



Zaidi v Fazal (Civil Suit E178 of 2022) [2023] KEHC 3097 (KLR) (Civ) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT E178 OF 2022

AN ONGERI, J

APRIL 14, 2023

BETWEEN

JON ABBAS ZAIDI PLAINTIFF

AND

RIZWAL SHERALI FAZAL DEFENDANT

RULING

1. The application coming for consideration is the one dated October 26, 2022 seeking to have this case referred to Arbitration and also security for costs of Kshs:5,000,000 (Kenya shillings five million).
2. The application is based on the grounds that the plaintiff is a foreigner currently residing in Epsom Auckland, 1051 New Zealand and does not have any known assets in Kenya. The plaintiff and the defendant's company entered into a mutual separation agreement by way of the revised mutual separation and confidentiality deed dated July 30, 2021. Clause 11 of the deed provided for a two-tier resolution process between the parties as follows;
 - i. Parties shall endeavor to resolve any dispute arising out of or in connection with the deed amicably; and
 - ii. In the event that the dispute cannot be resolved within 30 days of notification of the dispute by one party to the other, the dispute shall be referred to a single arbitrator to be appointed by the parties and in the event of failure to agree upon the appointment, the arbitrator shall be appointed by the chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) which appointment shall be binding on the parties hereto.
3. That by dint of clause 4.1 of the deed the plaintiff waived any and all claim against the company and the defendant who at the time was an officer of the company by the plaintiff. Pursuant to the deed the plaintiff received a colossal sum of Kshs 31,212,817 as full and final settlement of the mutual



- and amicable separation. The plaintiff has not shown any indication that he intends to refund the settlement amount.
4. Additionally the plaintiff has previously failed, refused and neglected to settle outstanding legal fees amounting to Kshs 2,250,000 of the advocate who advised him on matters concerning the deed and the defendants company was forced to settle the same.
 5. The application is supported by the affidavit of Rizwan Sherali Fazal the Defendant/Applicant dated October 26, 2022 in which it is deponed that he was a director at Lake Turkana Wind Power until May 1, 2021 when he resigned as a director. He is currently serving and supporting the company and its board of directors on a consultancy basis.
 6. He indicated that the plaintiff was employed as the Company's Chief Executive Officer from September 15, 2021 until July 30, 2021 when his employment was mutually terminated in accordance with a comprehensive revised mutual separation and confidentiality deed.
 7. Clause 11 of the deed expressly provides that parties are to engage in amicable settlement in case of a dispute and in the event that an amicable settlement fails the dispute should be referred to arbitration in Kenya. Section 7 of the *Arbitration Act* provides that a party to an arbitration agreement can apply to the High Court for an interim measure of protection.
 8. The Plaintiff/Respondent filed a replying affidavit dated November 18, 2022 in which he also deponed that the defendant ceased to be the director of Lake Turkana Wind Power on May 1, 2021 and the consultancy contract of the defendant was terminated in the first quarter of 2021. That in any event a consultant cannot be construed to be an officer of the company and was not an officer of the company at the time of signing the contract.
 9. The plaintiff indicated that the MSA is now being contested in the court through the ELRC Cause No E321 of 2022 dated May 13, 2022 and therefore the application herein is misleading. The plaintiff therefore vehemently contests the validity of the MSA and in no way accepts any of the clauses therein.
 10. He argued that the defendant cannot rely on the arbitration clause as he is not party to the agreement. That the defendant's claim that he is still employed as a consultant is unsubstantiated because he did not provide any evidence to prove the same.
 11. The plaintiff averred that he did not retain independent legal counsel to advise him through the negotiation of the settlement agreement and the reason why the company opted to pay the alleged advocate is because he had threatened to disclose some information about the company that would be damaging to it.
 12. The Defendant/Applicant filed a further affidavit dated October 16, 2022 in response to the replying affidavit and stated that he is a shareholder of Lake Turkana Wind Power as from September 11, 2014 which gives him important context and insights into the operations of the company. He reiterated what was contained in his supporting affidavit dated October 26, 2022 and that the claim by the plaintiff is one of defamation. That the email alleged to be defamatory amounts to day to day operational matters and supervision of the plaintiff and the then chief financial officer together with the senior most managers of the company at the time.
 13. He indicated that he had a stake in the day to day management including supervision, after interviewing and recruiting the plaintiff and that there is no doubt that as an officer of the company he is protected by the deed. That through the doctrine of kompetenz kompetenz the appropriate forum to settle matters relating to its jurisdiction and the validity of the deed and arbitral tribunal which is provided for under section 17 of the *Arbitration Act*.



14. The defendant/applicant filed his submissions and argued that it is trite law that jurisdiction is everything for courts of law. He indicated that clause 11 of the deed mandate all disputes relating to the deed or employment of the plaintiff be referred to Arbitration. That section 6 of the Arbitration Act provides that;

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

15. That therefore this court cannot exercise its jurisdiction where the parties to a suit have agreed on arbitration as their preferred dispute resolution. He further added that section 6 of the Act requires that there must be a dispute between the parties that can be referred to arbitration.

