



Feisal Shariff Ibrahim & another t/a Ogle Sheikh Shariff Advocates (formerly Ogle Sheikh Shariff Advocates) v Daniel Kamau Chege t/a Chege Kamau & Company Advocates (Commercial Civil Case E204 of 2021) [2021] KEHC 29 (KLR) (Commercial and Tax) (17 September 2021) (Ruling)

Neutral citation: [2021] KEHC 29 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E204 OF 2021
DAS MAJANJA, J
SEPTEMBER 17, 2021

BETWEEN

**FEISAL SHARIFF IBRAHIM & MOHAMUD SHEIKH MOHAMMED T/A
OGLE SHEIKH SHARIFF ADVOCATES (FORMERLY OGLE SHEIKH SHARIFF
ADVOCATES) APPLICANT**

AND

**DANIEL KAMAU CHEGE T/A CHEGE KAMAU & COMPANY
ADVOCATES RESPONDENT**

RULING

1. This ruling is in respect of the Respondent's Chamber Summons dated 18th May 2021 made under section 6(1) of the *Arbitration Act*, 1995 seeking an order staying this suit and an any other steps in the matter and in the alternative an order striking out the Originating Summons dated 19th April 2021. The application is grounded on the Respondent's supporting affidavit sworn on 18th May 2021. It is opposed by the Applicant through the Grounds of Opposition dated 22nd June 2021 and the replying affidavit of Feisal Shariff Ibrahim, an advocate in the Applicant firm, sworn on 23rd June 2021.
2. The issue in this case is whether this suit, being one for enforcement of an advocate's professional undertaking, should be referred to arbitration based on the existence of an arbitration clause in the agreement between the advocates' respective clients. The facts underlying the dispute and necessary for resolution of this matter are fairly straightforward and are set out in the depositions filed by the parties. The parties' respective advocates also made brief submissions to support their respective position. Counsel for the Respondent undertook to file written submissions but did not do so.



3. The genesis of the dispute is an agreement between Al-Raki Libyan Company for Import of Foodsuffs and Livestock (“Al-Raki”) and Amoo Holdings International (Kenya) Limited (“Amoo”) dated 1st November 2018 for the sale and purchase of animal fodder (“the Agreement”) where Amoo agreed to sell 300,000 tons of high grade barley for animal feed at a consideration of USD 94 per ton. Under Clause 15 of the Agreement, Al-Raki undertook to pay a deposit of USD 200,000.00 to Amoo’s advocates on or before the execution or such date as the parties agree upon receipt of a Professional undertaking that the Vendor’s Advocates shall hold the same on stakeholder basis till the buyer’s Advocates discharge them from the terms of the professional undertaking.
4. Al-Raki was represented by the Respondent while Amoo was represented by the Applicant. In due course, the Respondent issued a professional undertaking dated 8th November 2018 to the Applicant (“the Undertaking”). The Respondent avers that on the basis of the Undertaking, the Applicant paid the Respondent USD 200,000.00 on various dates between 7th November 2018 and 20th November 2018. A dispute has arisen whether the Respondent should be released and discharged from the Undertaking as the Applicant claims that the export documents including the Bill of Lading were not genuine.
5. The Applicant states that the Respondent released USD 85,000.00 contrary to the express terms of the Undertaking without obtaining a discharge from the Applicant contrary to the terms of the Agreement despite being notified that the Bills of Lading were not genuine. After some back and forth, the Respondent refunded the Applicant USD 115,000.00 leaving USD 85,000.00 which the Applicant now seeks to recover in these proceedings.
6. For purposes of this ruling, it is not dispute that the Agreement contains an arbitration clause which states as follows:

ARBITRATION & MEDIATION – DIFFERENCES TO BE REFERRED

22. Whenever any difference arises between the parties before approaching the court, the parties shall endeavour to resolve the matter amicable through negotiations.

- a. If a dispute has not been settled amicably within a period of thirty (30) days (or such longer period as may be agreed upon between the Parties), any party may elect to commence arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the Parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either Party, by the Chairman of the Kenya Branch of the Chartered Institute of Arbitration of Kenya.
 - b. Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the [Arbitration Act](#) 1995.
 - c. To the extent permissible by Law, the determination of the Arbitrator shall be final, conclusive and binding upon the Parties hereto.
 - d. Nothing in this Agreement shall prevent or delay a Party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.
7. The basis of the Respondent’s objection to jurisdiction is that the Undertaking and the Agreement are entangled and not severable as such, the Undertaking is subject to the arbitration clause hence these proceedings should be referred to arbitration. The Respondent advances several reasons to



support its position. First, that the Undertaking provided for the assembly of the subject matter of the contract as such, the performance clause of the Agreement depended on the Undertaking. Second, the Undertaking provided for delivery of goods and documents which granted title over the goods as provided in Clause 20 of the Agreement. Third, that the Undertaking provided for payment of part of consideration in the form of a deposit for the goods without which the Agreement would have lacked consideration. Fourth, the Undertaking provided for the performance of the Agreement.

8. The Applicant's position is that an undertaking issued by an advocate to another advocate is a separate contract and its enforcement is not contingent upon any terms of the contract between the said advocate's respective clients. The Applicant states that the Undertaking, being between the Advocates, did not contain an arbitration clause hence this court has jurisdiction to enforce the Undertaking.
9. Whether the arbitration clause is binding on the Advocates turns on the interpretation of the Agreement and also on the nature of the Undertaking in relation to the Agreement. A plain reading of the Agreement and the arbitration clause show that it refers to "the parties". The parties to the Agreement are Al-Raki and Amoo who have executed it and are bound by its provisions. This is important because arbitration under the Arbitration Act is a consensual process and to buttress its consensual nature, section 4 thereof provides as follows:

Form of arbitration agreement

- (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
 - (2) An arbitration agreement shall be in writing.
 - (3) An arbitration agreement is in writing if it is contained in –
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.
 - (4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.
10. The requirement that the arbitration agreement must be in writing confirms the parties resolve to be bound as was stated by Mwangi J., in *Goodison Sixty One School Limited v Symbion Kenya Limited* ML HC MISC. APPL NO. 131 OF 2016 [2017] eKLR, as follows:
 - (33) On the contrary, arbitration that is wholly consensual at inception proceeds under the Arbitration Act. Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of section 4, signifying the clear intent of the parties' to resolve their dispute through arbitration. It also signifies the parties' intent that should any legal proceedings be commenced in court by any parties the proceedings should be stayed by the court under section 6 of the Act.



11. I therefore hold that the Advocates, who are the subject of this dispute, are not parties to the Agreement and cannot be ordered to proceed to arbitration under the Agreement. The Respondent, however, relies on Clause 15 of the Agreement which refers to an undertaking and provides as follows:

15. At the execution of this agreement the buyer's advocates shall pay USD 200,000 (Two Hundred Thousand United States Dollars) to the seller's advocates client account upon receipt of a suitable undertaking that they shall hold the same on stakeholder basis till the buyer's advocates releases them from their undertaking and in case the Vendor fails to fulfil its obligations under the contract, the Vendor's Advocate shall transfer the deposit to the Purchaser's advocates within Seven (7) days of notification of breach and/or failure.

12. I agree with the Respondent that the Undertaking was an instrument for performance of the Agreement in the sense that it was intended to reduce the purchaser's risk against non-delivery by the vendor. It was intended to act in the manner of a documentary credit issued by financial institutions to facilitate exports across international boundaries. The Undertaking in this case is contained in a letter addressed to the Applicant and signed by the Respondent. It set out the terms of payment of the sum to be held as stakeholder. The Undertaking is therefore a separate and collateral contract between the Advocates to facilitate the Agreement. In this regard, I accept what Gikonyo J., stated in *Nelson Andayi Havi t/a Havi and Company Advocates v Jane Muthoni Njage t/a J. M. Njage and Company Advocates ML HC Civil Case No. 59 of 2009 [2015] eKLR* that:

(16) The foregoing arguments by the parties who are advocates are eminently powerful. But one thing is not in doubt; that a professional undertaking given by advocates is separate and distinct contract which is enforceable between the parties. The respective clients of the advocates in the undertaking are not parties in the undertaking. Therefore, only the advocates as the parties in can enforce the undertaking. There is ample judicial decision on this point and I do not wish to multiply them. Like Njagi J in the case of *David Karanja Thuo vs. Njage Waweru HCC No.209 of 2008 (OS)* I say;-

“In the first instance, it should be noted that the professional undertaking was between the advocates and none of the clients was a party to such an undertaking”.

13. The Undertaking, being a separate agreement between the Advocates, does not contain an express arbitration clause or incorporate the arbitration clause in the Agreement by reference as required by section 4 of the *Arbitration Act*. In the circumstances, any dispute between the Advocates concerning the Undertaking cannot be referred to arbitration under the *Arbitration Act*.

14. The Chamber Summons dated 18th May 2021 is therefore dismissed with costs to the Applicant.

DATED and DELIVERED at NAIROBI this 17th day of SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Wanyanga instructed by Wanyanga and Company Advocates for the Applicant.

Ms Wangare instructed by C. N. Kihara and Company Advocates for the Respondent.

HC COMM NO.E204 OF 2021 RULING Page 3

