



REPUBLIC OF KENYA



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**Harit Sheth Advocates v Jambo East Africa Limited & 6 others;
Coulson Harney Llp (Interested Party) (Civil Suit E054 of 2020)
[2021] KEHC 363 (KLR) (Commercial and Tax) (8 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E054 OF 2020
A MABEYA, J
DECEMBER 8, 2021**

BETWEEN

HARIT SHETH ADVOCATES APPLICANT

AND

JAMBO EAST AFRICA LIMITED 1ST RESPONDENT

CATALYST BRITANIA BRANDS LIMITED 2ND RESPONDENT

JAMBO BISCUITS (K) LIMITED 3RD RESPONDENT

TRIUMPH DEVELOPMENT LIMITED 4TH RESPONDENT

KILIMANJARO FOODS LIMITED 5TH RESPONDENT

SACHIN DAWDA 6TH RESPONDENT

NITIN DAWDA 7TH RESPONDENT

AND

COULSON HARNEY LLP INTERESTED PARTY



RULING

1. There are two applications for consideration. The first one is the applicant's Originating Summons dated 21/2/2020 brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 34 Rules 1 - 6 and Order 37 Rule 14 of the *Civil Procedure Rules*, 2010. It seeks orders that:-

“1.The Honourable Court be pleased to declare the rightful beneficiaries of the sum of KES 314,811,882.92 and any interest accrued on the following account held in Diamond Trust Bank Ltd, Capital Centre Branch –

Account Name: Coulson Harney LLP and Harit Sheth Advocates Client Account

Customer No: 0003xxxxx

Reference No: 008FDLC18130001.

2. Upon the declaration of the rightful beneficiaries to the account identified in order 1 above, the Honourable Court be pleased to direct the applicant to act accordingly.
 3. The Honourable Court be pleased to order that the costs of the Originating Summons be borne by the Respondents.
 4. The Honourable Court be pleased to make any other incidental or alternative order it may deem just and expedient.”
2. The application is supported by an Affidavit sworn on even date by HARIT SHETH, a partner in the applicant law firm. The 1st and 2nd respondent responded to the application vide a Replying Affidavit sworn by their director PAUL KAVUMA while the Interested Party filed a Replying Affidavit sworn by PARAS VINOD SHAH, an Advocate of the High Court of Kenya and a partner in the Interested Party Firm.
 3. The second application is the 1st and 2nd respondent's Notice of Motion dated 4/5/2020 brought under sections 1A, 18 and 3A of the *Civil Procedure Act* and the inherent power of the Court. It seeks for orders that:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. This Honourable Court do issue an order declaring that the 1st and 2nd Respondents are the rightful beneficiaries of KES 314,811,882.92 plus accrued interest held jointly in an escrow account at Diamond Trust Bank Limited, Customer No. 0003xxxxx, Reference No. 008FDLC183130001 by the Applicant and the Interested Party (the "Retention Amount") in accordance with the London Court of International Arbitration Partial and Final Arbitral Awards dated 14th November 2019 and 27th February 2020 respectively (collectively referred to as the "Arbitral Award").
 5. The Honourable Court be pleased to order the Applicant to sign the relevant documents within 24 hours of the order of the court necessary to give effect to the order issued by Arbitrator on 14th November 2019 directing inter alia, the release of the Retention Amount to the Applicants "within 28 days of the Final Award on Costs to follow this Final Award."



