



**Breakfast and Business Group Limited v Odyssey Capital Ltd &
7 others (Commercial Miscellaneous Application E824 of 2021)
[2023] KEHC 18855 (KLR) (Commercial and Tax) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E824 OF 2021
FG MUGAMBI, J
JUNE 23, 2023**

BETWEEN

BREAKFAST AND BUSINESS GROUP LIMITED PLAINTIFF

AND

**ODYSSEY CAPITAL LTD 1ST DEFENDANT
ODDYSEY CAPITAL 2ND DEFENDANT
PETER KIMARI KIHARA 3RD DEFENDANT
ADEDABI OLUWASEUM 4TH DEFENDANT
AKINDELE AKITOYE ADEOYE 5TH DEFENDANT
LADKOO GIRISH RAO 6TH DEFENDANT
MAINA MICHAEL 7TH DEFENDANT
MULI ERICK KINYOWE 8TH DEFENDANT**

RULING

Brief Facts

1. Before the court is a Chamber Summons application dated January 18, 2022 filed by the 1st, 7th and 8th defendants (the applicants). It is brought under Article 159(c) of the [Constitution](#) of Kenya 2010, section 6 of the [Arbitration Act](#) 1995 Rule 2 of the [Arbitration rules 1997](#) and all other enabling provisions of the law.



2. The application seeks the following orders;
 - i. THAT there be a stay of all further proceedings in this suit pending reference of all matters in respect of which these proceedings have commenced to alternative dispute resolution mechanism in accordance with clause 18.1 of the agreement between the parties.
 - ii. THAT time be limited within which parties should comply with appointment procedure of the mediator and/or Arbitrator in accordance with clause 18.1 of the shareholders Agreement between parties
 - iii. THAT costs be provided for
 - iv. THAT there be liberty to apply.
3. The application is premised on the grounds on the face of it, supported by the affidavit of Michael Maina dated January 18, 2022 and buttressed by the written submissions of the applicants which are dated April 12, 2022.
4. The dispute in the matter revolves around the shareholding of the 1st defendant in the plaintiff company, under a Shareholding Agreement. The applicants' case is that by virtue of clause 18.1, there was no right to move the court before exhausting the dispute resolution mechanism. The applicants took issue with the plaintiff for doing so, having filed the Notice of Motion application dated November 8, 2021.
5. The plaintiff opposed the Chamber Summons application and filed the following grounds of opposition dated February 28, 2022;
 - i. THAT the chamber summons application was misconceived, bad in law and instituted by the 1st, 7th and 8th respondents to cause inordinate delay in the determination of the plaintiff's application.
 - ii. THAT the respondents have as a matter of law acquiesced to the jurisdiction of the court since the respondent's advocates filed their notice of appointment on January 14, 2022 and subsequently their Chamber Summons application on January 18, 2022.
 - iii. THAT section 6(1) of the *Arbitration Act* requires simultaneous filing of the Notice of Appointment and an application for stay. The application seeking for stay of proceedings must be made not later than the time when the party seeking the same enters appearance or otherwise acknowledges the claim.
6. Simultaneously with the grounds of opposition, the plaintiff filed a replying affidavit dated February 28, 2022 sworn by Livingstone Monzi. The plaintiff states that given the numerous restructuring exercises that have taken place and still continue to take place in the 1st defendant company, not all members of the company are privy to the Shareholding Agreement. As such, not all parties to the suit herein are bound by the arbitration clause. Due to the new membership in the company, the plaintiff states that it is compelled into a contractual agreement with a new party unknown to it.
7. The plaintiff further avers that in any case, the applicants ceded to the jurisdiction of this court by failing to follow the procedure laid out by section 6(1) of the *Arbitration Act*.



Analysis

8. I have carefully considered the instant application together with the parties' rival submissions and authorities they have cited in support of their cases. To my mind, the only issue for determination here is whether this dispute should be before this court or before an alternative dispute resolution (ADR) forum.
9. The principles for stay of proceedings in circumstances of an arbitration clause are well known. I point out the case of *Blue Limited vs Jaribu Credit Traders Limited Nairobi (Milimani) HCCS No 157 of 2008* because of the observation that I wish to make. In this case, the court stated as follows:

' At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff's suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court. That principle recognizes the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration'.
10. I have perused the Shareholder Agreement that has been presented by the parties. Although the same is undated, it is executed by Eric Kinyowe Muli (8th defendant), Michael Maina (7th defendant), Peter Kimari Kihara (3rd defendant), Breakfast and Business Group Limited (plaintiff) and Alpha Hotels and Suites Ltd as shareholders, with Odyssey Capital Limited (1st defendant). I note that the authenticity of the document is not challenged by any of the parties. Clause 18.1 of the agreement states in part as follows: -

'Any dispute between the shareholders including any dispute regarding this agreement shall be firstly submitted to mediation and if no agreement is reached to informal arbitration on the following terms.
11. It is clear that there is a dispute with respect to the shareholding in the 1st respondent company. What is also clear is that there is an additional dispute as to the interpretation and application of Clause 18.1 of the agreement.
12. The decision to bypass the judicial system in favour of alternative dispute resolution was voluntarily taken by the parties herein. With respect to the requirements under section 6(1) of the *Arbitration Act*, the applicants filed a Notice of Appointment on January 14, 2022 and promptly filed the present application on January 18, 2022. I am satisfied that the application was filed 'at the earliest stage of the proceedings' (see *Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR*.) I do not agree that this amounted to acquiescing the shortchanging of the ADR clause in the agreement.
13. Having also found that the agreement is valid, the role of the court is to give effect to the intention of the parties and allow the ADR forum to determine the question on the application of the agreement to the parties, since it is a dispute that arises from the agreement. I believe I have said enough without getting into the merits of this ground, and would not wish to prejudice any finding in that regard.

Determination and orders

14. In the premises, this court finds merit in the application and it is allowed on the following terms;



- i. These Proceedings are hereby stayed pending referral of the dispute through the dispute resolution mechanism envisaged under clause 18 of the shareholder's agreement.
- ii. In order to enforce the agreement of the parties to the letter, with respect to mediation and subsequently arbitration should mediation not be successful, the parties shall appear before the Hon Deputy Registrar for purposes of appointment of a mediator to hear the dispute.
- iii. Costs to the applicant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23rd DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

