



**Mutisya & another v Nitro Chemicals Limited (Civil Appeal 553 of 2019)  
[2023] KEHC 22632 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 22632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL 553 OF 2019  
DO CHEPKWONY, J  
JUNE 15, 2023**

**BETWEEN**

**FESTUS MBOYA MUTISYA ..... 1<sup>ST</sup> APPELLANT**

**KIBUCHI & COMPANY ADVOCATES ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NITRO CHEMICALS LIMITED ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon.M.Obura (Mrs) (SPM) delivered  
on 17th September, 2019 in Milimani CMCC No. 5151 of 2019.)*

**JUDGMENT**

**Background**

1. By way of a Notice of Motion application dated 19<sup>th</sup> August, 2019, the Appellants sought for orders inter alia-that the Respondent’s suit by way of a plaint dated 8<sup>th</sup> July, 2019 and all proceedings be stayed pending hearing and final determination of the dispute by way of an arbitration process and that the suit by the Respondent be referred to arbitration.
2. The application was premised on grounds its face and further supported by the affidavit of the 1<sup>st</sup> Appellant dated 19<sup>th</sup> August, 2019. In summary, the deponent avers that the 1<sup>st</sup> Appellant and the Respondent executed a Sale Agreement dated 29<sup>th</sup> March, 2017 which was intended to be binding on both parties.
3. According to the 1<sup>st</sup> Appellant, the Respondent filed a suit vide a Plaint dated 8<sup>th</sup> July, 2019 in complete disregard of the clear and binding provisions for the dispute resolution mechanism contained in Clause



26 of the sale agreement dated 29<sup>th</sup> March, 2017 between the Respondent and the 1<sup>st</sup> Appellant which provided for the resolution of any dispute arising between the parties by way of arbitration.

4. The spirit of arbitration is captured in the Sale Agreement at Clause 26 and it states that:

“Should any dispute arise between the parties with regard to the interpretation, rights, obligation and or implementation of any one or more of the provisions of this agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation, should such negotiation fail to achieve a resolution within fifteen (15) days, either party may decree a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:-

26.1 Such arbitration shall be resolved in accordance with the provision of Kenya *Arbitration Act* 1995 (as amended from time to time);

26.2 The tribunal shall consist of one arbitrator to be agreed upon between parties failing which such arbitrator shall be appointed by the chairman for the time being of Chartered Institute of Arbitrators of Kenya upon application of either party;

26.3 The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;

26.4 The award of the arbitration tribunal shall final and binding upon the parties to the extent permitted by law and either party may apply to a court of competent jurisdiction for enforcement of such award. The award of the arbitration tribunal may take the form of an order to pay an amount or to perform or to prohibit certain activities; and

26.5 Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.”

5. The deponent stated that the Respondent never made any attempts to have this matter settled by way of amicable negotiations or referred the dispute for arbitration as per Clause 26 of the Sale Agreement. The Appellant tried to seek an amiable resolution of the dispute with the most recent request being requests for amicable negotiations vide a letter from his advocates to the Respondent’s advocates on record which letter was received on 23<sup>rd</sup> May, 2019. The Respondent refused to consider despite amicable negotiations being a first instance form of dispute resolution stipulated in the sale agreement.

6. The application was opposed by the Respondent vide a Replying Affidavit dated 9<sup>th</sup> September, 2019 sworn by Pratik Shaileshkumar Sanghrjka citing several grounds. He deposed that he is one of the directors of the Respondent Company and that the Sale Agreement made on 29<sup>th</sup> March, 2017 between the Respondent and the 1<sup>st</sup> Appellant was not denied though the 2<sup>nd</sup> Appellant was not a party to the subject agreement.

