REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. E036 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

AMING'A, OPIYO, MASESE AND

COMPANY ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

BALTON CP LIMITED.....CLIENT

RULING

The application before me for determination is dated 23rd October 2020 and is filed under Article 159 of the Constitution of Kenya, 2020, Section 1A, 1B and 3A of the Civil Procedure Act, Sections 6(1) and (2) of the Arbitration Act, Cap 49 and the inherent powers of the court, and all other enabling provisions of the law.

Background

The parties hereto are advocate and client respectively. On 19th August 2020, the two entered into an agreement for legal services which included an agreement on fees in the total sum of Kshs.5,800,000/- out of which Kshs.5,000,000/- was fees and Kshs.800,000/- was for VAT. The client subsequently made a down payment of Kshs.2,625,000/-.

The agreement for legal services contained an arbitration clause in the following terms –

> ***9. Arbitration.***
>
> *i. The attorney-client relationship is one of mutual trust and confidence. Whenever the Client will have any questions or concerns regarding your services, the Client shall not hesitate to contact your offices. Should a dispute arise between Client and your firm on the duties owed to the Client by you, both Parties will resolve this conflict in a manner consistent with the rules of professional conduct which resolution might under certain circumstances require your withdrawal from this engagement. If the same cannot be resolved informally, the firm and the Client shall agree to arbitrate the dispute. Both would jointly select an arbitrator.*
>
> *ii. If unable to agree on an arbitrator, two arbitrators shall be selected with one selected by you and one by the Client. The selected arbitrators shall select a third arbitrator who would serve as chairman. The arbitrator or arbitrators would establish the rules of arbitration, and shall act by majority vote if more than one. A decision of the arbitration or arbitrators would be final and binding subject only to the Kenya Arbitration Act 1995."*

The scope of the agreement for legal services is set out at paragraph 2 thereof as follows –

> ***2. Scope.***
>
> *i. You are engaged to provide the Client with the following services:*
>
> *a. Study and thoroughly understand the matter existing as Employment and Labour Relations Cause No. 1130 of 2018.*
>
> *b. Prepare a detailed legal opinion on the same and file a notice of change of lawyers in Court once the Client gives you a go ahead to do so.*
>
> *c. Prepare a detailed legal opinion and proceed to file an anti-corruption case against the three former employees Gal*

Arbel, Nir Sher and Amir Grienberg on grounds of conflict of interest.

d. Ensure that the matter is properly and professionally prosecuted with agreed milestones met.

e. Keep the Client duly informed of the progress in both matters.

ii. The Client shall provide you with the following documents towards the execution of this function:

a. This letter of engagement.

b. A brief history of the dispute.

c. A copy of the discussed draft Audit report.

d. Email correspondence with information pertaining to both cases.

iii. You and we may agree to expand or limit the scope of our representation from time to time; however, any expansion or limitation must be confirmed in a writing signed by you and us."

It would appear that there was a disagreement between the parties leading to the client terminating the agreement by letter dated 18th May 2020 whereupon the advocate demanded the balance of his fees in the sum of Kshs.3,175,000/- together with interest. It is this balance of fees that is the subject matter of the proceedings herein commended by way of a miscellaneous civil application dated 23rd September 2020 in which the advocate/Applicant seeks the following orders –

1. That the Court be pleased to compel the Respondent herein to pay the Advocate/Applicant the outstanding legal fees of Kshs.3,175,000/= together with interest.

2. That the Court be pleased to issue an order that in case of failure by the Respondent to pay the legal fees on timely manner, the Advocate shall be at liberty to execute for recovery of the same and interest therein in such a manner as a decree of this Court.

3. That costs of this application be provided for.

Upon being served with the application, the Client filed an application dated 23rd October 2020 in which it seeks the following orders –

1. Spent.

2. Pending the inter-partes hearing and determination of this application, there be an ex parte interim stay of proceedings in this Suit.

3. Pending reference of the dispute to arbitration in accordance with the terms of the Agreement for Legal Services dated 26 September 2019 (the Agreement), there be a stay of proceedings in this Suit.

4. The costs of this application be provided for.

It is this application for stay of proceedings and reference of the dispute to arbitration that is before me for determination.

Issues for Determination

The issue for determination is therefore whether the client has satisfied the conditions for grant of the orders sought.

Section 6 of the Arbitration Act provides as follows –

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.

(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.