6. That in default of complying with the above order, this Honourable Court be pleased to issue an order authorising the Deputy Registrar of this Court to sign the necessary documents to Diamond Trust Bank Limited authorising the release of the Retention Amount to the 1st and 2nd Respondents, within 3 days from the date of this Honourable Court's pronouncement.
7. The costs of this application be borne by the Applicant.
4. The second application is supported by an Affidavit sworn by PAUL KAVUMA, a director of the 1st and 2nd respondent as well as an Affidavit sworn on 29/10/2021 by ELLY OBEGI an Advocate of the High Court of Kenya practicing as such in the firm of Anjarwalla & Khanna LLP. In opposition, the 3rd to 7th respondents filed a Replying Affidavit and a Further Affidavit sworn by NITIN DAWDA, the 6th respondent and a director of the 3rd, 4th and 5th respondent on behalf of the 3rd to 7th respondent.
5. The background to the applications is that, vide a Business Transfer Agreement dated 24/6/2016 ("the BTA"), as varied by the Deed of Variation dated 1/1/2017, the 3rd to 7th respondent ("sellers") agreed to sell and transfer their business to the 1st and 2nd respondents ("buyers") as a going concern for a total sum of KShs. 1,200,000,000/=. The parties agreed to have a portion of the purchase price, being the sum of Kshs. 281,579,196/= (hereinafter "the retention amount"), deposited in an escrow account to cover any claims for warranties or indemnities that would arise after completion of the transaction.
6. Vide the Escrow Letter dated 23/12/2016 ("escrow letter"), the applicant and the interested party were appointed by the 1st, 3rd, 4th and 5th respondent as escrow agents in relation to the BTA. Consequently, the applicant and the interested party (hereinafter collectively referred to as "the escrow agents") opened an interest earning escrow account in their joint names at Diamond Trust Bank Limited (DTB), Capital Centre Branch under Account No. 0003xxxxx and Reference No. 008FDLC18130001 into which the retention amount was deposited.
7. The escrow agents were only authorized to release the retention amount upon receipt of either: (a) a release notice signed by the buyers authorizing them to release the relevant amount, together with a joint written notice signed by the buyers and the sellers stating the amount they had mutually agreed to; or (b) a duly executed final arbitral award or judgment.
8. A dispute arose from the BTA between the sellers and the buyers and pursuant to the terms therein, the sellers lodged a claim against the buyers in the London Court of International Arbitration (LCIA) Arbitration Number 173709. The sole arbitrator therein, Mr. Oba Nsugbe, QC SAN, delivered a Partial Arbitral Award on 14/11/2019 which substantively dealt with all the legal and factual issues in dispute, save for the issue of costs. In the Award, the Arbitrator held, inter alia, that the buyers were entitled to the return of the retention amount in diminution of their losses and directed the sellers to procure the release of the retention amount to the buyers within 28 days of the Final Award on Costs.
9. Subsequently, by a letter dated 20/1/2020 (1st release notice), the buyers instructed the escrow agents to release to them the retention amount plus the accrued interest. As such, the interested party by a letter dated 29/1/2020, issued instructions to Diamond Trust Bank Kenya Limited to release the retention amount to the 1st and 2nd respondent. Before the applicant could execute the instructions prepared by the interested party as a co-agent to the escrow account, the buyers gave instructions vide a letter dated 31/1/2020 not to release the retention amount on the basis that the partial award was not the Final Arbitral Award contemplated in the escrow letter.
10. The Final Arbitral Award on costs was delivered on 27/2/2020 following which the buyers sent a second release notice dated 7/4/2020 to the escrow agents. The interested party once again prepared



instructions to DTB for release of the retention amount to the buyers but the applicant did not execute the same as a co-agent.

11. Soon after, the buyers lodged *Nairobi High Court Miscellaneous Civil Cause Number E653 of 2019: Jambo Biscuits (K) Ltd & 3 others v Jambo East Africa Ltd and 3 others* in which they sought for the recognition and enforcement of the Arbitral Award (comprising both the partial and final) whilst the sellers sought to set aside the Award.
12. By a ruling delivered on 23/3/2021, this Court (Ngenye J.) dismissed both applications. The Court declined to recognize and enforce the Arbitral Award as it was found the same to be, inter alia, contrary to the public policy of Kenya. The application for setting aside was dismissed for having been filed after the period required for the same under the English *Arbitration Act* had lapsed.
13. The buyers have since lodged an application in the Court of Appeal viz Civil Application No. 357 of 2021, *Jambo East Africa Limited and Catalyst Britannia Brands Limited v Jambo East Africa Limited, Triumph Development Limited, Kilimanjaro Food Limited, Nitin Dawda and Sachin Dawda* wherein they seek leave to appeal against the said ruling and stay of these proceedings pending the determination of their intended appeal in the Court of Appeal. That then is the background to the present applications.
14. The applicant avers that it found itself in a difficult position when it received two conflicting instructions from its principals in January 2020 on how it should handle the retention amount in the escrow account. It states that it was justifiably apprehensive that either the 1st and 2nd respondent on the one hand or the 3rd to 7th respondent on the other, would institute legal proceedings against it if it released the retention amount given that each of those instructions came with a threat to hold the applicant personally liable.
15. The applicant asserts that it has no interest in the said funds save for any charges which may accrue from the transfer of the same to the rightful beneficiaries. It denies collusion with any of the respondents or the interested party in instituting the interpleader proceedings and states that it only did so to protect itself. The applicant noted that it is willing to authorize the transfer of the retention amount plus accrued interest to the court or dispose of it as the court may direct.
16. On the other hand, the 1st and 2nd respondents' case is that according to the Arbitral Award, they are the rightful beneficiaries of the retention amount. They contend that the Award (comprising the Partial and the Final Award) has neither been challenged before nor set aside by a court of competent jurisdiction being the High Court of England and Wales pursuant to the parties' agreement on the seat of the arbitral proceedings in the BTA and escrow letter.
17. They have taken issue with the applicant's reluctance to execute the instructions prepared by the interested party requiring DTB to release to them the retention amount. According to them, it was strange that the Interpleader Proceedings were filed on 21/2/2020 and the 3rd to 7th respondent were served on 27/2/2020 yet they were never served with the same on time particularly after having sent two release notices. In their view, the applicant is intentionally delaying and frustrating the efforts of the interested party (as the co-escrow agent) to release the retention amount as directed by the Arbitrator.
18. They argue that the applicant has demonstrated open bias in executing its duties under the escrow letter. That instead of acting impartiality and neutrally in the best interest of the parties, the applicant has chosen to act in concert with the 3rd to 7th respondent in breach of its duty. They contend that this is due to a conflict of interest on the applicant's part arising from the fact that it represented the 3rd to 7th respondent in the subject transaction and was also part of the 3rd to 7th respondent's legal team in the



