



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E278 OF 2019

DIRECTLINE ASURANCE CO. LTD.....1ST PLAINTIFF

ROYAL MEDIA SERVICES LIMITED.....2ND PLAINTIFF

ROYAL CREDIT LIMITED.....3RD PLAINTIFF

SAMUEL KAMAU MACHARIA.....4TH PLAINTIFF

PURITY GATHONI MACHARIA.....5TH PLAINTIFF

-VERSUS-

SUNINVEST.....1ST DEFENDANT

STENNY INVESTMENTS LIMITED.....2ND DEFENDANT

TRIAD NETWORKS LIMITED.....3RD DEFENDANT

AKM INVESTMENTS LIMITED.....4TH DEFENDANT

INSURANCE REGULATORY AUTHORITY.....5TH DEFENDANT

KEVIN DERMOT McCOURT.....6TH DEFENDANT

JANICE TERESA WANJIKU KIARIE.....7TH DEFENDANT

GEOFFREY GORDON WERE RADIER.....8TH DEFENDANT

JAMES KABERERE GACHOKA.....9TH DEFENDANT

JOHN MAONGA AND DANIEL NDONYE,

CERTIFIED PUBLIC SECRETARIES

T/A MAONGA NDONYE ASSOCIATES.....10TH DEFENDANT

JANUS LIMITED.....11TH DEFENDANT

WINNIE JUMBA

P/A LIVINGSTONE ASSOCIATES.....12TH DEFENDANT

COMMISSIONER OF INSURANCE.....13TH DEFENDANT

JOHN KATIKU.....14TH DEFENDANT

RODGERS KINOTI M'ARIBA.....15TH DEFENDANT

MERCY KIANA MWANGI.....16TH DEFENDANT

RULING

1. Directline Assurance Company Limited (hereinafter Directline) is the 1st Plaintiff in this action. It is a private Limited Liability company. It is licensed under the Insurance Act to conduct insurance business. According to its Chief Executive (CEO), Terry Winjenje, Directline “is the country’s first niche underwriter to solely focus on motor vehicle insurance, and is the single largest insurer of commercial vehicles in East and Central Africa.” Directline presently commands over 60% market share in public service vehicle (PSV) insurance.

2. This claim was filed by Directline, the 1st Plaintiff, **Royal Media Services Limited**, the 2nd Plaintiff, **Royal Credit Limited**, the 3rd Plaintiff, **Samuel Kamau Macharia**, the 4th Plaintiff and **Purity Gathoni Macharia**, the 5th Plaintiff. Those Plaintiffs have filed this case against sixteen Defendants. The 2nd, 3rd, 4th and 5th Plaintiffs and the 1st, 2nd, 3rd, 4th and 11th Defendants are members of the Board of Directors in Directline.

3. According to the Plaintiff in this action, Directline was restructured in the year 2005. Under that restructuring the 11th Defendant became a shareholder, with shareholding of 32% of the allotted shares, in Directline. The 4th Defendant had a shareholding of 48% of the allotted shares, while the 2nd to 5th Plaintiff and the Late Dan Karobia held 20% of the allotted shares in Directline.

4. It is further pleaded, in the Plaintiff, that in the year 2009 there was an amendment to the Insurance Act, in Section 233 (4)A, by which amendment the shareholding in insurance companies was restricted to be not more than 20% of the allotted shares, in respect to employees, and to 25% in respect to natural or legal person. This claim refers to a Board decision, to increase share capital from 7,246,058 to 15,000,000 and to have both the allotted and unallotted shares held by Directors of Directline. It is contended, in this action the said decision of the Board of Directline was null and void. This is because of the way the Board was constituted. The Plaintiffs so aver because:

i. The alteration of the share capital, in Directline, is vested in general meeting by the Memorandum and Articles of Association and not by Board of Directors, as was done;

ii. The 4th and 11th Defendants were obliged, by the Insurance Act, and by the Memorandum and Articles of Association, to sell to the 2nd, 3rd, 4th and 5th Plaintiffs and the late Dan Karobia 60% of the remaining allotted shares;

iii. The 4th and 11th Defendants did not follow the procedure set out in the Article 14 of the Memorandum and Article of Association to sell their excess shares; and

iv. No general meeting of Directline was convened to increase the share capital.

5. It is the Plaintiff’s case that the 5th and 13th Defendants failed to regulate Directline’s shareholding and other aspects of governance of Directline.

6. It is also the Plaintiffs case that the 10th Defendant, as certified public secretaries, failed to apply their skill care in discharge of its function. That they ought not to have filed with Registrar of Companies, a return of shares which was contrary to the Memorandum and Articles of Directline.

7. The Plaintiffs seek the prayers, by their claim for declarations in respect to Directline shareholding; declaration that the 6th, 9th and other persons not before Court were not lawful members of the Board of Directors; a declaration that the 5th and 13th Defendants have breached their duties under the Insurance Act; a declaration that Directline has lawfully removed 6th, 8th and 9th Defendants from the office of Directors; a declaration that S. K. Macharia is the Chairman of the Board of Directors of Directline; and a declaration that the 10th Defendant has breached its duty of care in refusing to reflect the lawful shareholding under the Memorandum and Articles of Association, amongst others.

8. By chamber summons application dated 20th September 2019 Directline, the 6th to 12 and 15th to 16 Defendants (the Applicant) seek the following order:

“The proceedings herein including the Plaintiffs’ Notice of Motion dated 9th September 2019 be stayed and the dispute between the parties be referred to Arbitration.”

9. Although there are other prayers in that Notice Motion dated 20th September 2019, they were not urged by submissions of the Applicants and I shall assume they were abandoned.

10. The Applicants seek that order on the following grounds among other:

i. That a dispute has arisen between the Plaintiffs and the Defendants in regard to the shareholding of Directline;

ii. Article 82 of Directline's Articles of Association require any dispute relating to the company, Directline, to be resolved through negotiation mediation and if no agreement is reached, the dispute to be referred to Arbitration;

iii. The Arbitration Clause is valid, operative and enforceable;

11. The application is hotly contested by the 2nd to 5th Plaintiffs. The contest is on the ground that the resolution to approve share transfers, made at the meeting of 23rd November 2011 was in contravention with the insurance act. That at that meeting the 1st to 3rd Defendants were made members of Directline without reference to the shareholders. The contention of the Plaintiffs is that the resolution and the appointment, made in that meeting, was null and void and that accordingly the Arbitration Clause cannot be invoked in because of the unlawful actions of that meeting.

12. The Plaintiffs also contended that there are parties, more particularly the 5th and 13th Defendants, who are not parties to the Arbitration Clause and who cannot therefore participate in the Arbitration contemplated by the application before Court.

ANALYSIS

13. I have considered parties' affidavits written submissions and their authorities. It is clear in my mind that the application before me does not call me to consider the merit of the suit before me. It follows the arguments/submissions which advanced the merits or demerits of this case will not be considered in this Ruling.

14. The issues which present themselves in the present application are only two. They are:

i. *Is there a valid Arbitration Clause between the parties.*

ii. *Is there a dispute which falls within the ambits of the Arbitration Clause.*

15. The **Arbitration Clause** is in Clause 82 (3) of the Articles of Association. **Article 82(1) and (2)** provide:

i. *Any Dispute, controversy or claim arising out of or relating to these Articles of Association, or the interpretation, breach or validity hereof, shall be resolved in the first instance by way of negotiation held in good faith between the company and its shareholders or mediation administered by the Board of Directors or an independent Third Party.*

ii. *Such consultation shall begin immediately after one party has delivered to the other a written request for such negotiation or mediation.*

16. Further Article 82(3) provides that if the dispute cannot be resolved within 30 days after negotiation or mediation has commenced, the dispute, controversy or claim shall be submitted to Arbitration.

17. On the first issue identified above, all the parties accept that there exists a valid Arbitration Clause under Clause 82 of the Articles of Association. That Clause distinctly provides that a dispute, controversy or claim arising from the Articles of Association shall be referred to Arbitration. It follows that my finding is that there is a valid Arbitration Clause.

18. Is there a dispute that falls within the ambits of that Arbitration Clause?

19. Herein above, in this Ruling I reproduced some of the claims brought forward by the Plaintiffs. All the claims the Plaintiffs brings into to this action, they have their roots in the dispute on shareholding, Directorship and the management of Directline by personnel appointed by Directors who the Plaintiffs allege were illegally appointed as Directors. All those heads of disputes are in the Articles of Association of Directline. The onus of showing that the dispute in this cause are inappropriate for Arbitration lies upon the Plaintiffs who oppose the referral of the dispute to Arbitration.

20. The Plaintiffs' argument is that the shareholding and appointment of some Directors was contrary to the Articles of Association and that accordingly the Arbitration Clause cannot be invoked in respect to the alleged wrong doing or illegality.

21. The Plaintiffs' argument is indeed self-defeating. This is because, and it is obvious in the prayers of the Plaintiff, that the Plaintiffs seek a finding that the Defendants have acted in breach of the Memorandum and Article of Association of Directline. To bolster that finding I will reproduce paragraph 27 of the Plaintiff as follows:

***“The Plaintiffs further aver that any person additional to the subscribers who became a shareholder after the 1st Plaintiff was incorporated was bound by the same Articles of Association.*”**

22. Indeed time and time again in the Plaintiffs' pleadings the Plaintiffs in reliance of the Memorandum and Articles of Association allege various wrong doings by Defendants. It is plain that the issues presented by the action are issues that fall within the ambit of Arbitration Clause under Article 82 of the Articles of Association.

23. It follows that the Court can invoke, as it is invited by the Applicants, the provision of **Section 6(1)** of that **Arbitration Act**. That Section provides:

6. Stay of legal proceedings

(1) A Court before which proceedings are brought in a matter which is the subject of an Arbitration agreement 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 the 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.”

24. The Canadian Court in the case:

CWL Commercial (Edm) Inc. v. Dynafour Real Estate, A Partnership, 2013 ABQB 545 (CanLII) discussed the role of Court in relation to Arbitration and stated:

“As a matter of law and policy, the role of the Courts in relation to Arbitration has been one of non-intervention. The objective or Arbitration legislation and the jurisprudence interpreting it is to promote adherence to agreements, efficiency and fairness and to lend credibility to an important dispute resolution process. Courts are instructed to be mindful of this overarching purpose in any exercise of discretion.”

That is the role this Court will play: to promote adherence to agreement.

25. The Plaintiffs in opposing the application for stay argued that there are other parties, in this action, who are not parties to the Arbitration Clause. Those are the company secretary (10th Defendant) and the insurance regulated (the 5th and 13th Defendants). When one looks of the Plaintiffs’ pleading one sees the allegations again these two is that they acted, or failed to act against, the alleged wrongs of the shareholders and Directors of Directline. The claim against them therefore is wholly dependent on the finding whether or not the other Defendants acted contrary to the Articles of Association. It follows that justice would in this case demand that the Plaintiffs’ claims against those two other parties be stayed until determination of the Arbitration between the shareholders and Directors of Directline. That finding is in keeping with a similar decision, which is persuasive, in the case YAWORSKI V GOWLING LAFLEUR HENDERSON LLP, 2012 ABQB 424 (CanLII) viz:

“In *The Law of ADR in Canada An Introductory Guide*, (Glaholt, Duncan and Rotterdam, Markus LexisNexis, Canada 2011) at page 101 the authors state that:

Where third party claims are involved, Courts have ordered that litigation with regard to matters within the Arbitration agreement and between the principal parties be stayed pending Arbitration, and, with regard to third party matters not governed by the Arbitration agreement, have ordered a stay of proceedings for the estimated time it would take the principal parties to complete their Arbitration. Thus, while a Court has no jurisdiction to order third parties to submit to Arbitration, the Court can stay third party claims pending Arbitration when it appears just and equitable to do so.” (emphasis added)

CONCLUSION

26. In the end the Applicants succeed by their application dated 20th September 2019 as follows:

a. This suit and all the pending application are hereby stayed and the dispute between the Plaintiffs and Defendants is hereby referred to Arbitration as provided under Article 82(3) of the Articles of Association of Directline Assurance Company Limited.

b. The Applicants are awarded the costs of the application, dated 20th September 2019.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF OCTOBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFFS

..... FOR THE DEFENDANTS