



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO 72 OF 2019

MURIUKI DANIEL MWENDA &

FREDRICK FADEY OUNDO BOTH

PRACTISING AS OUNDO MURIUKI & CO

ADVOCATES.....PLAINTIFFS

VERSUS

GILBERT OMOKE NYAMWEYA.....1ST DEFENDANT

KONYANGO DANIEL OWINO.....2ND DEFENDANT

VINCENT MULONDO T/A

MULONDO & CO ADVOCATES.....3RD DEFENDANT

RULING

INTRODUCTION

1. The 3rd Defendant’s Notice of Motion application dated 9th May 2019 and filed on 10th May 2019 was brought pursuant to the provisions of Section 6 of the Arbitration Act No 4 of 1995, Order 46 Rule 20 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

It sought the following prayers **THAT:-**

- 1. There be a stay of proceedings in this case pending the hearing and determination of mediation and arbitration processes between the parties.**
- 2. The court to issue an order referring the dispute between the parties herein to mediation for determination on terms that the pending application be concluded in default the matter be referred to a single arbitrator appointed by the chairperson of the Law Society of Kenya.**
- 3. In the alternative, before any further steps taken in these proceedings the current mediators to file the reporting court and/or before the arbitrator to be appointed.**
- 4. The court to issue such further and other orders as may be in the interests of justice.**
- 5. The costs of the summons to be awarded to the applicant Spent.**

2. The 3rd Defendant’s Written Submissions were dated 22nd May 2019 and filed on 23rd May 2019 while those of the Plaintiffs were dated

21st June 2019 and filed on 24th June 2019.

3. The Parties requested that the court deliver its decisions based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE 3RD DEFENDANT'S CASE

4. The 3rd Defendant's present application was supported by the affidavit of Vincent Mulondo that was sworn on 9th May 2019.

5. He contended that there arose a dispute between the parties that related to affairs of the former law firm, M/S Mulondo, Oundo, Muriuki & Company Advocates and that the Partnership Deed dated 20th March 2009 spelt out an elaborate dispute resolution mechanism at Clause 1.39 therein.

6. He pointed out that the partners in the former firm out of their own volition in accordance with the Partnership Deed appointed mediators namely the 1st and 2nd defendant to resolve the disputes. It was his averment that the mediation process was ongoing and a final report was yet to be submitted in respect of the findings. He was emphatic that the delay in submission of the mediator's report was as a result of ill will, malice and frustrations by the Plaintiffs.

7. It was his contention that the Plaintiffs' suit was made in bad faith and in an attempt to run away from the binding and unanimous resolutions made at the pending mediation process. He averred that a court of law could not rewrite the contract between the parties but that it had to uphold the provisions of the Partnership Deed between the parties. He added that in any event the court is enjoined to uphold alternative methods of dispute resolution including Arbitration under Article 159 (2) (c) of the Constitution.

8. He stated that it was in the interests of justice that the matter be referred to mediation and later to arbitration for resolution in case no determination was arrived at.

9. He therefore urged this court to allow his application as prayed.

THE 1ST AND 2ND DEFENDANT'S CASE

10. In response to the said application, the 1st Defendant swore a Replying Affidavit on 10th May 2019. It was filed on 13th May 2019.

11. He stated that sometime in August 2018, the Plaintiff in the 3rd Defendant who are running a law firm in the name and style of M/S Mulondo, Oundo & Muriuki Advocates requested him and the 2nd Defendant, in their capacities as mediators, to assist them resolve their disputes since the communication between them had irretrievably broken down. He stated that he commenced the process of mediation in the month of September 2018 and after a series of meetings the mode of resolution of their differences and issue was finally agreed upon. He pointed out that the various aspects of the dissolution resolution were implemented

12. He added that after about three (3) weeks of execution of the dissolution resolution, they noted that the former partners were acting contrary to the letter and spirit of the dissolution resolution. He stated that they found it necessary to hold several consultative meetings which were not successful. He stated that they resigned from being mediators when the former partners refused to pay the fees. They stated that they were ready to submit the files and other documents of the former firm to the Law Society of Kenya upon settlement of the outstanding aggregate mediation fees.

THE PLAINTIFF'S CASE

13. In response to the said application, Muriuki Daniel Mwenda swore a Replying Affidavit on 18th June 2019.

14. The Plaintiff's contention was that the Partnership Deed ceased to have effect on 20th November 2018 and it could not be conveniently resuscitated to give effect to an entirely inoperative arbitration clause. They were also emphatic that the application was specifically for the release of client files in the custody of the 1st and 2nd Defendant who were not parties to the Partnership Deed and it had nothing to do with the dispute between themselves and the 3rd Defendant.

15. They added that there was no pending mediation as the mediators, the 1st and 2nd Defendants herein, resigned and communicated that they would deliver all client files to the Law Society of Kenya but that they had instead continued to hold the files at the 3rd Defendants behest.

16. They further stated that it was not true that they did not disclose that the mediation proceedings were going on because as a matter of fact, the mediation had already collapsed. They stated that they had established that the 2nd Defendant had since partnered with the 3rd Defendant as a result of which he was biased towards them. They averred that the present application by the 3rd Defendant was to protract litigation so as to avoid the dissolution of the firm to their detriment.

17. It was therefore their argument that the 3rd Defendant's application ought not to be allowed so as to pave way for determination of the dispute herein on merit.

LEGAL ANALYSIS

18. The court noted the 3rd Defendant's submissions that Section 6 of the Arbitration Act provides for a stay of proceedings pending the hearing and determination of arbitration. In this regard, they relied on the case of **Adrec Limited vs Nation Media Group Limited [2017] eKLR** where it was held that any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance, make the application for reference of a matter to arbitration.

19. They further referred to this court to the case of **Owners of Motor Vessels Lillian "S" vs Caltex Oil Kenya Limited [1989] KLR** in which it was held that jurisdiction is everything and without it, the court has no power to make any more step but only to down its tools.

20. They were emphatic that the Partnership Deed contained an arbitration clause. They referred the court to several cases and definitions of what a partnership was and further stated that it was a trite principle of law that the parties were bound by their pleadings and because the Constitution of Kenya recognises alternative dispute resolution mechanisms including arbitration, this court ought to direct the parties to proceed to arbitration.

21. On their part, the Plaintiffs reiterated that there were no ongoing mediation proceedings for the reason that the mediators had already resigned and that in any event, the substratum of the current dispute had absolutely nothing to do with differences in the law firm because the same related to the release of the clients files from the unlawful custody of the 1st Defendant. They placed reliance on the case of **UAP Provincial Insurance Company Limited vs Michael John Beckett** wherein it was held that if a court came to the conclusion that a dispute was not within the scope of the mediation agreement, then the correct forum for resolution of the dispute would be the court.

22. It was their averment that the nexus between the mediator's report and the clients files that had been held by the 1st Defendant had not been established and they wondered why the 3rd Defendant would be keen to have an informal and non-binding report filed in court.

23. Article 159 (2) (c) of the Constitution of Kenya, 2010 provides as follows:-

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

24. The key word is "**promote**." The use of this word connotes that when exercising the judicial authority, the court shall not compel parties to have their disputes resolved by way of alternative dispute resolution mechanisms. The spirit of this provision recognises that alternative dispute resolution methods are consensual in nature and it would be unconstitutional to compel parties to resolve the disputes in such manner unless the law specifically provides for the same.

25. It was correct as the 3rd Defendant submitted, that under Section 6 of the Arbitration Act, the court has power to stay proceedings pending the hearing and determination of a dispute unless:-

a. 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 a great to be referred to arbitration.

26. It was evident from the submissions by the 1st and 2nd Defendants that the present dispute related to a lien over the clients files of the former firm on account of non-payment of their fees. A perusal of the Partnership Deed that was dated 20th March 2009 showed that the 1st and 2nd defendants were not parties to the same.

27. In as much as there was an arbitration clause in the Partnership Deed to refer any dispute in connection with the partnership or the deed to arbitration, there was nothing to suggest that any other dispute could be referred to arbitration. In this regard, the issue of holding of the clients files by the 1st and 2nd Defendants due to non-payment of the mediator's fees was not a matter that was contemplated under the arbitration agreement and hence court proceedings could not be stayed under Section 6 of the Arbitration Act as had been sought by the 3rd Defendant.

28. In addition, there was nothing to suggest that the mediation proceedings had been commenced through the court annexed mediation to warrant the filing of a mediation report.

29. Going further, Clause 1.39 of the Partnership Deed was clear that parties would in the first instance endeavour to amicably resolve the matter failing which the matter would be referred to a single arbitrator to be appointed by mutual consent or in the absence of consent by the Chairman of the Law Society of Kenya.

30. Evidently, there was no role by the court in as far as appointment of the mediator or arbitrator was concerned. Section 10 of the Arbitration Act is clear that unless otherwise provided by the said Act, the court must not interfere with the arbitral proceedings. Indeed, one of the ways in which the court should not interfere is in the appointment of arbitrators if the procedure of appointment of an arbitrator has been provided for in an arbitration agreement.

31. Further, this court could not also order for the referral of the dispute to mediation because as has been stated hereinabove mediation is a consensual process and where it collapses, the parties are at liberty to take the next step provided and/or available dispute resolution

mechanism. In this case, it was provided that in the event that there was still a dispute between the Plaintiffs and the 3rd Defendant, Clause 1.39 of the Partnership Deed was clear that the matter had been referred to the Chairman of the Law Society of Kenya to appoint an arbitrator. The 3rd Defendant had not demonstrated that he had attempted to have such an arbitrator appointed.

32. Having said so, the court was aware of the provisions of Article 50 (1) of the Constitution of Kenya 2010, that provides every person is entitled to a fair trial in having his dispute heard and determined in a court. In view of the several issues that have been raised by the Plaintiffs herein, it was the considered view of this was not a suitable case for the court to stay the proceedings herein pending the hearing and determination of the mediation processes because as has been stated hereinabove, the dispute did not appear to have been between the Plaintiffs and the 3rd Defendant herein.

33. Accordingly, having considered the affidavit evidence, Written Submissions and the case law that was relied upon by the parties herein, this court came to the firm conclusion that this was not a suitable case for it to order a stay of the proceedings.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's decision was that the 3rd Defendant's Notice of Motion application dated 9th May 2019 and filed on 10th May 2019 was not merited and the same is hereby dismissed with costs to the Plaintiffs.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of February 2020

J. KAMAU

JUDGE