



**Fun Cities Limited v Mung'au & 2 others (Civil Case E451 of 2020) [2021]
KEHC 36 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 36 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E451 OF 2020
WA OKWANY, J
SEPTEMBER 16, 2021**

BETWEEN

FUN CITIES LIMITED PLAINTIFF

AND

**KATHERINE MUNG'AU ALIAS KATHERINE JSA MUNG'AU 1ST
DEFENDANT**

EVERLYN OMBASA 2ND DEFENDANT

VITT CAPITAL KENYA LIMITED 3RD DEFENDANT

RULING

1. The 1st defendant/applicant herein, Katherine Mung'au, filed the application dated 14th December 2020 and amended on 22nd January 2021 seeking the following orders: -
 1. THAT this suit be stayed and the dispute be referred to Arbitration in accordance with the contract made by the parties.
 2. THAT the costs of this action and of the application be borne by the Plaintiff.
2. The application is brought under Section 6 (1) of the *Arbitration Act*, 1995, Rule 2 of the *Arbitration Rules*, and Article 159 (2)(c) of the *Constitution of Kenya*. It is supported by the applicant's affidavit and is premised on the following grounds: -
 - a) The Plaintiff's alleged cause of action in this suit arises from alleged breach of the terms of the 'Credit Agreement' (the "Agreement") between the parties.



- b) Under Clause 9.4 of the Agreement, it was mutually agreed that all claims and disputes whatsoever arising under the Agreement which cannot be settled amicably “shall be submitted by either party to arbitration in accordance with the Arbitration Act, Number 4 of 1995...”
 - c. In filing this suit, the Plaintiff has failed to abide by the dispute resolution mechanism under the Agreement as was agreed between the parties.
 - d) It is only just and fair that the Plaintiff’s suit and the proceedings herein are stayed and the dispute between the parties referred to Arbitration in accordance with the terms of the Agreement between the parties.
 - e) The suit herein is a gross abuse of the court process.
3. The plaintiff opposed the application through Grounds of Opposition and the replying affidavit of its Director Mr. Morrison Muchiri who states that there is no dispute to be referred to arbitration as the defendant admitted owing the plaintiff the sum of Kshs 6,000,000. He further states that the other issue arising from the plaintiff’s claim relating to misrepresentation, fraud, dishonesty do not fall within the ambit of the dispute resolution clause of the Credit Agreement.
4. The application was canvassed by way of written submissions which I have considered. The main issue before for determination is whether the applicant has made out a case for the granting of orders of stay of proceedings and referral of the matter to arbitration. The applicant contends that the plaintiff’s cause of action in the suit stems from the alleged breach of the terms of the ‘Credit Agreement’ (the “Agreement”) between the parties.
5. The applicant invoked Section 6(1) of the Arbitration Act which provides as follows: -
 - “A court before which proceedings are brought in a matter which is the subject of an arbitration 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 of 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...”
6. I note that at Clause 9.4 of the Credit Agreement the parties herein expressly agreed as follows: -
 - “any dispute which cannot be settled amicably shall be submitted by either party to arbitration in accordance with the arbitration Act Number 4 of 1995 Laws of Kenya, or any succeeding legislation for determination and if the parties fail to agree on the choice of one arbiter, then they shall submit a request to the Chairman of Chartered Institute of Arbitrators, Kenya Chapter for the appointment of one such arbiter and whose decision shall be final and binding to the fullest extent permissible by law.”
7. The plaintiff opposed the application while arguing that there was no dispute capable of being referred to arbitration because the defendant had admitted that she owed the plaintiff the sum of Kshs 6,000,000 and that she had assured the plaintiff that she would settle the debt.



8. In *Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited* [2014] eKLR, the Judge observed that; -

“The Defendant's argument was really that since there was an arbitration clause, the matter should be referred to arbitration. Such referral is not automatic. As has been seen in Section 6(1)(b) of the *Arbitration Act*, 1995, it is a condition precedent that there be a dispute capable of being referred to arbitration...”

9. In *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR the court held as follows: -

“The applicant has the burden to prove that there was a dispute which fell within the arbitration clause. The burden was not discharged. The burden did not shift on the respondent. In essence, the applicant failed to state with certainty the nature of the dispute and more so that it falls within a valid and subsisting arbitration clause in the agreement. The respondent's contention that the agreement is invalid has not been challenged and is therefore sound. This is an issue which falls for determination by this court and under Section 6(1)(a) of the Act the court ought to exercise discretion and decline to order a stay of proceedings. Since the applicant has failed to demonstrate that there is a dispute and the nature of the dispute he does not deserve the exercise of discretion by this court.... In Conclusion I find that the applicant has failed to prove the nature of the dispute or that he has a dispute which this court ought to refer to arbitration.”

10. Article 159 (2) (c) of the Constitution mandates the courts to be guided by the principles, inter alia, that justice shall not be delayed and that alternative forms of dispute resolution including reconciliation mediation, arbitration and traditional dispute resolution mechanisms shall be promoted as long as they do not violate the bill of rights and are not repugnant to justice and morality or result in outcomes which are repugnant to justice and morality or inconsistent with the Constitution.

11. In *John Juma & 2 others v Patrick Libanda & another; Zedekiah Orera & 4 others (Interested Parties)* [2019] eKLR it was held that: -

‘The purpose for which disputes are brought before the court is for the court to assist the parties resolve those disputes and not to escalate the same. And more particularly where parties enter into a consent to resolve the dispute in a particular manner which is recognized by law, the court has no jurisdiction to alter the consent in the absence of another consent or unless the conditions for setting aside of the consent are established and on an application before the court for consideration.’

12. Guided by the above cited authorities I find that where parties elect to have disputes arising from their agreement resolved through arbitration, courts are obliged to give effect to the agreement and refer the matter to arbitration. In the instant case, it is not disputed that the parties entered into a Credit Agreement and that it is alleged that the defendants breached the terms of the agreement. My finding is that the breach or failure to honour the terms of the Credit Agreement amounts to a dispute capable of being referred to arbitration.

13. In the upshot, I find that there is a valid arbitration agreement and that there is in fact a dispute between the parties with regard to matters agreed to be referred to arbitration in terms of Section 6(1) of the



Arbitration Act. I consequently find that the application dated 14th December 2020 is merited and I therefore allow it in the following terms: -

1. The dispute between the parties be referred to arbitration in the terms of the Credit Agreement.
2. That there be stay of proceedings in the instant suit pending the outcome of the arbitration proceedings.
3. That costs of the application shall abide the outcome of the arbitral proceedings.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Sila for Kotonya for defendant.

Mr. Mwangi for Plaintiff/Respondent.

Court Assistant: Sylvia.

