



Muita v Gachiri & another; Pekenya Gas Supplies Limited (Interested Party) (Civil Case 487 of 2020) [2021] KEHC 143 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)

Neutral citation: [2021] KEHC 143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 487 OF 2020
F TUIYOTT, J
OCTOBER 14, 2021**

BETWEEN

JAMES KARIUKI MUITA PLAINTIFF

AND

JAMES KINIYA GACHIRI 1ST DEFENDANT

SAMUEL MBUGUA GACHIRI 2ND DEFENDANT

AND

PEKENYA GAS SUPPLIES LIMITED INTERESTED PARTY

RULING

1. James Kariuki Muita, the plaintiff, seeks the following injunctive reliefs from the defendants:-
 - c) THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, servants, legal representatives, agents or howsoever from winding up Pekenya Gas Supplies Limited, the Interested Party herein.
 - e) THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, servants, legal representatives, agents or howsoever from disposing off the assets and documents being the property of Pekenya Gas Supplies Limited, the Interested Party herein.
 - g) THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendants



by themselves, servants, legal representatives, agents or howsoever from adversely dealing or handling transactions involving Pekenya Gas Supplies Limited, the Interested Party herein.

2. The Plaintiff's case is that on or around 25th May 2012, he and the two Defendants entered into a shareholding Agreement for purposes of regulating their relationship, rights and obligations in Pekenya Gas Supplies Limited (the Interested Party). On the basis of that agreement the breakdown of the shareholding in Pekenya was:-
 - a. James Kiiiiya Gachiri 47% (the 1st Defendant) 47% - 470 shares
 - b. John Kahiu Kiiiiya 27% - 270 shares
 - c. James Kariuki Muita (the Plaintiff) 20% - 200 shares
 - d. Samuel Mbugua Gachiri (the 2nd Defendant) 6% - 60 shares
3. A dispute arose in respect to the said agreement and the matter was referred to Arbitration. The Arbitral Tribunal made its award. The plaintiff states that the Tribunal found the agreement to be legal and binding and that the plaintiff could claim rights as the Company's shareholder. In addition, that the Tribunal ordered for specific performance of the shareholders' agreement.
4. The plaintiff is aggrieved as to what it sees as non-implementation of the Arbitral Award. The plaintiff's claim against the two defendants is for the following orders:-
 - a. Kshs.10,000,000/= together with interest at Court rates from 25th May 2012.
 - b. Damages for breach of contract.
 - c. Extemporal damage.
 - d. Costs and interest.
5. In a replying affidavit sworn on 21st December 2020 the 1st defendant states that this claim, if viable, should have been pursued by enforcement of the Arbitral award and not the filing of a subsequent suit. Further that the claim falls within the pecuniary jurisdiction of the Chief Magistrate's Court and third that there is a case pending before Chief Magistrate's Court, Kiambu Case No. 408 of 2018 (Kiambu case)
6. The Defendants raise objections on two fronts. One that the matter is res judicata. Secondly, that the Court lacks jurisdiction both pecuniary and by ouster of the Arbitration clause.
7. The application before Court is for a temporary injunction and has to be considered on the principles set out in *Giella vs Cassman Brown [1973] E.A. 358*.

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”
8. Even if I were to find that the Plaintiff has made out a prima facie case with a probability of success, I would not grant the order. The Plaintiff's claim is pecuniary in nature. He does not say that the Defendants will either refuse or are unable to meet any ultimate decree that this Court may issue. The



important limb that the plaintiff is likely to suffer irreparable harm is not proved. The nearest the plaintiff comes to make such assertion is found in ground 23 where he states:-

“(23) That if the 1st and 2nd Defendants/Respondents are not restrained from laying the Interested Party’s assets to waste, the Plaintiff/Applicant will have suffered a wrong without a remedy. Further, it will make it harder for the Plaintiff/Applicant to recover the fruits of his judgment.”

That does not sound like an apprehension of irreparable injury.

9. Without pretending to resolve the plea of Res Judicata taken up by the Defence, I make the following observations.
10. In the Arbitral Award dated 3rd June 2020, the following orders were made in favour of the plaintiff;
 - a. The Shareholders’ Agreement is valid and legally binding on the Respondents.
 - b. The Claimant can claim rights as the Third Respondent’s Shareholder
 - c. The Claimant is entitled to specific performance of the Shareholder’s Agreement dated 25th May 2012 by the Respondent as follows:

Share Certificates be issued to the new Shareholders; and A Shareholder’s or Directors’ meeting be held with immediate effect; and All the relevant assets (as enumerated in the Shareholders’ Agreement) be transferred to the third Respondent; and The Lease dated 4th August 2009 over LR No. 13/308 situated in Thika Municipality and the Lease dated 15th February 2013 over the Title No. Nakuru Municipality Block 8/50 be transferred to the third Respondent; and Additional bank signatories to the third Respondent be appointed; and The third Respondent’s accounts be duly audited and presented to the Shareholders for approval.

- d. The Claimant is entitled to recover costs of the arbitration from the Respondents, with no interests thereon, including:

The Tribunal’s fees and expenses in the matter; The Claimants’ legal fees in the matter; and The Claimant’s portion of the costs of the audit of the financial statements of the third Respondent for the financial years ended December 2012, 2013, 2014, 2015 and to June 2016.”

11. It is not clear to this Court why the Plaintiff did not seek the enforcement of that award in terms of Section 36 of the *Arbitration Act* instead of commencing Court litigation.
12. And even if Court litigation was necessary, it was not explained why the claim could not be pressed in the Kiambu case. I say so because the plaintiff in that suit has a counterclaim for specific performance of the memorandum of understanding signed on 21st June 2013. While it is true that Samuel Mbuga Gachiri (the 2nd Defendant herein) is not a party to that suit, there are the provisions of order 7 Rules 8 and 9 Civil Procedure Rules which would allow him to be joined as a Co-Defendant to the counterclaim.
13. All said, the Notice of Motion dated 20th November 2020 is without merit and is dismissed with costs.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE



DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

