



Cementers Limited v Multichoice Kenya Limited & another (Commercial Suit E384 of 2020) [2023] KEHC 21653 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E384 OF 2020**

FG MUGAMBI, J

JULY 21, 2023

BETWEEN

CEMENTERS LIMITED PLAINTIFF

AND

MULTICHOICE KENYA LIMITED 1ST DEFENDANT

STEVEN WANDERA OUNDO 2ND DEFENDANT

RULING

1. Before the court is the application dated March 18, 2021 brought under rule 3(2) of the Arbitration Rules 1997 and section 35(2) of the Arbitration Act 1995 and all enabling provisions of the law. The application by the 1st defendant seeks the following orders:
 - i. That the plaintiff's originating summons herein dated September 24, 2020 be struck out for being premised on grounds/questions outside section 35(2) of the Arbitration Act 1995;
 - ii. That the cost of this application be awarded to the 1st defendant.
2. The application is premised on the grounds on the face of it, the supporting affidavit sworn by Nancy Matimu, the Managing Director of the 1st defendant and submissions dated March 7, 2022.
3. The application was opposed through a replying affidavit sworn by Dipak Halal, a Director of the plaintiff company on July 12, 2022. The respondent's position was that the issues raised in the Originating Summons fell within the scope of section 35 of the Arbitration Act and that the issues were properly before the court in line with section 10 of the Arbitration Act.
4. The respondent averred that the court had the power to determine any issue raised on procedural irregularities within the confines of section 35 of the Act. The respondent faulted the arbitrator for



condemning it to paying costs for the application which amount was unfair, excessive and extravagant. Further it was contended that the arbitrator had committed certain acts that were contrary to his functions and obligations and thus was a risk of him being biased.

5. The respondent submitted that the court had the requisite jurisdiction to hear and determine the plaintiffs originating summons. It was submitted that a determination as to whether the grounds enumerated in the originating summons met the threshold of section 35 could only be determined at the hearing of the application. Further counsel submitted that the plaintiff sought the intervention of the court in accordance with the [arbitration Act](#) and was therefore properly before the court.

Analysis

6. I have considered the pleadings and rival submissions by the parties. The main issue for determination is whether the applicant has made out a case for striking out the originating summons dated September 24, 2020.
7. Section 35(2) of the [Arbitration Act](#), on which the application rests, provides as follows:
 - “ An arbitral award may be set aside by the High Court only if—
 - a. the party making the application furnishes proof—
 - that a party to the arbitration agreement was under some incapacity; or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
 - (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
 - (b) the High Court finds that—
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or



(ii) the award is in conflict with the public policy of Kenya.”

8. In addition to this, the court’s jurisdiction in arbitration proceedings is circumscribed by section 10 of the Arbitration Act which provides that courts interference is limited to only instances where it is expressly provided.

9. Having so stated, there is an abundance of judicial pronouncements on the subject of striking out of pleadings. In the *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa*, (Civil Appeal No. 54 of 1999) the Court of Appeal stated that:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...

Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

10. I do also concur with the court in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another*, [1980] eKLR, Madan JA, where it was again emphasized that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

11. A cursory look at the impugned originating summons indicates that the plaintiff seeks the determination of certain questions relating to the plaintiff’s application for the termination of the arbitrator’s mandate for inability to perform the functions of his office and/or to his failure to conduct the proceedings properly. The originating Summons challenges the interim award delivered by the arbitrator and also raises allegations of bias.

12. The issues raised by the plaintiff are substantial and would require evidence in proof. The issues would be best dealt with during the determination of the suit and not at this interlocutory stage. It is only fair that the litigant should have an opportunity to have its case decided on merit. The court reiterates that the power to strike out the suit is a drastic step that should be used sparingly.

Determination and orders

13. In conclusion it is my finding that the court’s jurisdiction has been properly invoked by the 1st respondent. The argument that originating summons was premised on grounds outside section 35(2) of the Arbitration Act is not a reason to strike out the pleading at this stage.

14. The application dated March 18, 2021 lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 21st DAY OF JULY, 2023

F. MUGAMBI

JUDGE



Court Assistant: Ms. Lucy Wandiri.

