REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL &TAX DIVISION

MISC CIVIL SUIT NO.228 OF 2015

ASHBELL MACHARIA WACHIRA & ANOTHER…….…PLAINTIFFS

VERSUS

NDIRITU MUCHEMI MICHAEL & 2 OTHERS…….....DEFENDANTS

RULING

[1] The Notice of Motion dated **25 May 2015** was filed herein by the two Applicants, **Ashbell Macharia Wachira** and **Githui Muriithi Peter**, for orders that:

> **1. There be interim orders of stay of execution of the Arbitral Award made on 9th April 2015 and published on 10th April 2015 by the Arbitrator, Mr. Tim Wamiti; pending the hearing and determination of this application *inter partes.***
>
> **2. Pending the hearing and determination of this application, the recognition or enforcement of the Arbitral Award be refused and/or declined by the Court.**
>
> **3. This Court be pleased to set aside the Arbitral Award made on 9th April 2015 in its entirety.**
>
> **4. Upon grant of Order No. 3 above this court be pleased to direct that the dispute between the parties herein be resolved by any court of competent jurisdiction.**
>
> **5. Costs of the application be in the cause.**

[2] The application was brought Pursuant to **Section 35(1), (2)(a)(iv) and (b) (i) and (ii) of the Arbitration Act, Chapter 49 of the Laws of Kenya** and **Rule 7 of the Arbitration Rules, 1997**. It is based on four broad grounds namely:

> (a) That the Award is fundamentally flawed and violates **Section 35(2) of the Arbitration Act,** in that it contains a decision whose subject matter is not capable of settlement by Arbitration in Kenya.
>
> (b) That the Award contains decisions on matters beyond the scope of the reference.

(c) That the Award is in conflict with public policy.

[3] The application is supported by the two affidavits of **Dr. Ashbell Macharia Wachira** sworn on **25th May 2015** and **16th September 2015**. In response thereto, the respondents relied on the **Grounds of Opposition** filed on **29th June 2015** and the Replying Affidavits sworn by **Dr. Michael Nderitu Muchemi** on **25th June 2015** and **5th October 2015**, respectively. The parties thereafter filed written submissions to canvass and advance their various arguments in respect of the application.

[4] The brief background to the applications is that the parties hereto are all practicing Pharmacists. They are the directors and shareholders of a pharmaceutical company known as **Pentapharm Limited,** the Company that they incorporated in the year **1997**. It was averred that the Company started from humble beginnings, but thereafter expanded in size with the opening of various branches in Nairobi and its environs as well as Mombasa. The steady growth went on until around the year **2011** when it began to experience financial constraints. It is the contention of the Applicants that in consequence thereof, the directors held a meeting and agreed to a separation arrangement. The terms thereof were that the two applicants would resign as Directors and Shareholders of the Company in return the Company would cede two shops together with stocks therein to each of them upon their paying Kshs. 6 million each to cater for the liabilities of the company.

[5] It was pursuant to the aforesaid agreement that the 1st Applicant took possession of the Springs valley Branch, while the 2nd Applicant took the Victoria House Branch both of which were going concerns. For the reason that the Applicants reneged on the Agreement aforesaid after making partial compliance, the Respondents, who were in the majority opted to sue the two applicants in the name of the company vide **Nairobi HCCC No. 726 of 2012: Pentapharm Ltd v Peter MuriithiGithi and Ashbell Macharia Wachira.** The Applicants herein however successfully moved the court for the referral of the dispute to arbitration, citing **Article 30** of the Company's Articles of Association. The Court Ruling to that effect dated **23rd May 2013**, is annexed to the Further Affidavit of **Dr. Wachira** filed on **16 September 2015** as **AMW 11**.

[6] The parties thereupon agreed on the sole arbitrator, **Mr. Tim Wamiti**, who proceeded to conduct the arbitration. He ultimately made his Final Award dated **9th April 2015** which the Applicants seek to have set aside. That Award was in the following terms:

(a) The 1st Respondent (1st Applicant herein) shall pay the Claimants (the Respondents herein) **Kshs 3,132,561**.

(b) The 1st Respondent (this appears to be a typographical error as the body of the Award makes reference to 2nd Respondent in this respect) shall pay the Claimants **Kshs 1,167,590**.

(c) The Claimants shall execute and deliver to each of the Respondents discharges and indemnities absolving the Respondents of any and all liability that the Respondents may incur or have incurred by virtue of their shareholding and directorship in the company.

(d) The Respondents shall execute and deliver to the claimants their resignations from the Board of the Company as well as Share transfers to the Claimants or their nominees of all their shares in the Company as well as all such other documents as may be required for the said changes to the directorship and shareholding of the company to be effected;

(e) The counterclaim is hereby dismissed

(f) Each party shall bear its advocates' costs in respect of this reference; and

(g) The Respondents shall reimburse the Claimants the mount remitted by the latter as Arbitrators' costs herein.

