



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.249 OF 2018

SOUTHERN SHIELD HOLDINGS LIMITED.....PLAINTIFF

VERSUS

TANDALA INVESTMENT COMPANY LIMITED.....1ST DEFENDANT

HAMERPOP INVESTMENT COMPANY LIMITED.....2ND DEFENDANT

TROGON INVESTMENT COMPANY LIMITED.....3RD DEFENDANT

RULING

1. The Applicant/Defendants through an application dated 3rd July 2018 brought pursuant to Section 6 of the Arbitration Act, 1995 seek the following orders:-

1. Pending the hearing and determination of this application, there be a stay of any other proceedings herein save for this application.
2. All further proceedings in this suit be stayed pending reference of all matters in respect of which this suit is brought to the alternative dispute resolution mechanisms set out in clause 20 of the shareholder's agreement between the parties.
3. The plaintiff do pay to the defendants the costs of this application.

2. The application is premised on the grounds on the face of the application in which it is stated as follows:-

1. The plaintiff and the defendants are shareholders of Fidelity Shield Insurance Company Limited (**hereinafter" the company"**) and they collectively own 76% of the shares in the company.
2. The relationship is governed by a shareholder's agreement (**hereinafter" agreement"**) dated 28th June 2013. Under clause 20 of the agreement, any dispute, controversy or claim arising out of or relating to the agreement shall be resolved by consultation, failing which the matter shall be referred to mediation and if no resolution is reached it shall be resolved by arbitration.
3. The plaintiff filed suit against the defendants on 22nd June, 2018 seeking various orders against the defendants including an order of specific performance of the agreement between the parties.
4. The plaintiff has filed the suit in disregard of the dispute resolution mechanism provided for in the agreement between the parties.
5. Article 159(2) (c) of the Constitution requires the court to promote alternative dispute resolution mechanisms.

3. The Application is supported by affidavit of Abdulali Akberali Karim Kurji sworn on 17th July 2018.

4. The application is opposed. The Plaintiff/Respondent filed Respondents Replying affidavit dated 17th July 2018 sworn by Trophimus Kiplimo.

5. The parties filed rival submissions in view of their opposing positions. The Defendants/Applicants submissions were filed on 3rd October 2018 whereas the Plaintiff/Respondent submissions were filed on 18th October 2018.

6. I have perused the application, affidavit in support and in opposition. The issues arising for consideration can be summed up as follows:-

- a. **Whether the matters in respect of which the suit is brought are within the scope of the dispute resolution clause in the agreement between the parties?**
- b. **Whether the matters raised in the suit ought to be referred to the dispute resolution mechanisms under the agreement?**
- c. **Whether the application ought to be allowed?**

A. Whether the matters in respect of which the suit is brought are within the scope of the dispute resolution clause in the agreement between the parties?

7. Under the shareholders agreement dated 28th June 2013, under clause 20 of the agreement it is provided that any dispute, controversy or claim arising out of or relating to agreement, it shall be resolved by consultation; mediation and arbitration respectively. This is admitted to be so in the Replying affidavit of Abdulali Akberali Karim Kurji's under paragraph 6 dated 17th July 2018. That means, the relationship of the Applicants and the Respondent Company in so far as shares in Fidelity Insurance are concerned at all times shall be governed and regulated by their shareholder's Agreement dated 28th June 2018 (*hereinafter referred to as "the agreement".*)

8. Clause 20.1 of the agreement provides in part that:-

"Subject to clause 20.2 any dispute, controversy, or claim arising out of relating to this agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation shall be resolved by way of consultations held in good faith between the parties."

Clause 20.2 and 20.3 of the agreement further provides for mediation and arbitration respectively as modes of resolving the dispute, controversy or claim in absence of resolution by consultation.

9. Section 6 of the Arbitration Act provides:-

"(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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

10. In the instant matter, the Plaintiff/Respondent urges there has never been any dispute or controversy between itself and the defendants on its demand for payment of Kshs.676, 940,982/- as its payment and/or consideration for its option shares. It is further urged the defendants surprisingly pleaded existence of dispute in their application and failed to submit on the issue to their submissions and that the defendants submitted on the issue of claim whereas they never pleaded it in their application.

11. There is no dispute from the Applicants and the Respondent that Clause 20.1 of the agreement refers to any **"dispute, controversy or claim."**

Black Law Dictionary Tenth Edition at page 572 defines "Dispute" as follows:-

"A conflict or controversy, especially one that has given rise to a particular law suit."

Controversy is defined at page 406 as follows:-

"A disagreement or a dispute, especially in public."

Whereas Black Law Dictionary defines a **claim** at page 301 as follows:-

"A statement that something yet to be proved is true."

12. In view of provisions of Clause 20.1 of the agreement referring to the **"dispute", controversy** or **'claim'**, the matters covered under the

three words in my view include a wide range and includes a situation where there is a controversy or a claim or dispute. The demand of money by any party and in particular in this case, where the plaintiff's claim is a claim of right to payment and it's claim falls under the definition of a "**claim**" and within the meaning of clause 20.1 of the agreement. The parties had voluntarily agreed to resolve claims, dispute and controversy by way of either consultation; mediation and arbitration respectively. The claim herein, is a claim that ought to be first resolved by way of Dispute Resolution Mechanism as set out under the agreement.

13. The plaintiff contention that the Defendants/Applicants by pleading existence of a dispute in their application and failing to submit on it on their submissions and instead of submitting on a claim in spite not pleading it, the defendants acknowledge non-existence of the dispute. I find to the contrary, as the Defendants/Applicants are seeking the stay of the proceedings and referral of the matter to Alternative Dispute Resolution Mechanism, their response to the plaintiff's claim is optional and not mandatory. The silence on part of the Defendants/Applicants; regarding the plaintiff's claim against them does not amount to an admission of liability nor does it preclude the existence of a dispute (**see Ellerin Bros Limited Vs Klinger (1982) 2 ALL ER 737**). I therefore find in a situation where a claim is raised as is the case herein, there is a dispute until the defendants admit, that the sum is due and payable or until the dispute is resolved. The Plaintiff/Respondent main prayer in the plaint is for payment of Kshs.676, 940,982/- amongst other prayers. The Plaintiff/Respondent cannot be heard to divert from it's own pleading and urge the Defendants/Applicants submissions are raising new issues, that the plaintiff's demand is a claim without submitting on a dispute as it was never pleaded in the application. From the plaintiff's pleading there is no way one can interpret it without holding that the same raises a claim or a dispute between itself and the defendants. It cannot be urged the plaintiff has a right of payment if there is no dispute or claim. I find that before an order of stay of proceedings can be made, the court has to ascertain there is a dispute between the plaintiff and the defendants, which is with regard to matters agreed to be referred to arbitration.

14. The parties to a contract are bound by the terms and conditions of their agreement. In the case of **National Bank of Kenya Vs Pipeline Samkolit (K) Ltd & another [2001] eKLR** the court stated as follows:-

"Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

15. From the aforesaid I am satisfied the matter in respect of which the suit is brought are within the scope of the dispute resolution clause 20 in the agreement between the parties.

B. Whether the matters raised in the suit ought to be referred to the dispute resolution mechanisms under the agreement?

16. From the plaintiff's plaint, it is clear that the plaintiff has made a claim against the defendants, which in my view falls within the scope of clause 20 of the agreement and the parties agreement ought to be given effect. In any matter where parties agree to resolve issues arising between themselves through an agreed dispute resolution mechanism, the court will give effect to the agreement by breathing life to it and will not allow a party to walk away from the agreement. In the case of **John Shantilal Malde & 9 others Vs Transmara Investment Limited & 2 others (2018) eKRL** Hon. Justice Tuiyott, held:-

"A party who ignores a step in a dispute resolution process which has been freely agreed will not be allowed to take advantage of his/her misfeasance to avoid an arbitral agreement. Having found that the matters in dispute herein are the subject of the arbitral agreement, I further find that by commencing the Petition before attempting the amicable solution, the petitioners overlooked that step and cannot rely on it to gain an advantage."

17. In the instant case, the Plaintiff/Respondent has ignored a step in a dispute resolution process which had freely been agreed between the parties by not bothering to attempt to have the issues which are subject of the suit to be resolved pursuant to clause 20.1 of the agreement. The plaintiff first rushed to the court ignoring the agreed dispute resolution mechanism between the parties. The issue raised by the plaintiff of non-disclosure is untenable as the agreement contrary clause 20.4 raised by the plaintiff; has been produced before the court by the plaintiff, secondly the said clause does not apply as the plaintiff's application dated 21st June 2018 is not an application seeking interim measures of protection pending reference of a matter to arbitration under section 7 of the Arbitration Act. The matters subject of the suit are matters that would be best determined through the alternative dispute resolution mechanism as set out in the agreement. The dispute involves shareholders who hold the majority shares in the company and the parties agreed to have their disputes, claims and controversies determined by alternative dispute resolution mechanism. A court faced with such scenario will give effect to the agreement and will not allow a party, who is out to frustrate the agreement to take advantage of the other to avoid alternative dispute mechanism, that he/she agreed to bind him/her in case of any dispute, or claim or controversy.

18. The Plaintiff/Respondent urge that Article 159 of the Constitution of Kenya 2010, is inapplicable in this case on the grounds that there has always been and remains to, that there is no dispute or claim between itself and the defendants to be referred to Alternative Dispute Resolution, pointing out the commencement of this suit was valid and has never been inconsistent with Article 159 of the Constitution of Kenya 2010. I have already come to the conclusion that there exists a dispute, or claim or controversy between the parties, that require to be referred to Alternative Dispute Resolution, in terms of clause 20 of the parties agreement, hence the commencement of the suit herein was invalid. Article 159 (2) (c) of the Constitution of Kenya 2010, requires the courts to promote alternative dispute form of dispute resolution which includes reconciliation, mediation, arbitration and traditional dispute resolution mechanism. I therefore find Article 159 of the Constitution of Kenya 2010 applicable in this case. It is a duty of a court to encourage parties and especially where matters can be resolved through Alternative Dispute Resolution, for parties to make use of the alternative dispute resolution mechanism.

19. Having said so much, I find that the Defendants/Applicants application to be meritorious, and I proceed to order as follows:-

a. All proceedings in this suit be and are HEREBY stayed pending reference of all matters in respect of which this suit is brought to the Alternative dispute resolution mechanism set out in clause 20 of the shareholder's agreement between the parties.

b. Defendants/Applicants are awarded costs of this application.

Dated, signed and delivered at Nairobi this 13th day of December, 2018.

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J .A. MAKAU

JUDGE