16. It was submitted that the applicant/respondent only filed a memorandum of appearance and not a defence thus the application herein was brought in a manner envisaged in Section 6 of the Act.

17. It was further argued that paragraph 4.1 of the deed contains a waiver of any claim against Lake Turkana Wind Power Limited including its directors, officers and employees. It was submitted that the plaintiff executed the deed on his own accord and that therefore clause 4.1 exempts the applicant from liability by virtue of a waiver.

18. The defendant/applicant further contended that that courts of laws are bound to respect the decisions and intentions of parties to an agreement and in support they cited Kenya Pipeline Limited v Datalogix and Another Nairobi HCCC No 490 of 2004 [2008] 2 EA 193

“The court must give effect to the terms of a contract which provides for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect, the wishes of the parties and their contractual relationship. Arbitration, I reckon is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. I think it is against public policy to deprive parties of that choice and hinder their attempt to resolve their dispute through arbitration mechanism.”

19. The plaintiff/respondent in his submissions argued that the case herein is against Rizwan Fazal and not Lake Turkana Wind Power Limited. He indicated that the defendant by his own admission ceased to be a director of Lake Turkana Wind Power from May 1, 2021 and in any case the Companies Act does not include a consultant as an officer.

20. He further contended that the agreement referred to was signed on July 31, 2021 and therefore at the time of the signing it the defendant was not an officer and he therefore cannot rely on it. It was further argued that the agreement is being contested as it is gravely unconscionable, flawed, unfair and unlawful as it was administered in bad faith and was based on unlawful and unfair labour practice. In support he cited Pauline Wangechi Warui v Safaricom Limited [2020] eKLR where the court stated that;

“.....the so - called mutual separation agreement dated March 20, 2015 amounted to unfair termination and/or wrongful dismissal and that to the extent that the so - called



mutual separation agreement sought to oust reliefs accruing to the Claimant for wrongful termination guaranteed by statute, the same is invalid and/or unenforceable.”

21. It was therefore his submission that this court therefore has jurisdiction to hear the subject as the agreement is null and void and consequently the arbitration clause.
22. The issues for determination in this ruling are as follows:
 - i. Whether this suit should be referred to Arbitration.
 - ii. Whether the Plaintiff/Respondent should deposit Kshs 5,000,000 as security for costs.
 - iii. Who pays the costs of this application?
23. On the issue as to whether this suit should be referred to Arbitration, the Applicant submitted that Clause 11 of the Revised Mutual Separation and Confidentiality Deed dated July 30, 2021 states that the parties agreed to refer disputes to Arbitration.
24. The Plaintiff/Respondent opposed the same on the basis that the Defendant/Applicant ceased to be a Director of Lake Turkana Wind Power Limited (LTWPL) on May 1, 2021 and further that the consultancy contract was terminated in the first quarter of 2021.
25. I find that Lake Turkana Wind Power Limited (LTWPL) is not a party to this suit since the Defendant has been sued for defamation in his personal capacity.
26. The said agreement also states that parties shall endeavor to resolve any dispute arising out of or in connection with the deed amicably before seeking arbitration, I find that there is no indication that the Defendant endeavored to have this issue resolved as in the said agreement before asking this court to send this case to Arbitration.
27. I find that there is lack of full disclosure in this case and the same cannot be referred to Arbitration.
28. On the issue as to whether the Plaintiff/Respondent should pay security of costs, it is a general rule that security for costs is normally required from the plaintiff residing outside the jurisdiction, but the court has discretion. This discretion is to be exercised reasonably and judicially, to refuse or to order that security be given.
29. This position was reiterated by the court of appeal in the case of *Shah v Shah*[1982]KLR 95.
30. When the court is considering an application for security for costs and the factors to be considered when dealing with such applications, it is guided by the principles laid down in the case of *Saudi Arabian Airlines Corporation v Sean Express Services Limited* [2014]eKLR that held inter alia that:-

“The law is settled that an order for security for costs is a discretionary one. The discretion is however to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing of the plaintiff; the bonafides of the plaintiff’s claim; or any other relevant conduct or circumstances of the plaintiff or the defendant. The list is not exhaustive. Conduct of the plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations and disposal of assets. And the conduct of the defendant include; filing of application for security for costs as a way of oppressing or



obstructing the plaintiff's claim, for instance where the defence is a mere sham, or there is an admission by the plaintiff of money owing except, there is a deliberate refusal to perform its part of the bargain,"

31. I find that the Defendant/Applicant has not demonstrated that the Plaintiff/Respondent will not be in a position to pay costs of the suit.
32. I dismiss the application dated October 26, 2022 with costs and I direct that parties take a date for pretrial conference and a hearing date.
33. The parties are directed to exchange witness statements and the documents they wish to rely on within 30 days of this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

.....

A ONGERI

JUDGE

In the presence of:

..... **for the Plaintiff/Respondent**

..... **for the Defendant/Applicant**