The advocate (Respondent in the application) opposes the reference to arbitration on grounds that: -

1. That the Advocate was surprised when he received a complaint lodged in the Office of the Attorney-General & Department of Justice by the Respondent/Client herein dated 8th June, 2020 on allegations that we had failed to render any or adequate legal services and failed to keep the Respondent informed of the progress of the matter.

2. That he responded to the above stated complaint and after hearing both parties, the Office of the Attorney-General & Department of Justice dismissed the Complaint for lack of evidence.

3. That in further deviation to the Retainer Agreement, the Client on the 19th August, 2020 instructed the firm of Anjawarlla & Khanna Advocates to take over the conduct of the matter yet at that time the Applicant/Advocate had not been served with a notice to show cause why there should be change of advocates.

4. That the stated actions of the Client to totally contravened Clause 9 of the Retainer Agreement since the Respondent/Client did not inform the Applicant/Advocate of any issues he had against him or try to settle any dispute informally but opted to try other means in attempt to avoid paying the remaining legal fees.

5. That from the conduct of the Respondent/Client, he is estopped from alleging the arbitration clause is in existence and parties are therefore bound by the principles of estoppel.

6. That therefore, the Respondent/Client should not be allowed to choose the mechanism he deems fit to resolve the pending legal fees by jumping from one body to another when he convenient to it.

7. That equity demands he who comes to court must come with clean hands but the Respondent/Client is definitely not coming to court with clean hands having chosen to raise the issue of arbitration when it conveniently suits him but totally disregards the same when he wishes to.

8. That referral of this matter to arbitration, if the court is persuaded to do so, will be an abuse of the due process of the court as the Respondent/Client will most likely not obey the arbitral award and parties will have to come back to this Court.

To buttress its case, the Advocate relies on the case of **D & S C Builders v Sidney Rees (1966) 2 QB 617,** where Lord Denning, M.R. held that

"It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties."

The Advocate further relies on the case of **John Niue Nvaga v Nicholas Niiru Nvaga & Another (2013) eKLR**, where the Court of Appeal sitting at Nyeri observed as follows: -

"*It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings." The applicant has not done so and is underserving of the orders he seeks."*

The Advocate further relies on the decision of Kasango J. delivered on 29™ day of July, 2019 in **Eastern and Southern Africa Trade and Development Bank v Mea Limited & 2 Others [20191 Eklr**, where the Applicant had prayed for the case to be referred to arbitration pursuant to arbitration clause in the agreement, the Hon. Judge held as follows: -

"The application will additionally fail because I do indeed find that there is no dispute capable of being referred to Arbitration herein. This is because the Deed of Settlement dated 26th April 2016 between the Bank and Mea, Cristle and Lee provided, under Clause 2.9. the Bank right of enforcing its security and claiming from the guarantors 'all the amounts due if the settlement amount and any accrued interest, charges and expenses are not paid as agreed.' The dispute the Defendants argued was there, that the period under amortization schedule had not lapsed, is incorrect. The Bank had the power to call for the full payment if the payment schedule was not adhered to."

Kemei J. in **Timax Building & General Contractors Limted v Machakos County Government [2017] eKLR** held as follows:-

"...As regards the second issue, a perusal of the contents of the Replying Affidavit of the Respondent and annexures shows that indeed the Respondent had already performed the works and had been issued with payment Certificates and was only awaiting settlement of its dues. Since the Respondent has shown that it had carried out its part of the bargain and is now awaiting payment, I find there is no dispute between the parties..... I am therefore convinced that the present suit is purely for the enforcement of the settlement as the Respondent is merely pursuing its right to payment after being issued with the payment Certificates by the Applicant. Hence it is my considered view that there is no dispute between the parties capable of being referred to arbitration. It is

now clear that the Applicant's Application is intended to delay the Respondent from realizing the fruits of its labour. In any event this court will ensure that each party will be given their day in court to ventilate their issues. In the result it is the finding of this court that the Application lacks merit. The same is ordered dismissed with costs to the Respondent."

When an application under section 6(1) of the Arbitration Act, 1995 is made by a party to an arbitration agreement, it is incumbent upon the court to which such an application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement. In **Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited [20141 eKLR;** the Judge observed that:

"The Defendant's argument was really that since there was an arbitration clause, the matter should be referred to arbitration. Such referral is not automatic. As has been seen in Section 6(1)(b) of the Arbitration Act, 1995, it is a condition precedent that there be a dispute capable of being referred to arbitration..."

