Ndirangu & 4 others v Africastalking (K) Limited & 7 others (Commercial Petition E009 of 2023) [2025] KEHC 391 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL PETITION E009 OF 2023

A MABEYA, J

JANUARY 27, 2025

BETWEEN

BILHA NYAMBURA NDIRANGU ..... 1ST APPLICANT

ESTON MAINA KIMANI ..... 2ND APPLICANT

RACHEAL WAGAKI KIMANI ..... 3RD APPLICANT

ZACHARY KINGORI MWANGI ..... 4TH APPLICANT

STEPHEN WARURU WARUI ..... 5TH APPLICANT

AND

AFRICASTALKING (K) LIMITED ..... 1ST RESPONDENT

SAMUEL NDERITU GIKANDI ..... 2ND RESPONDENT

TEDDY WARRIA ..... 3RD RESPONDENT

GRAHAM INGOKHO MUHANGA ..... 4TH RESPONDENT

MARY NJOKI GACHANJA ..... 5TH RESPONDENT

SARAH ACHIENG OLOO ..... 6TH RESPONDENT

PAUL WAMALWA ..... 7TH RESPONDENT

AT GROUP ESOP TRUST ..... 8TH RESPONDENT

RULING

1. This ruling is in respect to two applications. The 1st application is the applicants' Notice of Motion dated 10/7/2023 and amended on 24/8/2023. It was brought under sections 1, 1A, 1B, 3, 3A, 63 (e)

of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 40 Rule 2 of the Civil Procedure Rules, 2010, Sections 139 (1) & (2), 141, 287 (1) & (2), & 780 of the *Companies Act*, 2015.

2. The applicants sought a temporary injunction to restrain the respondents from interfering with the 1st applicant's duties as a Director of the 1st respondent, and from representing the non-operational ESOP as an operational entity, a shareholder, or capable of exercising shareholder rights, including voting, pending the hearing and determination of this suit and/or arbitration proceedings. They also sought that the 1st applicant be temporarily reinstated as a Director of the 1st respondent, with full duties, responsibilities, remuneration, and benefits, pending the hearing and determination of this suit and/or arbitration proceedings.

3. The application was premised on the grounds set out on the face of the Motion and the affidavit sworn on 24/8/2023 by Bilha Nyambura Ndirangu, the 1st respondent's founding Director. She averred that she holds 9.6% ordinary shares as a founder Director of the 1st respondent, whereas the 2nd, 3rd, 4th, & 5th applicants, and the 3rd, 4th, 5th, & 6th respondents were shareholders of the 1st respondent with varying shareholdings. That the latter collectively did not hold the majority needed for unilateral decisions.

4. She further averred that the 2nd respondent is a founder, Director, CEO, and chairman of the 1st respondent, holding 32.9% of the shares. She contended that a notice dated 15/5/2023 by the 2nd to 8th respondent proposed that she be replaced with the 7th respondent as a Director.

5. Subsequently, an Annual General Meeting (AGM) was scheduled for 27/6/2023 to deliberate on the said issue. During the AGM, the 1st respondent's shareholders voted on the said issue, which votes included votes by the 8th respondent who lacked voting rights, thereby skewing the outcome since if its votes are excluded, the combined shareholding of ordinary shareholders in favor of her removal would not meet the necessary majority.

6. Ms. Ndirangu asserted that the reliance on purported shares held by the Employee Share Ownership Plan (ESOP) in the vote was improper, as the ESOP is non-operational and lacks voting rights. She stated that the removal notice and subsequent meetings violated the provisions of the *Companies Act* and the Shareholders Agreement and that the adjourned General Meeting was not held within the required timeframe, thus rendering the process procedurally flawed.

7. Ms. Ndirangu claimed that her removal was motivated by retaliation for supporting a whistleblower investigation implicating the 2nd respondent and others in workplace misconduct. She stated that her removal as the 1st respondent's Director was unlawful and prejudicial, citing the inclusion of invalid votes and undue influence exerted on employees during the decision-making process.

8. That additionally, her removal threatens governance stability, shareholder value, and financial oversight. She further stated that the 1st respondent's failure to publish audited financial reports since 2020 exacerbates concerns about its governance under the 2nd respondent. She averred that the governance issues have delayed a transaction process involving the International Finance Corporation, impacting liquidity opportunities for shareholders and new investment prospects.

