



REPUBLIC OF KENYA



KENYA LAW
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**Careitas v Kenya Rugby Union (Civil Suit E333 of 2024)
[2025] KEHC 811 (KLR) (Civ) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT E333 OF 2024
RC RUTTO, J
JANUARY 31, 2025**

BETWEEN

CAREITAS PLAINTIFF

AND

KENYA RUGBY UNION DEFENDANT

RULING

1. In its Notice of Motion dated 25th July 2024, the defendant has invoked the provisions of Article 159 (2) (c) of the *Constitution*, section 1A, 1B and 3A of the *Civil Procedure Act*, section 6 (1) and (2) of the *Arbitration Act* 1995 and order 2 rule 15 of the *Civil Procedure Rules* seeking:
 1. ... Spent;
 2. ... Spent;
 3. That this court lacks jurisdiction to hear and determine the plaintiff's suit pursuant to the dispute resolution clause referenced in the executed Indicative Term Sheet for Funding executed by the plaintiff and the defendant;
 4. That the suit filed by the plaintiff as contained in the plaint dated 19th June 2024 be struck out with costs;
 5. That the costs of this application and the suit be borne by the plaintiff.
2. The application is premised on the grounds on its face and supported by the affidavit of Thomas Odundo, the Acting Chief Executive Officer of the applicant. The crux of the suit is an alleged loan claimed to have been advanced to the defendant in terms of a duly executed tripartite term sheet for



funding the defendant's sporting activities. Therefore, the suit is for the recovery of an alleged debt of a sum of USD 300,000 together with interest owing to the plaintiff from the defendant.

3. The applicant avers that by dint of clause 20 of the tripartite parties' agreement, any dispute arising out of, or in connection with the agreement must be determined with finality by way of Arbitration by a single arbitrator. Thus, the parties should be bound the terms and conditions of their agreement.
4. The applicant in urging this court to allow the application sets out three issues for determination namely; whether the defendant's application is properly before court; whether the court has jurisdiction to hear and determine the plaintiff's suit and whether the proceedings herein should be struck out.
5. The applicant urged this court to find that this application is properly before the court by dint of section 6(1) of the Arbitration Act which grants the leeway to a defendant to present its objection in two ways either at the filing of a memorandum of appearance or before acknowledging the claim through filing a defence. To buttress this argument reference was made to numerous decisions of this court including *SBI International Holdings (Kenya) v Kenya National Highway Authority* (2020)KEHC 10065 (KLR). The applicant also submitted that the instant application was made before the lapse of 14days from the date of entering appearance hence was made promptly and is properly on record.
6. As to whether this court has jurisdiction to hear and determine the plaintiff's suit, it was the applicant's submission that the agreement between the parties ousted the jurisdiction of this court. Further that Article 159(2) of the Constitution read together with section 6(1) of the Arbitration Act requires the courts to give effect to the intention of the parties as expressed in the agreement. it was also contended that the plaintiff suit is premature at this stage. They urged the court to down its tools and refrain from solving any factual disputes between the plaintiff and defendants.
7. On whether the proceedings should be struck out, the applicant made reference to the case of Adcock Ingram East Africa Limited v Surgilinks Limited (2012)KEHC 3633 (KLR) to urge that it is an abuse of the court process for parties to refer their disputes to court if the agreement that gives rise to the proceedings contain an arbitration clause. They contended that there are no legal impediments on the validity, operation or performance of the agreement and that the dispute is one where the parties agreed to be referred to arbitration. They urged the court to refer the proceedings to arbitration and strike out the plaint with costs.
8. The plaintiff opposed the application by filing grounds of opposition dated 8th August 2024 and submissions dated 8th August 2024. The grounds in opposition are as follows; first, the application was filed in contravention of section 6 of the Arbitration Act which requires an application to refer a dispute to arbitration to be filed not later than when a party enters appearance, files any pleadings or takes any steps in the matter; second there is no dispute between the parties to warrant a reference to arbitration; third the applicant has admitted the debt in writing in unequivocal and unambiguous terms as demonstrated in email communication to the plaintiff; fourth, the claim is liquidated and remains unpaid to date and there is no reasonable prospect of settlement; fifth the application is intended to bring delay, embarrassment and annoyance to the arbitration tribunal for presiding over a matter it clearly has no jurisdiction; sixth the arbitration tribunal has no dispute over matters not in dispute and lastly, that the application is a waste of judicial time and resources and should be struck out with costs to the plaintiff.
9. In its submissions the plaintiff/respondent set out the issues for determination as whether the notice of motion application is properly before court; whether there is a dispute to be referred to arbitration and what is the appropriate order as to costs,



10. On the first issue it was submitted that the application was in violation of section 6 (1) of the Arbitration Act since it was filed 13 days after the applicant entered appearance. On this limb they made reference to the case of Treadsetters Tyres Ltd v Elite Earth Movers Ltd (2007) eKLR and prayed that the application be struck out.
11. On whether there was a dispute capable of being referred to arbitration, the respondent argued that the applicant admitted to the debt unequivocally and in an unambiguous term. Citing several decisions of this court and of the Court of Appeal, the respondent urged that though the applicant claims that any dispute between the parties ought to be referred to arbitration, the dispute herein did not arise out of the transportation contract. Further, there was nothing to adjudicate in arbitration as the amount of debt was known and default had been established. For those reasons, the respondent urged this court to dismiss the application with costs.
12. I have considered the application, the affidavit, the annexures thereto and the law. It is not disputed that the applicant and the respondent entered into an agreement called an indicative term sheet for funding. The applicant seeks to strike out the suit on the ground that this court lacks jurisdiction to hear and determine the suit by dint of clause 20 of that agreement which provides as follows:

“ Any dispute arising out of or in connection with this agreement which has not been resolved by negotiation between the parties within 30 days shall be determined without recourse to appeal except on matters of law by arbitration in the English language by a single arbitrator, with the place and seal being Nairobi in accordance with International Court of Arbitrators in Paris.”
13. There is no contention as to the agreement or the clause in the agreement. A cursory look and reading of this clause are indicative that any discourse arising out of or in connection with the agreement is first subjected to negotiation by the parties and later if it remains unresolved within 30 days it proceeds for arbitration. On arbitration it sets out the governing parameters which is for the discourse to be determined by a single arbiter, in accordance with the International Court of Arbitration in Paris rules with the place and seat being identified as Nairobi. The agreement also limits the right to appeal the arbiter’s decision to matters of law only. Clearly, the arbitration clause remains apparent in the contract
14. This court therefore has a duty to establish whether the dispute herein arises out of or in connection with the subject agreement. A reading of the plaint shows that on or about 22nd March 2022 the parties herein entered into a loan agreement wherein the plaintiff agreed to offer loan facilities to the defendant for the aggregated sum of USD 300,000 by way of a term sheet which was duly executed by the parties. The plaintiff sets out the particulars of breach and non-compliance as failing to settle the loan amount of UDS 354,411 inclusive of accrued interest and failing to provide a settlement proposal. Also set out are particulars of loss and damage.
15. it is clear that the cause of action arises from the breach of the term sheet for funding which, under clause 20 provides for the resolution of any dispute arising therefrom to arbitration.
16. It therefore follows that indeed the dispute herein arises out of the implementation of the agreement and is therefore subject to arbitration. The applicant contended that the court lacked jurisdiction since the agreement between the parties contained an arbitration clause. That the respondent invoked this court’s jurisdiction prematurely without exploring arbitration. In agreeing with the applicant’s position, and further guided by the authority in Euromec International Limited v Shanding Taikai Power Engineering Company Limited (2021) KEHC93 (KLR) and Supreme Court decision in Nyutu Agrovet Limited v Airtel Networks Kenya Limited (2019) KESC 11 (KLR), I take note that it is now a well established principle of the law that parties should be allowed to resolve their disputes through



arbitration where they have mutually agreed to forgo their right to have the dispute determined in a court. They should be allowed to honour their contractual obligations to arbitrate and judicial intervention should be limited.

17. Having established so this court find that the parties herein had an obligation to have their dispute determined by way of arbitration. I proceed to determine whether section 6 (1) of the Arbitration Act was complied with. Section 6 (1) provides as follows:

“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.”

18. In this instant the applicant filed its application 13 days after entering its appearance which according to the plaintiff/ respondent contravened section 6 of the Arbitration Act. This court draws guidance from the case of SBI International Holdings (Kenya) v Kenya National Highway Authority (Supra) which adopted the Court of Appeal position in Eunice Soko Mlagui v Suresh Parma & 4 Other (2017)eKLR by holding “a defendant may apply for stay at the time of filing the memorandum of appearance or at any time before acknowledging the claim. Also see the case of Asano Tatsunori & world Gateway Japan Co. Ltd v Joel Kimutai Bosek t/a J.K Bosek & Co. advocates (2020) KEHC 1005 (KLR) where it was held that “...a party failed to contemporaneously file the memorandum of appearance and the application for stay of proceedings is not fatal, so long as the application is filed before the lapse of 14 days the defendant is required to file a defence...”

19. Guided by the reasoning and holding in the cited court decisions, this court concludes that filing the application before the expiration of the 14 days period required to file a defence was appropriate and properly brought before the court.

20. As to whether there is a dispute capable of being referred to arbitration, this court takes the position that this is a matter subject of which will be determined by the arbiter since by delving into the facts thereof the court will have delved into the realm of the arbiter.

21. It is therefore this court’s finding that the applicant has demonstrated that the plaintiff’s dispute is subject to arbitration by dint of clause 20 of the Term Sheet for Funding. Consequently, the Notice of Motion Application dated 25th July 2024 is allowed in the following terms

- a. That this court lacks jurisdiction to hear and determine the Plaintiff’s suit pursuant to the dispute resolution clause referenced in the Term Sheet for Funding executed by the plaintiff and the defendant.
- b. The suit filed by the Plaintiff as contained in the Plaint dated 19th June 2024 is struck out with costs.
- c. This claim be referred for resolution pursuant to the terms of dispute resolution as contained in the Term Sheet for Funding agreement executed by both the plaintiff and defendant.

It is so ordered.



DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY 2025

RHODA RUTTO

JUDGE

For Appellant:

For Respondent:

Court Assistant:

