shareholders Agreement dated 3/11/2011 and entered into between the parties herein.

    iii. The Plaintiff shall extract the order herein within ten (10) days from the date hereof and serve it upon the Chairman, Chartered Institute of Arbitrators (Kenya Chapter) within the same period upon which the twenty-one (21) days referred to above shall begin to run.

    iv. In default to comply with the order (iii) above, unless subsequent orders are given herein extending the time or otherwise, the suit shall stand dismissed.

    v. This matter shall then be mentioned on a date to be fixed, for the purpose of reviewing the progress of the Arbitration and for further directions, which may include closure of this file.

    vi. Costs of the appointment of the Arbitrator shall at this stage be borne by the Plaintiffs but the same shall be treated as costs of the Arbitration and in regard to which the Arbitrator shall be at liberty to apportion as stipulated in the *Arbitration Act*.

    vii. Costs of the instant Application shall however be borne by the Plaintiffs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

WANANDA J. ANURO

JUDGE

Delivered in the presence of:

Omwenga for Plaintiffs

Tororei for 1st Defendant

N/A for other Defendants

Court Assistant: Brian Kimathi