



**Hashi Energy Limited v Transfreight Logistics Limited (Civil Case
77 of 2022) [2023] KEHC 27567 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 27567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 77 OF 2022
F WANGARI, J
JUNE 2, 2023**

BETWEEN

HASHI ENERGY LIMITED PLAINTIFF

AND

TRANSFREIGHT LOGISTICS LIMITED DEFENDANT

RULING

1. The Applicants moved the court through a Notice of Motion dated 16th November, 2022 which sought the following orders: -
 - a. Spent;
 - b. That all further proceedings in suit be stayed pending the hearing and determination of this application inter parties.
 - c. That all further proceedings in this suit be stayed pending the hearing and determination of the dispute referred by the Defendant to arbitration on its claim for USD 329,773.90 (and which amount continues to accrue).
 - d. That The cost of this suit and the application be awarded to the Defendant.
2. Upon service of the application, the Plaintiff/Respondent filed a replying affidavit dated 7th December, 2022. Directions were taken that the application be disposed off by way of written submissions. Only the Defendant/ Applicant complied by filing detailed submissions as well as citing various decided cases in support its position.
3. The background of the matter is that the plaintiff and the defendant had a contractual relationship, where the plaintiff engaged the Defendants to provide clearing and transport of various goods from various ports. The parties entered into an agreement dated 1/8/2018 (signed on 8/12/2018 and 18/12/2018) and which was to run for a period of one (1) year, and it was to expire on 31/7/2019.



4. After the expiry of the agreement, the Plaintiff prepared another agreement dated 1/8/2019 (which was signed by their representatives, one Said Adan and the other Peter Ochieng, 21/7/2020 and 22/7/2020 respectively). The agreement was forwarded to the defendants for their signature, but as at the time of filing this suit, the defendant had not signed their part on the agreement.
5. In the agreement dated 1/8/2018, clause 17 provided for arbitration as a form of dispute resolution mechanism. In the agreement dated 1/8/2019, clause 18 provided for exclusive jurisdiction of the court as the dispute resolution mechanism in the absence of a solution through amicable negotiations.
6. The parties herein disagreed on the nature of services given to the Plaintiff and the payments due to the Defendant. The Plaintiff filed a suit seeking General and Special damages among other prayers, which claim arises from the breach of the contract dated 1/8/2019 by the Defendants. The Defendant filed this application seeking for stay of proceedings, as they were instituted in breach of arbitration agreement vide the agreement dated 1/8/2018.

Analysis and Determination

7. Having considered the application, supporting affidavit, replying affidavit, the annexures thereto, written submissions, cited authorities and the law, the following are the issues for determination: -
 - a. Whether the applicable agreement is the one dated 1/8/2018 or 1/8/2019
 - b. Whether the proceedings ought to be stayed
 - c. What is the order as to costs?
8. I have perused through the agreement dated 1/8/2018 specified that its term was for 12 months. As such, it was expected to expire on 31/7/2019. In reference to Clause 3:2 of the agreement states;

‘The initial term of 12 months mentioned above at clause 3:1 may be extended for a further term subject to mutual written agreement between the parties’
9. In reference to Clause 21:2 of the above agreement, it states;

‘A variation of this agreement shall be in writing and signed by or on behalf of each Party’
10. From the above, extension of the term or variation of the agreement was subject to mutual written agreement signed by or on behalf of both parties. Under the prevailing circumstances though there exists another agreement dated 1/8/2018, the same does not meet the test as it is only executed by one party, that is the Plaintiff/ Respondent.
11. The elements of a valid contract include ‘Offer’ and ‘Acceptance’. In *William Muthbe Muthami v Bank of Baroda (2014)* eKLR, it was stated that;

‘..... In the law of contract, the aggrieved party to an agreement, must in addition prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach’
12. In this case, the Plaintiff/ Respondent prepared the agreement dated 1/8/2019, and they signed on their part. That would be considered as the ‘offer’. The agreement was forwarded to the Defendant/ Applicant for their signature, which would be considered as the ‘acceptance’. The Defendant/ Applicant did not execute the said agreement. The contract having been executed by one party makes it an agreement that is not legally binding.



13. The parties herein continued to do business. It can be deemed that the parties continued their relationship as per the contract dated 1/8/2018. This can be implied from the conduct of the parties since they continued performing their obligations under the expired contract (a ‘Zombie Contract’), since the contract dated 1/8/2019 was not executed by the Defendants.

14. On the second issue, Clause 17 of the contract dated 1/8/2018 provided for arbitration as a dispute resolution mechanism. The Plaintiff has filed a suit before this court, which proceedings the Defendant seeks to stay. This court is granted the powers to stay proceedings under Section 6 of The Arbitration Act which provides as follows;

Stay of legal proceedings

(1) 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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings

15. The courts have been commanded to promote the use of alternative dispute resolution mechanisms under Article 159 (2) (c) of the Constitution provides;

Judicial authority

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation.

16. In Eunice Soko Mlagui V Suresh Parmar & 4 others (2017) eKLR, it was held that;

‘Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The condition under which the court can stay proceedings and refer a dispute to arbitration are prescribed by Section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution’

17. Under Clause 17 of the agreement dated 1/8/2018, it is clear that the parties’ intention was to have any dispute arising between them to be settled through arbitration. The parties are therefore bound by the contents of their agreement.

18. On the issue of costs, Section 27 of the Civil Procedure Act decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs.



19. Flowing from the foregoing, I proceed to make the following orders: -

- a. The application is allowed on the following terms;
 - i. Further proceedings in this suit are hereby stayed
 - ii. Matter be referred to arbitration as per Clause 17 of the agreement dated 1/8/2018
- b. Parties be at liberty to move the courts as and when the arbitration is concluded
- c. Each party to bear its own costs

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 2ND DAY OF JUNE, 2023.

F. WANGARI

JUDGE

In the presence of:

Ndiri Advocate h/b for Wamucii Advocate for Plaintiff/ Respondent

Ondego Advocate h/b for Defendant/ Applicant

Guyo, Court Assistant