7. According to the deponent, prior to the execution of the agreement the 1<sup>st</sup> Appellant in collusion with the 2<sup>nd</sup> Appellant presented to the Respondent that the 1<sup>st</sup> Appellant was the registered proprietor of parcel of land known as LR NO. 8914/87 upon which the 1<sup>st</sup> Appellant induced the Respondent to enter into the subject agreement for sale for the purchase of a portion to be hived out of the said parcel of land where upon the 1<sup>st</sup> Appellant offered for sale and the Respondent agreed to purchase one



- sub-division comprising 18 acres. The 1<sup>st</sup> Appellant was to obtain change of user of the subject sub-division comprising 18 acres from agricultural to commercial to be met by the Respondent whereas the 1<sup>st</sup> Appellant was to bear the cost of sub- dividing the parcel of land.
8. Through its advocates, the Respondent paid the requisite deposit of Kshs. 3,600,000/= to the 2<sup>nd</sup> Appellant as had been mutually agreed which the 2<sup>nd</sup> Appellant acknowledged receipt.
  9. Vide an email of 24<sup>th</sup> May, 2017, the 2<sup>nd</sup> Appellant expressly presented to the Respondent that the process of subdivision was ongoing where the 2<sup>nd</sup> Appellant requested to utilize the sum of Kshs.2,000,000/= out of the deposit towards securing the completion documents set out in the sale agreement. This presentation was made by the 2<sup>nd</sup> Appellant to the Respondent with full knowledge that the 1<sup>st</sup> Appellant did not have the title over the parcel of land and therefore the 2<sup>nd</sup> Appellant with knowledge subjected and exposed the Respondent to a risk of loss and actual monetary loss. Without any colour of right, the 2<sup>nd</sup> Appellant continues to arbitrarily hold the balance of the deposit of Kshs.1,060,000/=.
  10. He avers that after execution of the subject agreement, the 1<sup>st</sup> Appellant breached and persisted in the breach of the express terms of the agreement which breaches were expressly admitted in the 2<sup>nd</sup> Appellant's correspondence in the matter of the sale of the parcel of land. It also emerged that there was misrepresentation and concealment of material facts on the part of the Appellants on which basis the Respondent was with intent and ulterior motives induced to enter into the agreement.
  11. In light of the concealment of material facts and misrepresentation, the agreement between the Respondent and the 1<sup>st</sup> Appellant is frustrated owing to the matters where the Appellants without doubt acted by design with the intention to unjustly enrich themselves to the disadvantage of the Respondent. Following the discovery of the misrepresentation by the Appellants, through its advocates on record, the Respondent duly demanded a refund of the monies paid to the Appellants which they refused.
  12. The 1<sup>st</sup> Appellant deposed that without prejudice, though the 2<sup>nd</sup> Appellant had proposed an arbitration, the Respondent declined on the ground that there is no dispute to be referred to arbitration and that new parties who were not party to the agreement were being introduced into the contract in an attempt to unlawfully cover up and legitimize an otherwise illegitimate fraudulent misrepresentation by the Appellants. That there was no dispute or otherwise between the Respondent and the Appellants to be referred to arbitration as sought in the application.
  13. It was further deposed that the Respondent's claim was only limited to the refund of monies paid to the Appellants consequent to the acts of misrepresentation by the Appellants. And having been duped through the misrepresentation by the Appellants, the Respondent had no intention to proceed with the agreement.
  14. The Notice of Motion application dated 19<sup>th</sup> August, 2019 proceeded for hearing on 12<sup>th</sup> September, 2019. Upon consideration of the oral submissions by both parties, the trial court delivered its ruling on 17<sup>th</sup> September, 2019, where it made a finding that the 2<sup>nd</sup> Appellant and the third parties affected by the transaction were not parties to the arbitration agreement, hence they cannot be bound by the Arbitration Clause. Also, that the arbitration agreement was incapable of being performed and there was no dispute that had arisen within its scope on a balance of probability. In the premises, the Notice of Motion dated 19<sup>th</sup> August, 2019, was dismissed with costs.



## Appeal

15. The Appellants were dissatisfied with the ruling and the orders of the Trial Court hence lodged this appeal. Vide a Memorandum of Appeal dated 25<sup>th</sup> September, 2019, wherein they raise the following grounds of appeal:-
- a) That the learned Magistrate erred in law and in fact in failing to appreciate that the parties had executed a binding sale agreement dated 29<sup>th</sup> March, 2017, which agreement still in force and which has a specific clause providing that any dispute arising from the agreement will be referred in the 1<sup>st</sup> instance to arbitration for determination.
  - b) That the learned Magistrate erred in law and in fact in failing to order stay of proceedings and refer the dispute to an arbitral tribunal as provided at Clause 26 of the sale agreement dated 29<sup>th</sup> March, 2017, thereby usurping jurisdiction that is reserved for arbitral tribunal in the 1<sup>st</sup> instance.
  - c) That the learned Magistrate erred in law and in fact in delving into the merits, demerits, facts and evidence of the case instead of determining only issue of jurisdiction of the court which superseded all other matters.
  - d) That the learned Magistrate erred in law and in fact in failing to appreciate that the sale agreement dated 29<sup>th</sup> March, 2017, was still in force and where the cause of action and remedies sought by the Respondent emanated therefrom and therefore without jurisdiction which the sale agreement had granted to an arbitral tribunal the court had no locus to proceed further than making an order for stay of proceedings and referring the parties to an arbitration process.
  - e) That the learned Magistrate erred in law and in fact in relying on the inclusion of the 2<sup>nd</sup> Appellant as a party in the matter to avoid the arbitration process.
16. The Appellants sought for the following reliefs:-
- a) That this Honourable Court be pleased to set aside the ruling of the trial court made on 17<sup>th</sup> September, 2019 and in its place, allow the Appellants' application dated 19<sup>th</sup> August, 2019.
  - b) That the Appellants be awarded the costs of this appeal.
17. The parties were directed to canvass the appeal by way of written submissions. Both parties have filed their respective submissions in support and in opposition to this appeal.

## Analysis and Determination

18. Being a first appeal, this Court is minded of its duty to re-analyse, re-evaluate and reconsider the evidence that was adduced before the trial Court so as to draw its own conclusion. (see the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] E.A 123).
19. Having considered the rival submissions alongside the cited authorities by learned counsel in regard to the grounds of appeal cited, this Court finds there are three issues necessary for determination which are;
- a) Whether the sale agreement between the parties contained an Arbitration Clause?
  - b) Whether there was a dispute between the parties.
  - c) Which order can the court grant in the circumstances?



20. In regard to the first issue, it is noted that the 1<sup>st</sup> Appellant and the Respondent respectively agreed to sell and buy a parcel of land measuring 18 acres which was to be hived from Land Reference Number 8914/87. The agreement was reduced into writing between the 1<sup>st</sup> Appellant and the Respondent on 29<sup>th</sup> March, 2017 and executed in the presence of the 2<sup>nd</sup> Appellant. The parties agreed on various terms of the sale agreement including completion date, vacant possession, land control board consent, completion, failure to complete, time of the essence, beacons, condition of the property, apportionment and outgoings, costs, interest, notice survival, waiver, force majeure, remedies accumulative amendment, governing law and jurisdiction and arbitration.
21. The contention in this appeal being the arbitration clause, which is Clause 26 in the sale agreement, it is important that the same be reproduced word for word for the terms set out therein to be appreciated. It goes:-
- “Should any dispute arise between the parties with regard to the interpretation, rights, obligation and or implementation of any one or more of the provisions of this agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation, should such negotiation fail to achieve a resolution within fifteen (15) days, either party may decree a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:-
- 26.1 Such arbitration shall be resolved in accordance with the provision of Kenya *Arbitration Act* 1995 (as amended from time to time);
- 26.2 The tribunal shall consist of one arbitrator to be agreed upon between parties failing which such arbitrator shall be appointed by the chairman for the time being of Chartered Institute of Arbitrators of Kenya upon application of either party;
- 26.3 The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;
- 26.4 The award of the arbitration tribunal shall final and binding upon the parties to the extent permitted by law and either party may apply to a court of competent jurisdiction for enforcement of such award. The award of the arbitration tribunal may take the form of an order to pay an amount or to perform or to prohibit certain activities; and
- 26.5 Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.”
22. Upon perusal of the sale agreement, the Court notes that there is evidence that parties agreed to have any dispute that would arise from the sale agreement to be subject to the dispute resolution Clause 26 of the Agreement. The question that needs to be answered here is whether the trial court made a correct finding in dismissing an application seeking to refer the matter to arbitration or better still, whether this court should enforce the arbitration clause and refer the matter to arbitration.
23. In their supporting affidavit to the application, the Appellants deposed that they tried several attempts to have the disputes resolved in line with Clause 26 of the sale agreement but the Respondent blatantly refused such attempts.



24. However, according to the record and pleadings filed, the Respondent, submitted that the arbitration clause and by large the agreement for sale were procured through acts of misrepresentation, inducement and concealment of material facts on the part of the Appellants. And for this reason, the Respondent argues that the Appellants cannot lawfully seek to rely on an arbitration clause obtained by acts of misrepresentation, inducement and concealment of material facts
25. It is good to appreciate that arbitration is governed by the Arbitration Act No. 4 of 1995. Section 6 (1) of the said Act states as follows;
- “A court before which proceedings are brought in a matter which is 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 proceedings is sought, stay the proceedings and refer to arbitration unless it finds:-
- a) That the arbitration agreement is null, 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.”
26. It is the court’s considered view that both parties to the agreement had an obligation to comply with the dispute resolution clause set out in the sale agreement, which is Clause No.26.
27. On the second issue, evidence presented before court shows that parties entered into an agreement and a dispute arose during the performance of the contract and thus it was not possible for the obligations to be met. This is what the Respondent refers to as misrepresentation, inducement and concealment of material facts. In the court’s humble view, the arbitration clause binds the parties to the agreement to have any dispute between them resolved by arbitration.
28. It therefore follows that, the trial court’s jurisdiction was limited by the existence of the arbitration Clause 26 in the Sale Agreement. This court is also guided by the provisions of Article 159(2)(c) of the Constitution 2010 which gives courts the power to refer disputes to alternative methods of dispute resolution. It provides that;
- “In exercising judicial authority, the courts shall be guided by the following principles: - alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).”
29. In line with the provisions of the Constitution, the court is mandated to promote the use of alternative dispute resolution mechanisms and has power civil matters to refer any matter for resolution by such alternative mechanisms for determination as contemplated by Article 159 thereof.
30. In the instant appeal, by Clause 26 of the Agreement, the parties agreed to subject themselves to arbitration should any dispute arise between them and therefore are barred by the law from invoking the jurisdiction of the court. Section 10 of the Arbitration Act No. 4 of 1995 states as follows:-
- “Except as provided in this Act, no court shall interfere, in matters governed by this Act.”
31. Clearly, the existence of the said arbitration clause in the agreement limited the intervention of the trial court as parties had already submitted to the jurisdiction of the arbitral tribunal incase a dispute arose between them. The right forum for the dispute to be resolved was the Arbitral Tribunal and thus the



trial court was excluded from exercising jurisdiction by dismissing the application by the Appellants seeking to stay the proceedings and refer for the matter to be referred to arbitration.

32. Lastly, based on the foregoing reasons, the trial court erred in its said decision and the Appellants' appeal is merited and is allowed in the following terms:

- a) The ruling dismissing the Appellants' application dated 19<sup>th</sup> August, 2019 be and is hereby set aside and substituted with an order allowing the application.
- b) The costs of this appeal to await the outcome of the arbitral proceedings.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kibuchi counsel for Appellant

Mr. Ong'ondi counsel for Respondent

Court Assistant - Martin

