



REPUBLIC OF KENYA



**KENYA LAW**

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**Ventura Aviation Limited v Skylink Express Limited & another (Miscellaneous Civil Application E477 of 2022) [2023] KEHC 19133 (KLR) (Commercial and Tax) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19133 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E477 OF 2022**

**JWW MONG'ARE, J**

**JUNE 26, 2023**

**BETWEEN**

**VENTURA AVIATION LIMITED ..... APPLICANT**

**AND**

**SKYLINK EXPRESS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOHN ALAN OKEMWA ANUNDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 7/9/2022 the Plaintiff filed a suit against the Defendants seeking the for Judgment for;
  - i. A sum of USD 150,470 being principal sum owed to the Plaintiff.
  - ii. A sum of USD 150,470 being default interest thereon as per Clause 5.1 of the Lease Agreement.
  - iii. Costs of this suit.
  - iv. Interest on all the above at court rates from the date of filing till settlements in full.
2. On 19/1/2023 and upon being served with the Plaintiff's plaint, the Defendants filed a Notice of Preliminary Objection against the Plaintiff's suit on the following grounds;
  - a. Clause 16.0 of the Lease Agreement dated 23/7/2020 which forms the foundation of the suit herein provides for an Arbitration Clause which clause the Defendants have instigated but the Plaintiff has been hell bent on scathing(sic).
  - b. With the forgoing it goes without saying that the exhaustive forum principle was not complied with prior to filing of this suit.



- c. It is trite law that jurisdiction is everything without it the court has no power to make one more step.
  - d. Further, a party cannot through draftsmanship or legal craftsmanship confer jurisdiction to a court as jurisdiction is conferred by law.
  - e. Drawing reference to Clause 16.0 of the parties' Lease Agreement of 23/7/2020, it is the Defendants' contention that this Honourable Court is bereft of jurisdiction to hear and determine this matter and should therefore down its tools and refer the matter to its appropriate forum.
3. The Notice of Preliminary Objection is opposed and the Plaintiff filed grounds of opposition dated 24/1/2023 and a replying affidavit sworn on 25/1/2023 by Daniel Wanjohi, its finance manager.
  4. In filing the Notice of Preliminary Objection, the Defendant has challenged the jurisdiction of the court to hear the matter as filed before it. The Defendants' objection is premised on the fact that the Lease Agreement between the parties contains an Arbitration Clause which demands that any disputes arising out of the Lease Agreement must be determined through arbitrations as provided under Clause 16.0 thereunder.
  5. On its part, the Plaintiff opposes the Notice of Motion and argues that once there was breach of the agreement, the Plaintiff on several occasions attempted to have the matter referred to arbitration without much success. The Plaintiff further alleges that it has on several occasions invited the Defendant to agree on single arbitrator as per the sale agreement but all efforts to resolve the issues herein in accordance with the agreement have been frustrated by the Applicant. The Plaintiff therefore urges this court to determine the matter before it to bring finality to the issues and settle the matter.

**Analysis and Determination: -**

6. In the *locus classic* case of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*, Justice Nyarangi, (as he then was) stated as follows;-
 

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
7. It is imperative that a court seized with a matter must first confirm that it is clothed with the requisite jurisdiction to hear and determine the same and once it determines that it is lacking in jurisdiction, then it must stop and make no further steps. The *Arbitration Act, 1995* under Section 6 (1) and (2) provides as follows;
  - (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.”
8. Through the Lease Agreement dated July 23, 2021, the parties before this court under Clause 16 therein bound themselves to resolve all disputes arising thereto through Arbitration. The said Clause 16 provides as follows;
- i. “16.1 All disputed or differences which arise out of or in connection with the agreement or its construction, operation, termination or cancellation shall be settled by means of negotiations.
  - ii. 16.2 Any Dispute that both parties are unable to resolve by negotiation shall be referred to an arbitrator accredited by the Chartered Institute of Arbitrators. Both parties shall mutually select the Arbitrator and both parties hereby agree that the decision of the Arbitrator shall be final and binding. The cost of the Arbitrator will be borne by both parties in equal share. The Arbitration sitting shall be in Nairobi, Kenya.”
9. Flowing from the above, it is my finding that the parties to the Lease Agreement, by inserting the above Clause no.16 intended to have the disputes arising from the said agreement resolved through arbitration in the first instance. In the premises therefore I find and hold that the Preliminary Objection has merit and I shall allow it. The suit and its attendant applications are therefore stayed forthwith and parties are directed to resolve the dispute herein through arbitration in the first instance, in accordance with Clause 16 of the Lease Agreement.
10. Costs of this application are awarded to the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2023**

**J. W. W. MONGARE**

**JUDGE**

**In the Presence of: -**

Mr. Umazi holding brief for Mr. Walukwe for the Applicant.

N/A for the Respondent.

**Sylvia- Court Assistant.**

