



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.11OF 2017

PAUL WEGENAAR.....APPELLANT

VERSUS

SAMUEL ADADA ONDIEKI.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 397 of 2016 delivered by Hon. P.L.Shinyada (SRM) on 20th January, 2017)

JUDGMENT

1. **SAMUEL ADADA ONDIEKI** (*hereinafter referred to as 2nd respondent*) has sued **PAUL WEGENAAR** and **ATTORNEY GENERAL** (*hereinafter referred to as appellant and 2nd respondent respectively*) in **Kisumu CMCC No. 397 of 2016** claiming damages for malicious prosecution.
2. Appellant and 2nd respondent filed their respective statements of Defence and denied the claim.
3. By a notice of motion dated and filed on 2nd September, 2016, appellant sought orders for reference of this dispute to Arbitration on the basis that Mayfair Holdings Ltd t/a Peche Foods where he worked as General Manager and Das Group Kenya Ltd had 29th December, 2012 entered into an agreement for processing, storage and transportation of fish which provided for an arbitration clause in case of any dispute regarding the construction, enforcement, termination or any other matter connected thereto.
4. In a ruling delivered on **20th January, 2017**, the trial court found the appellant's notice of motion had no merit and dismissed it with costs to the 1st respondent.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 27.1.17 filed the Memorandum of Appeal dated 4.1.17 which sets out 5 grounds that:-
 1. **The learned trial magistrate erred in law and in fact in failing to appreciate the provisions of section 6 of the Arbitration Act**
 2. **The learned trial magistrate erred in law and in fact in misinterpreting the provisions of section 6 of the Arbitration Act as regards to filing of an appearance**
 3. **The learned trial magistrate erred in law and in fact in failing to appreciate the meaning of parties and assign to an agreement**
 4. **The learned trial magistrate erred in law and in fact in failing to appreciate that the arbitration agreement was binding on the plaintiff and the 1st defendant**
 5. **The learned trial magistrate erred in totality in arriving at the decision and applied the wrong principles**

SUBMISSIONS BY THE PARTIES

6. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

7. Appellant holds the view that **Kisumu Criminal Case No. 203 of 2013** in which 1st respondent and others were arrested and charged with theft from Mayfair Holdings Ltd t/a Peche Foodsarose when the appellant was General Manager of Mayfair Holdings Ltd and that any claim arising therefrom is subject to the arbitration clause in the agreement between Mayfair Holdings Ltd t/a Peche Foods and Das Group Kenya Ltd. Appellant relied on the following authorities.

1. **Section 6 of the Arbitration Act Cap 49 Laws of Kenya**
2. **Hamam Singh and Others v Mistri [1971] EA 122**
3. **Jadva Karsan V Harnam Singh Bhogal (1953) 20 EACA 74**
4. **Damaris Wanjiru Nganga v Loise Naisia Leiyen & another [2015] eKLR**

Respondent's submissions

8. It was submitted for the 1st respondent that the agreement between Mayfair Holdings t/a Peche Foods and Das Group Kenya Ltd was not binding on the respondents.

Analysis and Determination

9. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123**.

10. At page 3 of the ruling that is the subject of this appeal, the learned trial magistrate rendered herself as follows:

“The agreement attached to the application as an annexure was entered into between Mayfair Holdings Ltd t/a Peche Foods and Das Group Kenya Ltd. I do find that the claim herein was brought by the 1st defendant and not on behalf of the parties to the agreement. If anything, a glance at the charge sheet had no reference to between Mayfair Holdings or Das Group Kenya Ltd. As such it cannot be said that the plaintiff and the 1st defendant are bound by the terms of the agreement, which if anything would only apply where the dispute regards construction, enforcement, termination or any other matter connected thereto.”

In conclusion, the court stated as follows:

“I do find that the claim of malicious prosecution of the plaintiff herein does not fall in the category of the matters that ought to be referred for arbitration as per the agreement.”

11. I have considered the agreement between Mayfair Holdings Ltd t/a Peche Foods and Das Group Kenya Ltd vis a vis the cited authorities. An agreement is only binding to the parties thereof. I therefore entirely agree with the learned trial magistrate that the agreement between Mayfair Holdings Ltd t/a Peche Foods and Das Group Kenya Ltd is inapplicable to the dispute between the parties herein.

Disposition

12. In view of the foregoing finding, this court holds that the decision by the learned trial magistrate was well considered and declines an invitation to interfere with the court's finding. *The Appeal is thus disallowed with costs to the 1st respondent.*

DATED, DELIVERED AND SIGNED THIS 10th DAY OF May 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr. Ojoro

Respondent - N/A