- LCIA Arbitration Proceedings. As such, they aver that they are apprehensive that without appropriate orders from this Court, the applicant will persist in its biased conduct against them.
19. The said respondents further assert that, the effect of Ngenye J's Ruling of 23/3/2021 in Miscellaneous Civil Cause Number E653 of 2019 ("the said suit") is that the Arbitral Award remains valid and binding upon the parties and conclusively determines that they are the rightful owners of the retention amount. In addition, they argue that since the urgent disposal of the Court of Appeal Application in Civil Application No. 357 of 2021 is imminent, this Court risks arriving at a conflicting decision from that of the Court of Appeal, should the latter make a finding in their favour in the intended appeal.
 20. On their part, the 3rd to 7th respondent contend that the effect of the ruling in Miscellaneous Civil Cause Number E653 of 2019 is that the Arbitral Award is unenforceable, invalid, of no effect whatsoever and cannot be applied or considered by this Court in determining the lawful beneficiary of the retention amount.
 21. In the premises, they assert that the retention amount lawfully belongs to them under the terms of the BTA as varied by the Deed of Variation. They further argue that holding otherwise would amount to recognition and enforcement of the Award which this Court has already found to be against public policy.
 22. They further contend that no appeal has been filed against this Court's ruling of 23/3/2021 and that there is no order from the Court of Appeal staying these proceedings. They therefore urge the Court to order the applicant and the interested party to forthwith jointly instruct DTB to remit all the funds held in escrow account to their bank account whose details they have provided.
 23. On its part, the interested party takes the position that the Arbitral Award fully and finally determined who the beneficiary of the funds is. It holds the view that the 1st and 2nd respondent are the beneficiaries and that since the escrow agents are in receipt of valid release notices, the amount must properly be released to them. It therefore urges the Court to dispose of the Originating Summons by ordering that the 1st and 2nd respondent are properly entitled to the retention amount so as to release the applicant and the interested party from their legal obligations under the escrow letter.
 24. The applications were canvassed by way of written submissions. It was submitted for the applicant that the 1st and 2nd respondents' allegations of partiality were baseless. That there was no evidence of collusion. That instituting the interpleader proceedings cannot be a basis of partiality. That failing to institute these proceedings would have meant that it was selecting the position of one of its principals over the other. It maintains that all the actions taken by it have been of utmost impartiality and good faith.
 25. The 1st and 2nd respondent submitted that this Court has no jurisdiction to hear and determine the Interpleader application. This is because any dispute concerning the ownership of the escrow funds ought to be referred to arbitration in accordance with the terms of clause 12.9 of the escrow letter. That at the point upon which the 3rd – 7th respondent raised their dissent against the release notices, the said arbitral clause crystalized and thus, if the applicant was uncertain on how to proceed, it was required to file an arbitral claim at the LCIA, whose rules were incorporated in the Escrow Letter by reference.
 26. It is further submitted by the 1st and 2nd respondent that, the willingness of the interested party to comply with their release notices proved that they are the rightful beneficiaries of the funds. That they have met the requirements under the escrow letter for the release of the said funds.
 27. They further submit that the question as to whether the applicant has met the requirements for the grant of the Interpleader application rests on three issues namely: whether the applicant has no interest



- in the retention amount; whether there has been no collusion between the applicant and the 3rd to 7th respondent and whether the purpose of the interpleader suit is to obtain a decision as to the person to whom the sum should be paid and to obtain indemnity for the applicant.
28. On these issues, they submit that the applicant's conduct in the transaction, the arbitral proceedings, the period after delivery of the Partial and Final Awards and the pendency of this suit preclude it from asserting that it has no claim or interest in the retention amount. That the applicant is manifestly in collusion with the 3rd to 7th respondent to delay and defeat the 1st and 2nd respondent's enjoyment of the fruits of their Award. Finally, that the interpleader proceedings serve no useful purpose as the rightful owner of the retention amount had already been conclusively determined.
 29. Finally, the 1st and 2nd respondent submit that for as long as the Arbitral Award was not set aside by Ngenye J, then the 3rd to 7th respondent cannot claim ownership or any right to the retention amount. That they are aggrieved by the ruling and it is only the Court of Appeal which can clarify the position with respect to the Arbitral Award. That if the retention amount is paid to the 3rd to 7th respondent, the intended appeal will be rendered nugatory and also they will not be able to recover any sums from them as they do not have any attachable assets. They therefore urge this Court to exercise its inherent jurisdiction and stay these proceedings until the intended appeal is determined.
 30. The 3rd to 7th respondent submit that the claim that this Court has no jurisdiction is baseless. That the issue of ownership of the escrow funds was part of the arbitral proceedings in LCIA Arbitration Number 173709. That the Arbitrator had made a finding in his Award that the escrow funds belonged to and should be released to the buyers. In the circumstances, the arbitral clause in the escrow letter is now exhausted, spent and cannot be revived or re-enforced.
 31. It was further submitted that, the only claimants to the escrow funds are the buyers and the sellers. That the 1st and 2nd respondent had submitted to the jurisdiction of this court by having taken definite steps in these interpleader proceedings. They have filed several affidavits substantively setting out their claim to the said funds and even filed an application seeking to have these proceedings heard and determined expeditiously.
 32. It is further submitted that the Award having been found to be unenforceable in Kenya, it must now be treated as though it does not exist. That it should be ignored in any determination of the rightful beneficiary of the escrow funds. Relying on the case of *Watson Mogere & 2 Others V East African Building Society [1992] Eklr*, it is submitted that the Award must now be treated as an illegal contract and therefore unenforceable for all purposes as it have been found to offend public policy.
 33. That by applying to this Court to recognize and enforce the Award, the 1st and 2nd respondent had conceded that such recognition was necessary for the Award to have any legal effect or applicability in Kenya and/or be able to confer any legal rights or impose any legal obligations in Kenya.
 34. In conclusion, it is submitted that under Clause 5.4 of the BTA as amended by the Deed of Variation, the retention amount belongs and is payable to the 3rd to 7th respondent, barring ONLY any amounts payable to the buyers under any warranty claims. That with the non-recognition of the Award, there are no amounts payable to the buyers for their warranty claims and therefore no reduction in the amount to be paid to the sellers.
 35. Having considered the opposing contentions of the parties, and their respective submissions, the following are the issues for determination
 - a. Whether this Court has jurisdiction to entertain the interpleader proceedings.
 - b. Whether the applicant has met the threshold for interpleader proceedings.



