Sequiera v African Educational Publishers Limited (Commercial Case 027 of 2020) [2024] KEHC 14400 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14400 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 027 OF 2020

A MABEYA, J

NOVEMBER 20, 2024

BETWEEN

MARIA LINA SEQUIERA ..... PLAINTIFF

AND

AFRICAN EDUCATIONAL PUBLISHERS LIMITED ..... DEFENDANT

RULING

1. Before Court is the preliminary objection raised by the defendant on 31/3/2022. The objection is premised on the ground that the plaint was incurably defective for failing to invoke the dispute resolution clause of the memorandum of agreement being arbitration. That the suit had abated as per Order 5 rule 1(6) of the Civil Procedure Rules 2010.

2. It was further contended that the plaintiff's suit did not indicate the track it was despite that being a mandatory requirement under Order 3 rule 1(1) and (2) of the Civil Procedure Rules 2010. The defendant further stated that the suit was an abuse of the court process and there was no jurisdiction to entertain the suit before exhaustion of all the remedies available.

3. Parties filed their respective submissions on the preliminary objection which the Court has carefully considered. The defendant submitted that the preliminary objection was based on pure points of law. That the Court did not have jurisdiction to hear and determine the matter since the memorandum of agreement had a dispute resolution clause and due to the doctrine of exhaustion the court ought to down its tools.

4. It was submitted that the plaintiff failed to demonstrate why the arbitration clause in the memorandum of understanding was inoperative. That the plaintiff did not comply with statutory timelines in service of summons to enter appearance.

5. For the plaintiff, it was submitted that the defendant did not show when the electronic summons was collected and therefore the suit cannot be said to have abated. That the preliminary objection could only be raised if all the facts had been ascertained and the defendant's allegation that the summons are unsubstantiated is not a pure point of law.

6. On jurisdiction the plaintiff submitted that the Court had the jurisdiction to hear and determine the matter. That the defendant filed a memorandum of appearance and a defence prior to raising the issue of arbitration and therefore, the Court had the jurisdiction to hear and determine the suit. That the inadvertent error of not including the track is not fatal and can be cured under an amendment in the spirit of Article 159(2) of *the Constitution*.

7. I have considered the submissions and the record. In Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696, a preliminary objection was defined to consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. It is argued on the assumption that all the facts pleaded by the other side are correct.

8. The first ground as raised by the defendant is that the plaint was fatally and incurably defective on account of failing to properly invoke the dispute resolution clause of the memorandum of agreement with respect to arbitration. The defendant further contended that the Court lacked jurisdiction to entertain the suit prior to the exhaustion of remedies. It argued that due to the dispute resolution clause which preferred arbitration, the Court ought to down its tools

9. In Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd [2014] eKLR it was held: -

> "... I should add that, the requirement in Section 6(1) of the *Arbitration Act* is not a mere technicality which can be diminished by Article 159(2) (d) of *the Constitution* as claimed by the applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through though arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration ... a party who fails to adhere to the law such as Section 6(1) of the *Arbitration Act* forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court. With that understanding, a delay of fourteen (14) days becomes unreasonable in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail."

10. It is clear that the section 6 of the *Arbitration Act* provides for a stay of proceedings pending the referral of a dispute to arbitration. However, this right is not automatic; it must be actively invoked by the party seeking to benefit from the arbitration clause.

11. In this case, the defendant should have filed the application for referral at the time of entering appearance, prior to filing the defense or addressing any other matters related to the suit. By failing to do so, the defendant effectively engaged the jurisdiction of this Court and cannot now seek to opt out. That ground fails.

12. The defendant further contended that the plaint failed to indicate the track it is despite that being a mandatory requirement under order 3 rule 1(1) and Order 3 rule 1(2) of the Civil Procedure Rules 2010 which provides that: -

> "(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed
>
> (2) The claim shall indicate at the heading the choice of track; namely "small claims", "fast track" or "multi-track".

13. It is clear that the aforementioned provisions require a suit to indicate a heading that reflects the chosen track. The plaintiff acknowledges the existence of this error but contends that it can be corrected through an amendment. Upon reviewing the record, I agree with the plaintiff's position. The failure to specify the track of the case does not render the suit defective to the extent that it warrants dismissal.

14. In DT Dobie & Company (Kenya) Ltd v Muchina (1982) KLR 1, Madan JA held 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."

15. To strike out or dismiss the suit for failure to comply with a mere procedural requirement would be tyrannical. The failure can be cured by an amendment. The objective of this Court under Article 159(2) of *the Constitution* is to facilitate justice and ensure that cases are heard on their merits rather than dismissed on procedural technicalities.

16. On whether the suit had abated on the issue of service of summons, the Court finds that the facts on this issue are not agreed and cannot therefore be determined on a preliminary point.

17. In the premises, I find that the preliminary objection dated 31/3/2023 is not sustainable and is hereby dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE