SBM Bank (Kenya) Limited v Kenya Revenue Authority (Commercial Case E345 of 2023) [2024] KEHC 16689 (KLR) (Commercial and Tax) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16689 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E345 OF 2023

AA VISRAM, J

NOVEMBER 6, 2024

BETWEEN

SBM BANK (KENYA) LIMITED ..... PLAINTIFF

AND

KENYA REVENUE AUTHORITY ..... DEFENDANT

RULING

1. I have considered the Chamber Summons Application dated 7th August, 2023, together with the supporting affidavit sworn on even date and the replying affidavit sworn in opposition to the same on 25th August, 2023, together with the rival submissions made by the parties, and applicable law.

2. The Application seeks to refer the present matter to arbitration and further seeks interim measures of protection pending the hearing and determination of the tribunal in relation to the subject matter of the arbitration.

3. In particular, the Applicant seeks to preserve the sum of Kshs. 727, 137,980/= claimed by the Respondent on the basis that the amount claimed is in dispute, and the Respondent does not have the power to claim the same. As such, the Applicant seeks to restrain the Respondent from issuing agency notices to collect the disputed amount pending the hearing and determination of the Arbitration.

4. Based on the record before me, the details of factual background leading to the dispute are as follows: On 10th May, 2017, SBM Africa Holdings Limited acquired Fidelity Commercial Bank Limited (FCB) through a Share Purchase Agreement and renamed it SBM Bank (Kenya) Limited. FCB was experiencing severe liquidity challenges at the time it was being taken over by SBM Africa Holdings Limited.

5. FCB had entered into a Service Level Agreement dated 29th October, 2014, with the Respondent (the Agreement) where FCB agreed to act as a tax collection agent for the Respondent.

6. Clause 8 of the Agreement provided that FCB would transfer all funds collected on behalf of the Respondent within two days following the date of collection or as otherwise specified by the Respondent. A penalty equivalent to 2% of the amount delayed compounded every other day it remains outstanding would be levied by the Respondent where the collected funds were not remitted to the designated account.

7. Clause 21 of the Agreement provided that any dispute arising from the Agreement would be referred to arbitration.

8. On 29th November, 2016, FCB informed the Respondent that it was facing a major liquidity crisis and requested the Respondent to suspend the service under the Agreement until such a time as it was in a position to resume normal operations. FCB also requested a waiver of the penalties that would ordinarily accrue from the delayed remittance.

9. At the time SBM Holdings acquired FCB, the funds collected by FCB under the Agreement that had not been transferred to the Respondent were KES 239,289,236/- which represented collections for the period between May and November 2016.

10. The Applicant remitted Kshs. 239,289,236/= to KRA in June 2017 on account of the funds that were collected but had not been remitted to KRA by FCB under the Agreement.

11. By a letter dated 23rd June, 2017, the Respondent demanded Kshs. 14,742,759,606.70/= on account of penalties accrued under the Agreement for the period 1st May, 2016, to June 2017.

12. The Applicant thereafter disputed the penalties claimed by the Respondent and engaged the Respondent in numerous discussions between June 2017 and March 2023 in an attempt to try and resolve this matter amicably.

13. On 21st March, 2023, the Respondent informed the Applicant that the Respondent's board had directed that the penalties claim be settled in the sum of Kshs. 737,137,980.30/=.

14. On 26th April, 2023, the Respondent issued an agency notice under section 42 of the *Tax Procedures Act*, 2015 to the Central Bank of Kenya (CBK) for the sum of Kshs. 737,137,980.30/= on account of alleged tax due from the Applicant to the Respondent.

15. The Applicant engaged the Respondent and it was agreed that the agency notice dated 26th April, 2023, would be withdrawn upon the Applicant making a deposit of Kshs. 10,000,000/=. It submitted that this agreement was reached to give the parties another opportunity to try and amicably resolve the issue of the penalties accrued under the Agreement. The agency notice was lifted on 12th May, 2023.

