



**Mastermind Tobacco (K) Limited v Maroa (Civil Appeal
E118 of 2022) [2023] KEHC 19923 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E118 OF 2022
RPV WENDOH, J
JULY 13, 2023**

BETWEEN

MASTERMIND TOBACCO (K) LIMITED APPELLANT

AND

WAMBURA JOSEPH MAROA RESPONDENT

*(An Appeal from the Ruling and Order of Hon. Johnstone Munguti (SPM)
Migori dated and delivered on 14th day of September 2022 in Migori CMCC
No. 39 of 2022: Joseph Wambura Maroa vs Mastermind Tobacco (K) Limited)*

JUDGMENT

1. This appeal was commenced by Mastermind Tobacco (K) Limited against the ruling and order of Hon Munguti (SPM) dated and delivered on September 14, 2022 in Migori CMCC No 39 of 2022. The memorandum of appeal is dated October 11, 2022.
2. The grounds of appeal as contained in the memorandum of appeal is as follows:-
 1. That the learned Magistrate erred in fact and in law in finding inter alia that the defendant was the one to initiate arbitration process in a dispute that was subject to an arbitration clause and the *Arbitration Act* 1995 as opposed to the plaintiff who was the aggrieved party in the events leading to the dispute leading to the case;
 2. That the trial court erred in ignoring the provisions of Section 6 of the *Arbitration Act* 1995, the relevant law governing the application of the nature before him and decided case laws drawn to his attention, thereby delivering an erroneous conclusion in the impugned ruling delivered on September 15, 2022;
 3. That the trial court erred by coming up with its own issues for determination that were not set out by any of the parties and proceeded to decide on issues that were not for determination;



4. That the trial court erred in dismissing the application dated May 11, 2022 which had merit in law.
3. The appeal was canvassed by way of written submissions and both parties complied. The appellant's submissions are dated February 23, 2023. It was submitted that the dispute before the trial court was to be first settled by friendly negotiations before being referred to the Chartered Institute of Arbitrators after lapse of 30 days. The appellant relied on the provisions of Section 6 of the *Arbitration Act* and submitted that it does not give the trial court latitude to fail to stay the proceedings on the grounds that a letter was written to the Chartered Institute of Arbitrators but it was not responded to; that there is no evidence to show that meaningful attempts were made at attempting negotiations before seeking the arbitration process.
4. Further, it was submitted that the respondent has not been keen in settling the matter through follow up letters to the Chartered Institute of Arbitrators if at all the first letter was served upon them; that parties voluntarily submitted disputes of the nature before the trial court to arbitration. The appellant relied on the findings in the case of *Kenya Pipeline Company Limited v Datalogix Limited & Another HCCC No 490 of 2004* where the court held that courts must give effect and honour contracts which provide for arbitration as a means for the parties to resolve their disputes. The appellant urged the court to allow the memorandum of the appeal dated October 11, 2022 as prayed.
5. The respondent filed his submissions dated March 21, 2023. The respondent submitted that he wrote a demand letter dated August 18, 2020 which was duly received by the appellant on August 24, 2020 but they did not respond to it; that the respondent wrote to the Chartered Institute of Arbitrators on February 24, 2021 but there was no response to his letter; that between August 18, 2020 and February 24, 2021 the appellant did not take any further steps to facilitate the negotiations.
6. The respondent contended that the appellant has not shown sufficient reason why they delayed to have the matter solved either by negotiation or arbitration since the respondent raised his dispute on August 18, 2020 in his demand letter; that the decision whether or not to stay proceedings is the discretion of the court. The respondent referred to the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2000] eKLR* where the court outlined the factors to be considered in an application for stay of proceedings brought under Section 6 (1) of the *Arbitration Act*; that if the appellant was interested in the expedient determination of this matter, they would have participated in the arbitration as the respondent had referred their dispute to the Chartered Institute of Arbitrators.
7. The respondent submitted that the appellant would not suffer prejudice by submitting to the jurisdiction of the trial court; that the respondent stands to suffer irreparably as the appellant holds the money that he was supposed to be paid; that the main objective of arbitration is fair resolution of disputes without unnecessary delay or expense; that the conduct of the appellant is meant to delay the settlement of the dispute between them and this is against the objective of arbitration proceedings. The respondent urged this court to dismiss the appeal with costs.
8. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co Ltd [1968] EA 123*.
9. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of



the Court of Appeal in *Mbugua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

' An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.'

10. Guided by the above decisions, I have read, understood and considered the grounds of appeal, the record of appeal and the submissions by both parties. The issue which arises therefrom is whether the trial court ought to have stayed the proceedings and referred the dispute to arbitration.

11. There is no dispute that the parties herein entered into an agreement dated July 10, 2016 for the purposes of growing and selling of tobacco. The clause on dispute resolution reads as follows:-

' All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached after friendly negotiation within thirty (30) days from the date of the dispute, the case in dispute shall then be submitted for arbitration to the Chartered Institute of Arbitration (Kenya) and be administered in Kenya and in accordance with the Laws of Kenya.'

12. Section 6 of the *Arbitration Act* provides for stay of legal proceedings 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.

(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.'

13. It is trite law that a court cannot rewrite or interfere with the parties' autonomy in contracts. The courts are under an obligation to give effect to the terms of the contract executed by the parties. Since the parties agreed to refer the dispute to arbitration, the court should, at the first instance, give them an opportunity to resolve their dispute through their preferred method.

14. Referring the parties to arbitration under Section 6 (1) of the *Arbitration Act*, is a matter of discretion. The court should take into account certain criteria such as the conduct of the parties in their willingness



to work towards resolution of the dispute through their preferred method of dispute resolution. In the case of Kenya Pipeline Company Limited (supra) the court held:-

' It is a pre-requisite factor that before the court can exercise its discretion to make an order for arbitration, the applicant must satisfy the court that it is and was at all times willing to do everything necessary for the proper determination of the dispute.'

15. The Court of Appeal in the case of *East African Power and Lighting Company Ltd v Kilimanjaro Construction Ltd [1983] eKLR* considered an appeal from the Superior Court which dismissed the appellant's application for stay under Section 6 (1) of the *Arbitration Act* on grounds that the appellant had not shown willingness to do all things necessary to the proper conduct of arbitration. The Court of Appeal held:-

' If a party asked to refer the dispute pursuant to the arbitration provision in the contract, whether warned or not that proceedings will be instituted in court in default, merely replies that he does not waive the arbitration provision in the contract but takes no other action, then, if proceedings are instituted, he cannot be heard to say that he was and still is ready and willing to do all things necessary for the proper conduct of the arbitration in accordance with the provisions of the contract. He is also not entitled to an order to stay proceedings. In order to comply with the arbitration provision in the contract the steps necessary for a reference to arbitration must be set in motion by the party on his initiative or in response to an invitation by the other side. There should be, either way, some positive action taken which could lead to a reference to arbitration, so that, even though it may not actually take off the ground owing to refusal or non-action by the other party, the court is able to say that there was and is readiness and willingness to do all things necessary for the proper conduct of the arbitration; all this is one of the pre-requisites to an order for stay of proceedings. 'the manner set out above' referred to in the letter was a demand for the plaintiff to agree certain calculations of the work done in manner dictated by the defendant. It was not enough for the appellants to say that they were ready and willing to go to arbitration. They should have gone further and demonstrated their willingness and readiness to do so by taking active steps to refer the matter to arbitration for such reference was the duty of both parties.'

16. There is a letter dated August 18, 2020 from the respondent which was received by the appellant on August 24, 2020. The contents of the letter is a demand for the payment of Kshs 2,040,900/= an alleged debt for the settlement of the supply of tobacco. The appellant has not denied having knowledge of this demand letter. The respondent also wrote to the Chartered Institute of Arbitrators on February 24, 2021 requesting for appointment of an arbitrator in terms of the dispute resolution clause. In as much as the appellant has cast doubt on whether the letter was received by the Chartered Institute of Arbitrators (CIA), there is evidence of a certificate of postage via a courier company addressed to the CIA. The appellant simply contends that the respondent being the aggrieved party has not shown effort to have the matter addressed and only wrote a single letter without any follow ups.
17. A reading of the arbitration clause/agreement shows that referral of the matter to arbitration proceedings was not a preserve of one party over the other. The clause has the tenor of the parties exercising mutual intention in referring any dispute to arbitration, within 30 days from the date of the conclusion of friendly negotiations if they would not have reached an agreement. Furthermore, the appellant has not demonstrated that after receipt of the demand letter, it invited the respondent for friendly negotiations. This court fails to see the good faith and/or intentions the appellant has demonstrated in commencing the dispute resolution process. It is approximately three years since they



were served with the demand letter and the appellant has been awakened by the suit filed in court by the respondent.

18. Arbitration is not meant to be a hardship but create a conducive platform for parties to speedily resolve their disputes. It is the finding of this court that the appellant, being well aware of the impending dispute chose not to take the necessary steps to involve itself in solving the dispute but chose to take a laid back position to the detriment of the respondent. The appellant is therefore not deserving of the court's discretion to stay the proceedings under Section 6 (1) of the Arbitration Act.
19. This court takes judicial notice of the time and expenses involved in arbitration proceedings vis a vis the subject matter which is an alleged debt of Kshs 2,040,090/=. Without necessarily interfering with the terms of solving disputes between the parties (since the parties had first opted for an alternative means of dispute resolution) this court invites the parties to consider the court annexed mediation process to assist them resolve their dispute.
20. This matter shall be referred back to the trial court for further directions, if need be, for parties to engage a court appointed mediator. In default, the trial court is properly seized of the matter and should proceed to hear the parties.
21. The foregone position is that the appeal dated October 11, 2022 is devoid of merit and it is hereby dismissed. The following orders do issue:-
 - a. The ruling and order of the Hon Munguti dated and delivered on September 14, 2022 in Migori CMCC No 39 of 2022 is hereby upheld.
 - b. The respondent is awarded costs of this appeal.

Dated, Delivered and Signed at Migori this 13th day of July, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Migele for the Appellant.

N/A for the Respondent.

Emma & Phelix Court Assistants.