9. In opposition thereto, the 1st respondent filed a replying affidavit sworn on 28/11/2023 by Kevin Karuga, the 1st respondent's Legal Officer. The 1st respondent's position was that the 1st applicant's removal as a Director of the 1st respondent was lawful and in accordance with the Shareholders Agreement dated 25/4/2018, not the *Companies Act*.

10. He averred that the applicant was removed as a Director of the 1st respondent under clause 6 of the Shareholders Agreement, which allows ordinary shareholders to appoint and remove Directors at will, rather than under statutory provisions meant for fixed-term Directors. Therefore, reinstating

the applicant would disrupt the governance framework, which limits ordinary shareholders to two Directors, and infringe on the rights of Series A shareholders. He further averred that the remedy of reinstatement is not an interim measure and would undermine ongoing arbitration proceedings.

11. Mr. Karuga contended that the applicant's removal reflected the will of the ordinary shareholders, expressed through a notice dated 15/5/2023 and confirmed during the 1st respondent's Annual General Meeting. He asserted that claims on irregularities during the 1st applicant's tenure not only lack merit, but also highlights her unsuitability for reinstatement. That contrary to the 1st applicant's assertions, audited financial statements for the years 2020 & 2021 were published and shared. That the 1st applicant ceased to contribute meaningfully to the 1st respondent since being replaced as CEO in 2021, receiving no benefits or compensation thereafter.

12. The 2nd application is the 1st respondent's Chamber Summons dated 17/8/2023, brought pursuant to the provisions of section 6 of the *Arbitration Act*, 1995, Rule 2 of the Arbitration Rules, 1997. The 1st respondent sought that the present matter be referred to arbitration.

13. The application was based on the grounds set out on the face of the Summons and the affidavit sworn on 17/8/2023 by Irene Muiruri, the 1st respondent's Legal Officer. She averred that the relationship between the parties herein is governed by the 1st respondent's Articles of Association and the Shareholders Agreement dated 25/4/2018, which explicitly mandate arbitration for resolving disputes.

14. She asserted that Clause 32 of the Shareholders Agreement and Clause 80 of the Articles of Association underscore the parties' agreement to settle disputes through arbitration. That the dispute concerning board membership falls squarely within the scope of the Shareholders Agreement, particularly Clause 6 which addresses such issues.

15. It was contended that the 1st respondent was prepared to proceed with arbitration promptly to resolve the dispute between the parties in view of the fact that the governing agreements were valid, enforceable and binding, as reaffirmed by Clauses 26 and 3.1(b) of the Shareholders Agreement. That referring the dispute herein to arbitration will not prejudice the applicants, as it aligns with their agreed dispute resolution process.

16. In response, the applicant's filed a replying affidavit sworn on 25/8/2023 by Victor Magoma Orandi, an Advocate of the High Court of Kenya and learned Counsel for the applicants. He stated that the applicants acknowledge the existence of an arbitration agreement but argue against an automatic referral to arbitration. That the applicants reserve the right to contest the validity and enforceability of the arbitration agreement based on legal and factual considerations, urging the court to evaluate its applicability carefully.

17. It was contended that the existence of an arbitration agreement does not mandate a stay of proceedings, as the Court has discretion to issue interim orders in favor of the applicants. It was claimed that referring the petition to arbitration may impose significant financial burdens on the applicants, including arbitrators' fees, administrative costs, and legal expenses. Additionally, the applicant's may face difficulties in enforcing an arbitration award within the Kenyan legal framework after the process concludes.

18. In rejoinder, the 1st respondent filed a further affidavit sworn on 27/11/2023 by Kevin Karuga, the 1st respondent's Vice President, Legal and Group Data Protection Officer. He averred that the applicants acknowledge the existence of an arbitration agreement and have not established or alleged that it is null, void, inoperative, or incapable of being performed.

19. That the Court has a statutory obligation under section 6(1) of the *Arbitration Act*, 1995, to stay proceedings unless specific exceptions are met, which have not been demonstrated by the applicants. That the parties having explicitly agreed to arbitration under the International Chamber of Commerce cannot now claim it is too expensive to justify bypassing the agreed dispute resolution mechanism. That the Kenyan law provides mechanisms to enforce arbitral awards, contrary to the applicant's assertions of potential enforceability challenges. That reinstatement was not an interim measure of protection as it would preemptively decide the dispute herein.