16. On 3rd August, 2023, the Applicant received a letter demanding the immediate payment of Kshs. 727,137,980.30/=. Accordingly, the Applicant wrote to the Respondent disputing the validity of clause 8 of the Agreement and declaring a dispute under the Agreement on 7th August, 2023.

17. Having outlined the background, the first issue to resolve is whether or not there is indeed a dispute between the parties?

18. In this regard, the Respondent submitted: that there was no dispute because on 20th April 2023, the Agent proposed to pay Kshs. 15 Million in full and final settlement of the penalties outstanding. The Agent claimed that the amount of Kshs. 727, 137, 98.30/= was punitive since the reasons for the delay were due to liquidity crises by FCB.

19. The Agent, thereafter, on 30th June, 2023, made another proposal to pay Kshs. 143, 573,542/= again, in full and final settlement of the penalties.

20. In Counsel for the Respondent's view, the Agent had therefore admitted liability to the penalties being demanded by the principal, and as such, he contended there is no dispute subject to clause 21 as per the SLA dated 29th October, 2014.

21. The Respondent contended that the SLA is a binding contract between the parties and that the agent breached the terms, and is therefore liable for the penalties imposed. In its view, the reference to arbitration proceedings are a mere afterthought, and intended to delay the process of payment. Counsel was also of the opinion that the arbitration clause ought to have been triggered earlier. He contended that the same was no longer actionable, and had been extinguished by the delay. He did not however submit any authority to that effect. Counsel further admitted that the contract between the parties did not bar or preclude negation or settlement by other means of dispute resolution prior to arbitration.

22. Further, the Respondent was of the view that the threshold for the grant of the interim reliefs had not been met. It relied on the authority of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, where the Court of Appeal stated that:-

> "With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,
>
> "If there is no prima facie case on the point essential to entitle the plaintiff to complain of the Defendant's proposed activities that is the end of any claim to interlocutory relief."

23. Having considered the submission and the law stated above, in my view, the word 'dispute' ought to be construed liberally, and interpreted to mean 'any difference' arising between the parties, or 'any issue' that may give rise to a difference or dispute. Here, I find that at this preliminary stage, and based on the record before me, there is a difference between the parties in relation to the both the sum claimed by the Respondent, and the powers of the Respondent to lawfully claim the same.

24. The next question then, is whether or not there is a valid arbitration agreement between the parties? Here, there is no dispute that Clause 21 of the Agreement between the parties contains an arbitration agreement.

25. Having found that there is both a dispute between the parties, and an arbitration clause; to my mind, where parties have agreed to submit or refer a matter to arbitration, a court of law ought to support that process, and allow the arbitral tribunal to carry out its mandate.

26. In this regard, Section 6 of the *Arbitration Act*, which relates to a stay of legal proceedings, but is nonetheless helpful, in so far as the language of the same compels a court to refer appropriate matters to arbitration subject to the appropriate inquiry, states as follows:-

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.

27. The import of the above section, is that subject to the above inquiry, in the event a court finds a valid arbitration agreement between the parties, and further finds that there is a dispute between the parties capable of being resolved by arbitration, the court must refer the matter to arbitration. Once again, I note that in the present matter, no application for stay of legal proceedings has been tendered. The section is relevant given the Respondents view that there is no dispute between the parties to be referred to arbitration, which I disagree with.

28. At the present stage of proceedings, having found both of the above, on balance, it appears to me that there is a dispute between the parties which falls within the scope of the agreement to arbitrate. I say so cautiously, bearing in mind that the tribunal, once formed, and with the benefit of all the information before it, ought to be given the liberty to draw its own conclusions relating to the scope of its jurisdiction in the first instance.

29. Accordingly, the Applicant has triggered the said clause 21 in accordance with law, and I am inclined to agree with the Applicant, that the present matter is now within the domain of the arbitration, and the issues ought to be ventilated, and resolved before the tribunal once composed, and in accordance with the terms of the Agreement.

30. As regards the interim relief sought by the Applicant, the applicable law is found at Section 7(1) of the *Arbitration Act*, 1995 ("the Act'). The same provides as follows:-

> It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

31. The criteria upon which such an interim measure of protection ought to be granted is set out in the decision of the Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR at pages 15 to 16 of the judgment, where the court stated as follows:-

a. The existence of an arbitration agreement.

b. Whether the subject matter of arbitration is under threat.

c. Which is the appropriate measure of protection in the circumstances of the case.

d. For what period must the measure be given, especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunals decision making power as intended by the parties.

31. Guided by the above, I note that the first limb of the test is not disputed. Clause 21 of the Agreement provided that any dispute arising out of the Agreement is to be referred to arbitration and the proceedings conducted in accordance with the *Arbitration Act* (*Act No. 4 of 1995)*.

32. Further, it is evident that the Applicant has declared a dispute under the Agreement. A copy of the relevant letter dated 7th August, 2023, is found at pages 30 and 31 of the Applicant's Exhibit GO 1 triggering the arbitration proceedings in accordance with the procedure agreed by the parties. In my view, therefore, the arbitration proceedings have already commenced in accordance with the rules applicable to the arbitration between the parties.

33. As regards the second limb, namely, whether the subject matter is under threat. I am guided by the decision of the High Court in *Talewa Road Contractors Limited v Kenya National Highways Authority* [2014] eKLR J A Kamau J, at paragraph 35 of the ruling, followed the holding in *CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited* where the court held:-

> " The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection." (Emphasis mine)

31. Guided by the above, in my view, the purpose of the interim relief is to protect the subject matter of the arbitration. In my view, the subject of the arbitration is not only the sum being claimed as penalties, but also the question relating to the enforceability of the clause relating to penalties. I take note of counsel's contention that the penalties have ballooned from just over Kshs. 230,000,000/= to over 14 Billion over the years, and may continue to balloon further. It is therefore evident to me that if the said money in question is paid to KRA, there may also be a challenge as to whether or not the Applicant will be able to recover the same from KRA in the event it is successful. Further, bearing in mind that the amount in question is a colossal amount; and given that the dispute relates to questions involving not only the amount claimed, but also questions relating to the powers and lawfulness of the enforceability clause; and issuance of agency notices arising from the SLA, I find on balance, that the second limb has been met, and that the subject matter is under threat and in need of protection.

32. As regards the third limb, in relation to the appropriate interim measure of protection; I am persuaded that a conservatory order is an appropriate measure of protection pending a decision by the tribunal on the subject issues in question.

33. Finally, as regards the period of the conservatory order, the court wishes to point out that the nature of interim orders are intended to be interlocutory. The measure is intended, in principle, to operate as a holding order, pending, or to maintain the status quo for the time being, pending such time as the tribunal may be constituted, and address its mind to the issues in question. I therefore find it appropriate to order that status quo orders shall remain in force until such time as the tribunal determines, either as a preliminary question, in the first instance, or on the merits, as may be appropriate for the tribunal, to determine the subject issue. This logic is in line with the principle of party autonomy in arbitration; and the logic that the parties ought to be allowed to determine disputes arising out the SLA in accordance with their chosen dispute resolution mechanism.

34. Based on the reasons set out above, I find that the application is with merit. Given that the Respondent is an agent of the Government for the collection and receipt of all revenue and was carrying out its mandate in pursuit of the same, I do not think it is appropriate to follow the general rule that costs follow the event.

35. The orders of this court are:-

a. Prayer No. 5 is allowed with the modification that the conservatory order shall remain in force until such time as the subject issue has been determined by the arbitral tribunal.

b. Each of the parties shall bear their own costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 6TH DAY OF NOVEMBER 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... For the Plaintiff

..... For the Defendant