Gitari J. on 4th May 2020 in County Government of **Kirinvaga v African Banking Corporation Ltd [2020] eKLR** held as follows: -

"The applicant has the burden to prove that there was a dispute which fell within the arbitration clause. The burden was not discharged. The burden did not shift on the respondent In essence, the applicant failed to state with certainty the nature of the dispute and more so that it falls within a valid and subsisting arbitration clause in the agreement. The respondent's contention that the agreement is invalid has not been challenged and is therefore sound. This is an issue which falls for determination by this court and under Section 6(1)(a) of the Act the court ought to exercise discretion and decline to order a stay of proceedings. Since the applicant has failed to demonstrate that there is a dispute and the nature of the dispute he does not deserve the exercise of discretion by this court.... In Conclusion I find that the applicant has failed to prove the nature of the dispute or that he has a dispute which this court ought to refer to arbitration."

In a nutshell the advocate argues that the client has already sought resolution of this dispute by a complaint lodged in the Office of the Attorney General and Department of Justice where the complaint was dismissed for lack of evidence. That the same allegations are the subject of the application under consideration herein. That the application has not been lodged in good faith. Further that there is no dispute as envisaged in clause 9 of the agreement between the parties. Further, that the issues that the applicant wishes to be referred to arbitration can be canvassed in the application filed before this court.

For the Client it is submitted that there indeed is a dispute and there is a valid arbitration agreement. The client relies on the case of **Monique Oraro v AAR Insurance Company Ltd (2019) eKLR**, where the court held that by entering into an arbitration agreement, parties express their intention to refer any disputes between them to arbitration. The Client further relies on the case of **Samuel Gachie Kamiti v Oseko & Ouma Advocates LLP (2020) eKLR, MITS Electrical Company Limited v Mitsubmishi Electric Corporation (2018) eKLR** and **Albert Lukoru Loduma & 2 Others v Judicial Service Commission & 2 Others (2013) eKLR**.

It is not in dispute that there is an agreement that contains an arbitration clause. It is further not in dispute that the parties have a disagreement over whether or not the Advocate is entitled to the balance of the agreed fees. The only issues the court has to decide is therefore whether there is bad faith on the part of the Client as alleged by the Advocate, and if this would render the arbitration clause inoperative.

The relevant portion of the agreement reads –

"… Should a dispute arise between Client and your firm on the duties owed to the Client by you, both Parties will resolve this conflict in a manner consistent with the rules of professional conduct which resolution might under certain circumstances require your withdrawal from this engagement. If the same cannot be resolved informally, the firm and the Client shall agree to arbitrate the dispute…"

It is my opinion that part of the rules of professional conduct for advocates is the filing of a complaint to the Advocates Complaints Commission. The parties have not disclosed to the court the nature of the complaint that was made to the Advocates Complaints Commission, and the court is therefore unable to discern whether the complaint related to fees payable to the advocate as in the instant application or a different issue.

Again, for a determination to be made whether or not the advocate is entitled to the balance of fees, it will be necessary to establish at what point the balance of fees was due, and whether the same had been earned by the advocate at the time of withdrawal of instructions by the client. This is provided for in the Fee Note but is left blank in the copy filed by the Advocate while the copy filed by the client has some endorsement to the effect that the second tranche of Kshs.1,500,000/- was payable upon hearing while the final payment of Kshs.1,000,000/- was payable upon judgment. The Advocate has not raised any objection to the copy of the Fee Note filed by the client or that the balance of the fees was payable upon the happening of the events as endorsed in the client's copy of the Fee Note.

I do not think that the filing of a complaint by a client against an advocate would in itself be an indication of bad faith. And would that be sufficient to oust the arbitration clause, even if it was in bad faith? My answer would be in the negative.

I find that there is a valid arbitration agreement and that there is in fact a dispute between the parties with regard to matters agreed to be referred to arbitration in terms of Section 6(1) of the Arbitration Act.

The application dated 23rd October 2020 therefore succeeds and I accordingly make orders as follows: -

1. That the dispute between the Client and the Advocate/Applicant be referred to arbitration in terms of the Agreement for Legal Services dated 26th September 2019;

2. That there be stay of proceedings in the instant suit pending the outcome of the arbitration proceedings.

3. That costs of the proceedings herein be determined by the arbitrator(s).

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE