



**Alibhal & another v Hussein & another (Civil Appeal E022 of 2020)
[2023] KEHC 23645 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E022 OF 2020
DKN MAGARE, J
SEPTEMBER 20, 2023**

BETWEEN

TAHA IQBAI ALIBHAL 1ST PLAINTIFF

JAMILA TAHIR AHMED 2ND PLAINTIFF

AND

ANWAR MAJID HUSSEIN 1ST DEFENDANT

**BENJAMIN OLUOCH-OLUNNYA T/A OLUOCH-OLUNYA & ASSOCIATES
ADVOCATES 2ND DEFENDANT**

JUDGMENT

1. This is an appeal against the ruling of the Honourable F.N. Kyambia delivered on 6/11/2020. The decision dismissed a preliminary objection that the suit was supposed to go for Arbitration.
2. This is one of those Appeals that a reading of the law governing Arbitration will have obviated. It could also be avoided if the parties properly understand the meaning of a preliminary objection.
3. Appeal raised 2 grounds, that is: -
 - a. The learned Magistrate fundamentally erred in law and in fact by finding that the arbitrarily clause in the contract was optional and not mandatory and therefore not binding
 - b. The Learned Magistrate fundamentally erred in law and in fact by failing to refer the dispute to Arbitration for determination.
4. I called upon the file and noted that the matter proceeded and judgment was delivered on 21/6/2023. This means there is no dispute to be taken to Arbitration. The appeal is thus academic and had no value to the administration of justice.



5. Secondly, Section 6(1) of the *Arbitration Act* provides as doth: -

“6. 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.

6. Pursuant to section 6(3) of the *Arbitration Act*, once stay is declined, the issue of Arbitration being condition precedent are inoperative. This means parties must then proceed to hearing. They should not proceed to appeal.

7. It should be noted that it is not a preliminary objection or an application to strike out the plaint, that is to be filed. Section 6 of the *Arbitration Act* is cast in stone, it is an application for stay. This application as to be filed at the same time as the filing of the memorandum of appearance. It means, if a memorandum is filed to da and the application is filed tomorrow, the court has no jurisdiction to stay. It is for good reason. When you file a memorandum of appearance without more, it is unconditional submission to the court’s jurisdiction.

8. However, when appearance is filed with the application for stay, it is conditional appearance and as such there will be no other steps pending the determination of the application for stay. However, once a defence is filed, whether or not the application for stay was filed, the question of arbitration lapses. The 1st defendant filed a memorandum of Appearance on 17/6/2020. The 2nd defendant made an application for stay pending Arbitration on 6/7/2020. The application was dismissed on 6/11/2020. This resulted in the appeal herein. A defence was subsequently filed. An application for stay pending appeal was dismissed on 17/12/2020. On 27/7/2023 the 2nd defendant filed defence. Whichever the reason, upon filing of the defence, the right to Arbitration is lost pronto.

9. It is therefore this court considered holding that by filing defence, the Appellant submitted to jurisdiction of the court. By so doing the appeal was rendered nugatory. Consequently, the Appeal lacks merit and is dismissed with costs.

10. I have considered submission by parties, however they are on merit of the application that is now rendered nugatory. No value will be added by regurgitating the same here.

Determination

11. The upshot of the foregoing is that: -



- a. The Appeal herein lacks merit.
- b. Consequently, it is dismissed in *limine* with costs of Kshs. 175,000/= payable within 30 days, in default execution to issue.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