- c. What effect, if any, the Ruling of 23/3/2021 in Misc Civil Cause No. E653 of 2019 has in these proceedings.
- d. What orders should be made in the circumstances.
36. It is well settled that when jurisdiction is in issue, it must be determined first because without it, a court must down its tools since there would be no basis for continuing with the proceedings. (See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*).
37. It was the 1st and 2nd respondent's contention that this Court lacks jurisdiction because of the arbitral clause in the escrow letter. That jurisdiction lies with the London Court of Arbitration.
38. The view which the Court takes is that, the Arbitral clause in the escrow letter was invoked when the parties referred the dispute arising from the BTA to arbitration in the London Court of Arbitration. The Tribunal made a determination on the escrow funds by ordering its release to the 1st and 2nd respondent.
39. In this regard, it is futile to require the applicant who has no interest in the funds to re-invoke the said clause to determine the question already determined. Since the award has been held to be unenforceable, the determination therein is of no effect in Kenya. It is only before this Court that the applicant can have the issue determined. The Court therefore has jurisdiction to determine these proceedings.
40. As to whether the applicant has met the threshold for interpleader proceedings, section 58 of the Civil procedure Act, Cap 21 provides: -
- “ 58. Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants, or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:...”
41. Order 34 Rule 2 of Civil Procedure Rules 2010, which is founded on the above section, lays out the characteristics of an interpleader as follows:-
- “In every suit of or application by way of interpleader the applicant shall satisfy the court by way of affidavit or otherwise—
- (a) that the applicant claims no interest in the subject-matter in dispute other than for charges or costs;
- (b) that there is no collusion between the applicant and any of the claimants;
- (c) that the applicant is willing to pay or transfer the subject-matter into court or to dispose of it as the court may direct.”
42. From the foregoing, it is clear that Interpleader proceedings are instituted by a party who has no interest in the subject matter of the dispute save for charges or costs relating to the property held. In order for a court to grant orders in interpleader proceedings, the interpleader must satisfy the court that there has been no collusion between himself and any of the claimants. He should be willing to pay or transfer the subject matter into court or dispose it as the court may direct.