Granted the foregoing, the key issue for the court to determine is whether a good case has been made out for the setting aside of the Award.

[7] Section 35 (1), (2) (a) (iv), (b) (i) and **(ii) of the Arbitration Act** provides as follows:

> **"(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).**
>
> **(2) An arbitral award may be set aside by the High Court only if-**
>
> **(a) the party making the application furnishes proof-**
>
> **(iv) that the arbitral awarded deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;**
>
> **(b) the High Court finds that-**
>
> **(i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
>
> **(ii) The award is in conflict with the public policy of Kenya."**

In the premises, the questions that arise are:

> **(1) Whether the Arbitral award herein dealt with a dispute not contemplated by or falling within the terms of the Reference;**
>
> **(2) Whether the subject matter is capable of settlement by arbitration; and**
>
> **(3) Whether the Award is in conflict with the public policy of Kenya**

Scope of the Award

[8] It was the contention of the Applicants that the set of facts set out in the Respondent's Statement of Claim before the Arbitrator related to **Pentapharm Limited**, a separate legal entity, and that the Respondents could not agitate the claim on behalf of the company as they purported to do. They relied on the case of **Foss vs Harbottle (1843) 67 ER 189** and posited that if the Respondents intended to agitate claims in favour of the company in their own names, then the only known way of doing so would have been to follow the relevant procedures for derivative suits. Counsel cited the case of **Dadani vs Manji [2004] eKLR** for this proposition. The Respondents on their part argued that this is a matter that the applicants ought to have taken before the arbitrator, but did not and is therefore an afterthought.

[9] As has been pointed out hereinabove, the suit in which the referral order was made was brought by the company upon a valid resolution by the majority shareholders and the reference was only an offshoot thereof. Thus I am not persuaded that in pursuing the reference, the Respondents were under any obligation to comply with the principles set out in the case of **Dadani v Manji [2004] eKLR**. Besides in its Ruling dated **23rd May 2013,** the Court found as a fact that the dispute was one between the shareholders/Directors *inter se*. At page 12 thereof the Court's observation was thus:

> **"On first reading, the said Article seems to envisage differences arising as between the Plaintiff Company on the one hand and any of its members *etcetra* on the other. Essentially what we are dealing with in this matter is a dispute between shareholders/directors. However**

in the body of the Article it states " or to any of the affairs of the company'. To my mind this would mean and cover disputes between shareholders/directors"

[10] Additionally, although the Applicants denied that the disputants reached an agreement to facilitate their exit from the Company, it is evident that they made payments to the Respondents in partial fulfillment thereof, whereupon they were allowed to take one shop each, which they are running to date. I therefore find no merit in the argument that the Reference was wrongly filed.

Whether the subject matter is capable of settlement by arbitration:

[11] It was the contention of the Applicants herein that the Award dated **9th April 2015** is fundamentally flawed and violates **Section 35(2)** of the **Arbitration Act** in that it contains a decision whose subject-matter is not capable of settlement by arbitration. In this regard, the Applicants posited that, though satisfied that the applicants had executed personal guarantees in favour of third parties to guarantee loans and supplies to **Pentapharm**, the Arbitrator nonetheless ordered the Respondents to execute unspecified discharges ostensibly in favour of the Applicants over the said liabilities, purporting that such discharges could legally and validly absolve the applicants from the said Guarantees. It was further the Applicants' contention that neither the Respondents nor **Pentapharm Limited** could legally or legitimately discharge any liability due to third parties who were not party to the arbitration proceedings.

[12] First and foremost, it was common ground that the Company was facing cash flow constraints and that this is what prompted the Directors/Shareholders to come to an agreement to each pay **Kshs. 6 Million** towards the settlement of those debts. There is credible evidence to show that those sums were indeed contributed by the Directors and used to pay off third party creditors; and that the Applicants also made partial payments, hence the claim for the outstanding sums. Consequently, the debts owed by the Company to **Njimia Pharmaceuticals Ltd** and **CBA** among others were cleared and/or substantially reduced. These averments have not been rebutted by the Applicants.

[13] Secondly, the aspects of award complained of are intended to be enforced against the Respondents in favour of the Applicants, with view of a fair distribution of assets amongst the Directors/shareholders. If any of the Directors was aggrieved thereby then it ought to have been the Respondents, on whose shoulders the responsibility to pay rests, and certainly not the Applicants. In any event, having considered the background of this matter, it is abundantly clear that in the previous suit, **HCCC 726 of 2012: Pentapharm Ltd vs. Peter Muriithi Githui and Ashbell Macharia Wachira,** the reliefs sought were;

(a) A declaration that the Defendants ceased to be shareholders and directors of the Plaintiff with effect from **30th August 2011**.

(b) Peter Muriitha Githui to pay the Plaintiff (the company) **Kshs. 1,343,798.Ashbell Macharia Wachira** to pay the plaintiff **Kshs. 3,603,373/80**.

(c) The Defendants to pay costs and interest at bank rates with effect from **30th August 2011** till payment in full.

(d) Any other or further relief as the Court may deem fit to grant.

It is evident from the Ruling dated **23rd May 2013** (annexure **AMW 11**) that it was at the instance of the Applicants that the matter was referred to arbitration in the first place. This is manifest at paragraph 2 of the Ruling in which the Court introduced the application thus:

"The second Application filed under Certificate of Urgency, is Chamber Summons brought by the Defendants under the provisions of section 6(1) of the Arbitration Act as well as Rule 2 of the Arbitration Rules...That Application seeks a stay of proceedings and that this court be pleased to refer the dispute between the Plaintiff and the defendants to an arbitrator in accordance with Article 30 of the Plaintiff's Articles of Association."

The Court, upon considering the applicants' application in the light of the documentation presented before it, as well as the nature of the dispute and reliefs sought, was of the view that the same were fit and proper subjects of arbitration. Indeed, the Court felt constrained by dint of **Article 30** of **the Articles of Association** of the Plaintiff Company and **Section 6(1) of the Arbitration Act** that the referral order was made. I therefore find it mischievous that the Applicants should turn round and now say the dispute is not capable of settlement by arbitration, and seek the setting aside of the Award on the basis of this ground.

Whether the Award is in conflict with public policy:

[12] In support of their position that the Award is in conflict with public policy, the Applicants flagged out the following as their grounds for complaint:

> (a) By ordering the applicants to sign off shareholding to respondents without compensation, and that therefore the award violated **Article 40 of the Constitution**, the provisions of the Companies Act and **Article 9** of the Articles of Association of **Pentapharm Limited**.
>
> As pointed out herein above, the Directors/Shareholders did have discussions as to how to relieve the company of the debts it owed to third parties. Accordingly, discussions were held and it is not in dispute that the shareholders agreed to each pay **Kshs. 6 Million** to this end, and that the payments were made, though the Applicants only made partial payments. The balance of what was due to them is what is the subject of award. On their part, the Applicants were to take specific shops of the Company and continue with the same as going concerns in return for signing off their shares in the other shops in favour of the Company. It is therefore not the case, from the evidence availed that the Award amounting to a violation of the Applicants' right to property as provided for in **Article 40 of the Constitution** as alleged. My views in respect of this ground applies equally to (b) and (d) below.
>
> (b) By ordering the applicants to pay respondents a total of **Kshs. 4,300,151** thereby violating public policy as there was no proven debt owed by the Applicants to the Respondents; that this amounted to unjustly enriching the Respondents to the detriment of the Applicants without any factual or legal foundation. My findings on this point are as per (a) above.
>
> (c) By continuing to sustain the company thereby exposing the public, including **KRA** to risk in that after making a finding of fact on insolvency, the Award nonetheless sought to continue sustaining the Company at the risk of exposing the public, including **KRA** dealing with it in good faith as if it was healthy financially.
>
> The Award did acknowledge that the Company experienced turbulence at some point, after a successful run over a number of year. As a result it was not able to meet its obligations, including the payment of its debts. However, the Directors/Shareholders met and prescribed a turnaround formula, which appeared to work. The Arbitrator was, under those circumstances under no obligation to recommend winding up.
>
> (d) By awarding unproven special damages, the Arbitrator violated public policy granted that special damages must be specifically pleaded and proved. My findings on this ground are as per (a) above.
>
> (e) that the Award is tainted by procedural impropriety in that the circumstances surrounding its publication portray manifest haste and contradictions sufficient to render the same an affront to public policy.

I have looked at the Award and find nothing therein to show that the Award was hastily written, or that the loss of computer data rendered it impossible for the Arbitrator to prepare his award. As rightly pointed out by the Respondents, the Arbitrator had recourse to his handwritten notes.

It was also submitted on behalf of the Applicants that it was an affront to public policy for the Arbitrator

to direct the Respondents to discharge the Applicants from liabilities due from them to third parties on behalf of the Company. The case of **Christ for all Nations vs Apollo Insurance Co. Ltd [2002] 2 EA 366** was cited in support of this argument. However, having considered the submissions in the light of the evidence availed herein, I find nothing to show that the Award is inconsistent with the Constitution or any other law; that it is contrary to justice and morality or that it is otherwise inimical to the national interests of Kenya. I would thus agree and adopt the expressions of **Ringera, J** (as he then was) in **the Christ for all Nations case** (supra) thus:

> **"Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust...in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."**

In the result, it is my finding that the Notice of Motion dated **25 May 2015** is lacking in merit. The same is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF SEPTEMBER 2016.

…….

OLGA SEWE

JUDGE