



**Waiyaki v Human Capital Synergies Limited & another (Commercial Case E348 of 2022)
[2024] KEHC 13089 (KLR) (Commercial and Tax) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E348 OF 2022
MN MWANGI, J
OCTOBER 14, 2024**

BETWEEN

VERONICA ANAM WAIYAKI PLAINTIFF

AND

HUMAN CAPITAL SYNERGIES LIMITED 1ST DEFENDANT

NJOKI MARTHA MWIHIA 2ND DEFENDANT

RULING

1. This ruling is in respect to two applications. The 1st application is the plaintiff's Notice of Motion dated 29th September 2022, filed pursuant to the provisions of Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling laws. The plaintiff seeks inter alia orders that this Honourable Court restrains the defendants from withdrawing, transferring, debiting, or in any way depleting the balance of the 1st defendant's bank accounts at Equity, NCBA, KCB, Cooperative Bank, Kingdom Bank, Unaitas Sacco, and/or other accounts held by the 1st defendant with these banks, their successors, affiliates, or through any mobile banking services. In the alternative, the plaintiff seeks an order directing the defendants to deposit the sum of Kshs.30,523,710.41 in Court or into an escrow account jointly held by the parties' respective Counsel, an order preventing the defendants from representing to third parties that the plaintiff is a Director or involved in the operations of the 1st defendant, its successors, or affiliates, an order prohibiting the 1st defendant or its Directors from disclosing the plaintiff's personal data, such as home address, phone number, place of work, email address, or other personal information, to unauthorized parties, and an order directing the 1st defendant to provide accounts in respect of application of contributions to company debts made by the plaintiff, in particular to clearing PAYE arrears of Mueni Mutinda Udeozor.



2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Veronica Anam Waiyaki, the plaintiff herein. She averred that during her time as a Director of the 1st defendant, she provided loans totaling to Kshs.30,523,710.41 to the 1st defendant. That on 11th May 2021, she resigned as an employee and Director of the 1st defendant due to an irreparable breakdown in her relationship with the 2nd defendant. She deposed that thereafter, she proposed a separation agreement with the 2nd defendant to allow the 1st defendant to continue operating and to recover the loans she had advanced the 1st defendant on 28th July 2021. She stated that the 1st defendant sent a letter to the Registrar of Companies seeking to register a caution to prevent her resignation from being recorded in the Company Register.
3. She averred that being aggrieved by the defendant's actions, she requested the Registrar of Companies to formalize her resignation in the Company's Register vide a letter dated 7th September 2021, basing her request on the provisions of Article 20(d) of the 1st defendant's Memorandum and Articles of Association, as well as Sections 30(1) and 138(1)(a) & (b) & (3) of the *Companies Act*, 2015. She deposed that the Registrar of Companies in a letter dated 14th September 2021 informed her that her resignation could not be processed due to a caveat placed by the 1st defendant, who had cited outstanding obligations and liabilities to KRA, NHIF, NSSF and NITA. The plaintiff stated that she has repeatedly assured the defendants that she has no intention of avoiding her personal obligations incurred during her directorship. She acknowledged that under the law, personal obligations incurred while serving as a Director remain even after resigning.
4. The plaintiff stated that she continued to fulfill her personal financial obligations incurred during her directorship even after her resignation. She contended that the 2nd defendant has been misrepresenting to third parties that she is still a Director of the 1st defendant and has threatened to share her personal information to make it appear as if she is still involved in the company's administration. The plaintiff stated that during a virtual meeting held on 4th March 2022, the 2nd defendant acknowledged the loans she advanced to the 1st defendant but refused to prioritize repaying her, stating that she (plaintiff) had was not a priority creditor. The plaintiff also alleged that the 2nd defendant has incorporated a new company and is transferring the business, assets, and operations of the 1st defendant to this new entity to avoid liabilities and hinder her efforts to recover the amounts she is owed.
5. She claimed that vide a letter dated 10th December 2021, forwarded to her Advocates by the 2nd defendant's Advocates, the 2nd defendant claimed to have resigned as a Director of the 1st defendant in an attempt to frustrate and prevent her from recovering the sums owed to her by the company. She averred that the resignation notice was sent to the 1st defendant's Advocates rather than following the proper procedure outlined in Article 20(d) of the 1st defendant's Articles of Association, which requires notice to be given directly to the company. The plaintiff expressed concern that the 1st defendant had no intention of repaying the money she advanced to it, and is trying to force her to cover all of the company's obligations to creditors by blocking her resignation from being registered. She argued that if the orders sought are not granted, she will suffer irreparable injury.
6. In opposition to the application, the 2nd defendant filed grounds of opposition dated 19th October 2023 raising the following issues –
 - i. The applicant has not met the test for the grant of an interlocutory injunction;
 - a. The plaintiff has not shown that there is prima facie case which warrants the Court to grant prayers 2 and 4 of the application;



- b. The applicant will not suffer any irreparable harm which cannot be compensated by an award of damages; and
 - c. The balance of convenience tilts in favour of the second defendant as she is not a party to the dispute between the plaintiff and the first defendant.
- ii. The plaintiff claims to have advanced the alleged loan to the 1st defendant. The 1st defendant is a separate and distinct legal entity. The plaintiff has no claim against the 2nd defendant who is not a necessary party to the suit;
 - iii. Prayers 3 & 5 of the application seek the grant of a mandatory order of injunction which ought not be granted at this interlocutory stage;
 - iv. No special circumstances have been established to warrant the grant of a mandatory injunction at this interlocutory stage; and
 - v. Other grounds to be set out in the replying affidavit to be filed herein.
7. The 2nd defendant also filed a replying affidavit sworn on 8th April 2024 by herself. She claimed to have resigned as a Director and Shareholder of the 1st defendant on 10th December 2021, but both her and the plaintiff remain in these positions pending a Board meeting and resolution, after addressing concerns raised in a caveat with the Registrar of Companies. She averred that the 1st defendant has only two Directors and Shareholders, being the plaintiff and herself. She deposed that the parties engaged in mediation and signed a Mediation Settlement Agreement dated 4th August 2021, to ensure an amicable separation and to address the company's significant liabilities to creditors, and that they agreed to handle all matters through mediation and consult tax experts to clarify their personal liabilities related to the company's statutory dues. She stated that, the Tax Consultant's Report concluded that none of the Directors was personally liable for the company's debts.
8. She stated that in the Mediation Settlement Agreement, it was agreed that the plaintiff waived any claims to dues related to NSSF, Pension, PAYE, and unpaid salaries, but she did not make a similar waiver, so these claims remain owed to her by the 1st defendant. She stated that the items not resolved include debts to Kenya Revenue Authority and other statutory bodies, a list of creditors, claims of defamation and breach of privacy, and the repayment of loans the plaintiff claimed to have advanced on behalf of the 1st defendant, which the plaintiff and the 2nd defendant agreed would be resolved through arbitration as provided for in Article 31 of the Articles of Association. The 2nd defendant indicated that any personal funds injected into the 1st defendant during financial distress should not be considered as repayable loans. The 2nd defendant denied that the plaintiff had subsequent to her alleged resignation, continued to meet her personal obligations incurred during her term as a Director of the 1st defendant.
9. The 2nd defendant asserted that even if the 1st defendant owed the plaintiff money, such a debt would not have priority over other debts, especially over those owed to statutory bodies. She stated that she maintained the said position during a Zoom meeting held on 4th March 2022, and she did not admit to being indebted to the plaintiff. She denied creating a new company to which she transferred the 1st defendant's business and assets, stating that she resigned as a Director and Shareholder of the 1st defendant, and thereafter revived an old company, Human Capital Advisory Services, which she had registered in the year 2009 before she formed the 1st defendant with the plaintiff. She stated that she also revived a non-operational company, Evolving Outsourcing Solutions Limited (EOS), which the plaintiff had willingly resigned from on 11th May 2021. She averred that forming of new companies is within her rights and did not require the plaintiff's consent.



10. The 2nd application is the 2nd defendant's Notice of Motion dated 14th October 2022 filed pursuant to the provisions of Section 3A of the *Civil Procedure Act*, Section 6 of the *Arbitration Act*, 1995, and Article 159(2)(c) of *the Constitution* of Kenya, 2010 seeking orders for stay of all further proceedings in this suit, pending reference of all matters in respect of which this suit is brought to arbitration, as set out under Article 31 of the 1st defendant's Articles of Association and the Mediation Settlement Agreement dated 4th August 2021.
11. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Njoki Martha Mwihi, the 2nd defendant herein and a Shareholder of the 1st defendant. She stated that this suit was initiated by the plaintiff to compel the defendants to pay her KShs.30, 523,710.41, which she claims is owed to her by the 1st defendant. She averred that the suit also seeks to update the company records to reflect the plaintiff's resignation or alternatively, to direct the Registrar of Companies to remove the plaintiff as a Director of the 1st defendant. The plaintiff referred to Article 31 of the 1st defendant's Articles of Association and asserted that it requires any differences between the 1st defendant and any of its members to be referred to arbitration.
12. The 2nd defendant stated that by a Mediation Settlement Agreement dated 4th August 2021, the plaintiff and the 2nd defendant agreed to refer some disputes to arbitration, and that the issues include loans obtained by the plaintiff on behalf of the company. She asserted that the dispute between the parties herein is within the scope of what is contemplated under Article 31 of the 1st defendant's Articles of Association and the Mediation Settlement Agreement dated 4th August 2021, hence they should be referred to arbitration as set out in the 1st defendant's Articles of Association and the Mediation Settlement Agreement.
13. In opposition to the 2nd defendant's application, the plaintiff filed grounds of opposition dated 20th December 2023 raising the following grounds -
 - i. That the 2nd defendant has misconstrued the application of the *Arbitration Act* of 1995 by failing to read through the provisions of Section 7(1) which grants parties the capacity to seek interim orders of protection from the High Court pending the hearing and determination of arbitration proceedings; and
 - ii. That the arbitration clause in the Articles of Association expressly allows the application of the *Arbitration Act* of 1995, which Act allows for parties to seek interim orders of protection under the present circumstances.
14. The applications herein were canvassed by way of written submissions. The plaintiff's submissions were filed on 12th February 2024 & 20th March 2024, by the law firm of Victor Lee Advocates, whereas the 2nd defendant's submissions were filed by the law firm of Hamilton, Harrison & Mathews Advocates on 20th February 2024 & 9th April 2024. The 1st defendant did not file any documents either in support or in opposition of the applications herein, thus the determination of the applications herein proceeded without its participation.

Application dated 29th September 2022

15. Mr. Mabachi, learned Counsel for the plaintiff relied on the case of *Giella v Cassman Brown* [1973] EA 358, and the case of *Salama Beach Hotel Limited & 3 others v Arcuri Ignazio & 2 others* [2020] eKLR, and submitted that the plaintiff has established a prima facie case with a probability of success. He submitted that the plaintiff demonstrated that during her time as a Director of the 1st defendant, she advanced to the 1st defendant loans totaling to KShs.30,532,710.41, a fact the 2nd defendant



- admitted in a virtual meeting held on 4th March 2022 in the presence of their Advocates. He stated that subsequently, and after a breakdown in her relationship with the 2nd defendant, the plaintiff resigned as a Director and employee of the 1st defendant and instructed her Advocates to demand repayment of the outstanding sums, but the defendants have not repaid the sums due to her, arguing that the plaintiff is not a priority creditor, and by refusing to discuss repayment.
16. Counsel referred to the decision in *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others* [2008] eKLR, and argued that it is trite law that where there is breach of the law, an applicant cannot be compelled to accept damages as compensation. Further, the plaintiff claimed to have been informed that the 2nd defendant had created a new company and that she was transferring the 1st defendant's business, assets, and operations to avoid liabilities, and to obstruct her efforts to recover the money she loaned to the 1st defendant. He contended that the 2nd defendant vide a backdated resignation letter dated 10th December 2021 purported to resign from the 1st defendant so as to frustrate the plaintiff's recovery efforts and leave the 1st defendant as a shell company to evade repayment. Counsel argued that the plaintiff stands to suffer irreparable harm if the orders sought are not granted. He submitted that the defendants would not be prejudiced in any way if the orders sought are granted, as opposed to the plaintiff who stands to suffer irreparable loss and damage in the event the orders sought are not granted. He urged that the balance of convenience tilts in favour of the plaintiff.
 17. Mr. Ochieng, learned Counsel for the 2nd defendant submitted that the plaintiff had not established prima facie case with a probability of success to justify being granted an interlocutory injunction. He contended that the plaintiff has not provided sufficient grounds for the Court to freeze the bank accounts listed under prayer No. 4 of the application. He stated that the said bank accounts were no longer operational, either because they were closed or due to Agency Notices issued by the Kenya Revenue Authority for unpaid taxes, and the plaintiff had not provided any evidence to the contrary. Counsel referred to the case of *Morris & Company Limited v Kenya Commercial Bank Limited & others* [2003] 2 EA 6054, and argued that the instant application is incompetent because it seeks to preserve funds without requesting for an order of permanent injunction in the main suit.
 18. Counsel argued that the plaintiff had not provided evidence of a loan agreement or supporting documents for her claim that she loaned the 1st defendant Kshs.30,523,710.41, or that she repaid loans, rent, and audit fees on behalf of the 1st defendant. He asserted that as a Shareholder, the plaintiff was expected to inject capital into the company which was not refundable, especially when the company was financially distressed such as is the case herein. Mr. Ochieng cited the case of *Kabansora Millers Ltd v New Salama Wholesalers & 2 others* [2002] 1 KLR 451, and stated that the plaintiff claims to have loaned money to the 1st defendant, not the 2nd defendant. He argued that without a guarantee from the 2nd defendant to pay the 1st defendant's debts, the 2nd defendant cannot be held liable for the 1st defendant's debts. He argued that the claims against the 2nd defendant are baseless and urged that she she should be struck out from this suit. Counsel contended that damages would be an adequate remedy if the plaintiff succeeds in her case, as the issue at hand involves money.

Application dated 14th October 2022

19. Mr. Ochieng, learned Counsel for the 2nd defendant cited the provisions of Section 6 of the [Arbitration Act](#) and submitted that the instant application was timely since it was filed alongside the 2nd defendant's Notice of Appointment, and before the 2nd defendant took any other step in the litigation. He relied on the Court of Appeal case of *Omino v Laifi Meghji Patel and Co Limited* (1995-19982) 1 EA 264 and the case of *Niazons (K) Limited v China Road & Bridge Corporation Kenya* (2001) KLR, and further submitted that the conditions under Section 6(1) of the [Arbitration Act](#) were met as there is a valid



arbitration agreement, and a dispute that can be referred to arbitration. He stated that the plaintiff is seeking the recovery of Kshs.30,523,710.41, allegedly owed by the 1st defendant, and an order directing the Registrar of Companies to remove her as a Director in the records of the company.

20. He cited the Court of Appeal case of UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR, and Article 31 of the 1st defendant's Articles of Association which requires disputes between the 1st defendant and its members to be referred to arbitration, and that a Mediation Settlement Agreement dated 4th August 2021, was in place. He asserted that the matters in issue are within the scope of the said Agreement and Article 31 of the 1st defendant's Articles of Association. He pointed out that the plaintiff's application is not for interim measures under Section 7(1) of the Arbitration Act, but for an injunction under Order 40 Rule 1 of the Civil Procedure Rules, therefore this Court's jurisdiction was not properly invoked. He contended that the Arbitrator has jurisdiction to grant an injunction pending the determination of the arbitration proceedings.
21. Mr. Mabachi, learned Counsel for the plaintiff cited the provisions of Section 7 of the Arbitration Act, the Court of Appeal case of case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR, and the case of Don-Woods Company Ltd v Kenya Pipeline Company Ltd [2005] eKLR, to support the assertion that this Court has the jurisdiction to grant injunctive reliefs to preserve the subject matter of the dispute pending arbitration. He acknowledged that the plaintiff's application dated 29th September 2022 was filed under Order 40 Rule 1 of the Civil Procedure Rules and not Section 7(1) of the Arbitration Act, but referred to the Supreme Court holding in the case of Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone [2013] eKLR, and asserted that the submitted shortcoming did not render the said application defective. Counsel submitted that without the preservation orders sought from the Court, the plaintiff would be prejudiced if the 2nd defendant's application dated 14th October 2022 is allowed, as only the High Court has the jurisdiction to issue such orders.

Analysis And Determination.

22. I have considered the two applications filed herein and the affidavits filed in support thereof. I have also considered the grounds of opposition and the replying affidavit filed in opposition thereto, as well as the written submissions by Counsel for the parties.
23. Stay of proceedings and reference of disputes to arbitration is provided for under Section 6 of the Arbitration Act of 1995. Section 6(2) of the Arbitration Act provides the following –

Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
24. In the premise, in as much as the plaintiff's application dated 29th September 2022 was filed first, this Court is duty bound to at first determine whether the 2nd defendant's application dated 14th October 2022, seeking stay of all further proceedings in this suit pending reference of the dispute between the parties herein to arbitration, is merited.
25. The issues then that arise for determination are -
 - i. Whether an order for stay of all further proceedings in this suit should be issued pending reference of the dispute between the parties herein to Arbitration;
 - ii. Whether the plaintiff has satisfied the conditions of being granted an order of interlocutory injunction; and



- iii. Whether the orders sought in prayer Nos. 6 to 8 are in the nature of a mandatory injunction are merited.

Whether an order for stay of all further proceedings in this suit should be issued pending reference of the dispute between the parties herein to Arbitration.

26. As stated here before, stay of proceedings and reference of disputes to arbitration is provided for under Section 6 of the Arbitration Act, Cap 4 of 1995. Section 6 (1) thereof states that -

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.
27. The above provisions have been the subject of numerous Court decisions. In *Niazsons (K) Ltd v China Road Bridge* [2001] KLR, the Court held that -

All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things -

- a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
 - b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - c. Whether the suit intended concerned a matter agreed to be referred to arbitration
28. The 2nd defendant contends that the 1st defendant's Articles of Association and the Mediation Settlement Agreement dated 4th August 2021 provide that disputes between the 1st defendant and its members are to be resolved through arbitration. Upon perusal of Article 31 of the 1st defendant's Articles of Association, it states that –

Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these articles, or of the statutes or touching any breach, or alleged breach or otherwise relating to the premises, or to these articles or to any statutes affecting the company, or to any of the affairs or the company, every such difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of the two arbitrators, of whom one shall be appointed by each of the parties in difference.



29. Further, Clause 14 of the Mediation Settlement Agreement between the plaintiff and the 2nd defendant dated 4th August 2021 states that –

The parties have agreed to refer the following matters, which were not resolved at the mediation to arbitration...

30. In view of the foregoing, it is evident that there exists an arbitration agreement between the parties herein, a fact which is not disputed. In this suit, the plaintiff is seeking an order for this Court to compel the defendants to pay Kshs.30,523,710.41 owed to her by the 1st defendant, and an order that the 1st defendant's records be updated to reflect the plaintiff's resignation, or alternatively to direct the Registrar of Companies to remove the plaintiff as a Director of the 1st defendant. Evidently, the dispute between the parties in the suit herein is within the scope of the differences and the matters contemplated under Article 31 of the 1st defendant's Articles of Association and the Mediation Settlement Agreement dated 4th August 2021. Further, it is worthy of note that the plaintiff does not object to the stay of proceedings in this suit pending reference of the dispute between the parties herein to arbitration. She urges this Court to grant her interim measures of protection, preserving the subject matter of the said dispute pending determination of the dispute by an Arbitrator.

31. An application contemplated under Section 6 of the *Arbitration Act* should be filed and/or lodged not later than the time of entering appearance or filing a defence. This suit was instituted by a plaint dated 1st September 2022, filed on 14th September 2022, followed by an application dated 29th September 2022 filed by the plaintiff on 30th September 2022. It is however evident from the Court Case Tracking System that the 2nd defendant's Advocates on record filed a Notice of Appointment dated 14th October 2022 accompanied by the 2nd defendant's application dated 14th October 2022 seeking an order for stay of all further proceedings in this suit, pending reference of the dispute between the parties herein to arbitration.

32. The Court of Appeal in the case of Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR, when discussing the import of Section 6(1) of the *Arbitration Act* held that -

We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings. The dispute between Charles Njogu Lofty, the appellant herein, and Bedouin Enterprises Ltd, the respondent herein, basically concerns the interpretation given by G.B.M. Kariuki, J. to section 6 (1) of the 1995 Act, "the Act" hereinafter, in light of the circumstances surrounding the dispute.

33. From the foregoing decisions and the circumstances of this case, I am persuaded that the 2nd defendant complied with the provisions of Section 6(1) of the *Arbitration Act*, since her application dated 14th October 2022 was filed at the time she took the first step in these proceedings, which was when her Advocates on record filed a Notice of Appointment on her behalf.

34. In the premise, I am persuaded that the 2nd defendant's application dated 14th October 2022 is fully compliant with the provisions of Section 6(1) of the *Arbitration Act*. I therefore find that the 2nd defendant has made out a case to warrant this Court to exercise its discretion in her favour, and stay all further proceedings in this suit pending reference of the dispute between the parties herein to arbitration.



35. In view of the above finding, I shall not determine the other two issues I had identified for determination because the jurisdiction of this Court to grant the other orders sought is extinguished upon referral of a matter to Arbitration. Further, this Court's supervisory jurisdiction can only be invoked in a separate cause, after institution of arbitral proceedings.
36. This Court finds that the 2nd defendant's application dated 14th October 2022 is merited and is allowed in the following terms –
- i. That all further proceedings in this suit are hereby stayed, pending reference of all matters in respect of which this suit is brought to arbitration; and
 - ii. Costs of the application dated 14th October, 2022 are awarded to the 2nd defendant

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ochieng for the 2nd defendant

No appearance for the plaintiff

B. Wokabi – Court Assistant.