43. In the instant case, the applicant states that it has no interest in the retention amount save for any charges which may accrue from the transfer of the same to the rightful beneficiaries. That it was only appointed as a co-agent of the escrow account alongside the interested party. It denied the suggestion that it is in collusion with the sellers as insinuated by the 1st and 2nd respondent.
44. The Court notes that the applicant acted for the 3rd to 7th respondent in the subject transaction. It was contended that it was part of the legal team for the 3rd to 7th respondent in the arbitral proceedings. These two alone cannot be said to be evidence of collusion. Without strong and cogent evidence, there can be no inference that an advocate who has previously acted for a client will be in collusion with such client where he acts as escrow agent. There is also no evidence that the applicant has any interest in the funds. Its strong denials by the insinuations of the 1st and 2nd respondent has not been displaced.
45. In any event, the Court is alive to the fact that the applicant tendered a reasonable explanation as to why it failed to execute the two instructions to DTB prepared by the interested party. Further and considering the circumstances in this matter, the Court is persuaded that the applicant acted in utmost good faith and impartiality as there were two competing demands and it could not heed to one over the other. At the time, there were two applications pending, one for recognition and the other for setting aside.
46. There are two competing claims to the funds in question. There is no evidence that the applicant has any interest in the funds. There is also no evidence of its collusion with any of the claimants. It is willing to surrender the funds as shall be directed. In this regard, the Court is satisfied that the application meets the threshold of an interpleader.
47. The next issue is the effect of the ruling of 23/3/2021 in Misc Civil Cause No. E 653 of 2019. That ruling found the Arbitral Award to be unenforceable in Kenya for, inter alia being contrary to public policy and declined to recognize it. The effect thereof was that the Arbitral Award was rendered ineffective, invalid, of no consequence within Kenya. It was ripped off of the power to confer any legal rights to either party and thus no legal obligation would flow from it within this jurisdiction.
48. What this means is that, the Arbitrator's finding in the Partial Award that the 1st and 2nd respondent are entitled to the retention amount is of no consequence and cannot be enforced. It matters not that the 1st and 2nd respondent have since lodged an application in the Court of Appeal seeking leave to appeal against the said decision. As it now stands, the said decision has not been overturned by the Court of Appeal nor is there any order of stay.
49. Having found that the Arbitral Award is ineffective and of no effect, it goes without say that the 3rd to 7th respondent are the rightful beneficiaries of the retention amount. From the BTA, as amended by the Deed of Variation, the retention amount was only set aside for purposes of settling any claims for warranties or indemnities by the buyers after completion of the transaction. The same constituted part of the purchase price. The buyers are in exclusive possession of the business that was transferred to them by the 3rd to 7th respondent.
50. Now that the Arbitral Award was not recognized and cannot be enforced in Kenya, it means that there are no claims to that effect which can entitle the 1st and 2nd respondent to the retention amount. It is only fair that the 3rd to 7th respondent do get the said amount together with any accrued interest so that they can have the benefit of the entire sale price for their business to the 1st and 2nd respondent. The latter continue to enjoy and derive income from the business they purchased.



51. The 1st and 2nd respondent urge that the Court to order a stay of these proceedings pending the application in the Court of Appeal. That is a prayer they should have sought formally so as to enable the applicant and the other parties to respond to it.
52. In view of the foregoing, the orders that commend themselves to the Court are that:-
- a. The applicant's interpleader originating summons dated 21/2/2020 is hereby allowed.
 - b. The 1st and 2nd respondent's application dated 4/5/2020 is hereby dismissed.
 - c. A declaration hereby issues that the 3rd to 7th respondent are the rightful beneficiaries of the retention amount held in the Escrow Account together with the interest accrued thereon.
 - d. An Order issues that the applicant and the interested party do issue instructions to DTB to release the said amount to the 3rd to 7th respondent less any charges which may accrue from the transfer within 24 HOURS of this order as had been prayed by the 1st and 2nd respondent in their dismissed application.
 - e. The said funds be remitted to the following account provided by the 3rd to 7th respondents' in their Affidavits unless otherwise agreed: Account name: JAMBO BISCUITS (K) LIMITED, Account Number: 0742xxxxxx, Bank: I & M BANK LIMITED, Branch: INDUSTRIAL AREA, Bank Code: 570069.
 - f. Should the applicant and the interested party fail to execute instructions to DTB for release of the funds within the stated period, the Deputy Registrar of this Court is hereby authorized to execute appropriate instructions to the bank for the release and remittance of the funds accordingly.
 - g. The costs of both the interpleader application and the 1st and 2nd respondent's Notice of Motion dated 4/5/2020 be borne by the 1st and 2nd respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