20. The applications were canvassed by way of written submissions. The applicant's submissions were dated 26/10/2023 & 5th July 2024 respectively, while the 1st respondent's submissions were dated 28/11/2023 & 12/9/2024, respectively.

Application dated 24/8/2023

21. The applicants cited the provisions of section 141 of the *Companies Act*, Article 47 of *the Constitution*, 2010 and the case of Wambeye Kimweli Marakia v Board of Directors, Nzoia Water Services Co. Ltd & 2 others; Nzoia Water Services Co. Ltd (Interested Party) [2021] eKLR and submitted that the 1st respondent failed to convene a proper Board meeting or pass a resolution to determine the details of the AGM, thus rendering the notice of 31/5/2023 irregular and unilaterally issued. They argued that the 1st applicant was denied the opportunity to contest her removal as a Director, contrary to the provisions of section 141 of the *Companies Act*, making the removal unprocedural and unfair.

22. They further submitted that the 2nd to 8th respondents misrepresented themselves as the majority of ordinary shareholders in the removal notice. The applicants referred to the provisions of sections 139 & 256 of the *Companies Act* and submitted that the respondents falsely represented themselves as the majority of ordinary shareholders, holding only 25.25% instead of the required 41.67%. Therefore, they lacked the legal authority to unilaterally remove the 1st applicant and appoint the 7th respondent as the 1st respondent's Director.

23. The 1st respondent on the other hand submitted that the dispute herein is between ordinary shareholders thus rendering section 780 of the *Companies Act* inapplicable, as the 1st respondent plays a little role in appointing or removing Directors serving under shareholder agreements. It relied on the Court of Appeal case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR and argued that the Shareholders' Agreement was binding and cannot be rewritten by the Court. The applicant had benefited from a term without limit under the Agreement, cannot now claim protections for directors with term limits. The 1st respondent contended that the applicants failed to raise claims of Article 47 violations in their initial pleadings and cannot introduce new arguments at the submissions stage.

24. The Court of Appeal case of Securicor Courier (K) Ltd v Benson David Onyango & another [2008] eKLR was cited in support of the submission that the removal process, as stipulated in the Shareholder Agreement was valid, requiring only a notice to the company secretary.

25. In submitting that reinstatement was not a temporary relief but a substantive relief hence cannot be granted as a provisional measure, the Court was referred to the Court of Appeal case of Kenya Tea Growers Association & another vs Kenya Plantation and Agricultural Workers Union [2018] eKLR. That no exceptional circumstances existed to warrant the reinstatement of the 1st applicant.

26. It was submitted that the provisions of Order 40 Rule 2 of the Civil Procedure Rules, 2010 was not applicable since the reliefs thereunder can only be granted where there is a pending suit involving a

threat of breach of contract which is not the case herein. In addition, the principles for the grant of an injunction had not been met.

Application dated 17/8/2023

27. The 1st respondent relied on the Court of Appeal case of East African Power Management Limited v Westmont Power (Kenya) Limited Civil Appeal No. 55 of 2006 and Karunda v Keekorok Capital Ltd (Cause E064 of 2023) [2023] KEELRC 783 (KLR) and urged the Court to refer the matter to arbitration as the exceptions under section 6(1) of the *Arbitration Act* had neither been alleged nor proved.

28. On their part, the applicants cited the provisions of section 6 (1) (a) of the *Arbitration Act*, 1995 and the case of Scales and Software Limited v Web Commercial Systems Limited & another [2021] eKLR and submitted that the arbitration agreement was inoperative because the 7th & 8th respondents are not parties to or bound by the agreement, yet they are involved in these proceedings. It was further submitted that the dispute between the parties herein was interconnected among all parties, making it impossible to sever the 7th & 8th respondents from the case.

29. They referred to the provisions of section 7 (1) of the *Arbitration Act* and the case of Peema Investments Co. Ltd v Principal Secretary, Ministry of Defence & another [2021] eKLR for the submission that even if the arbitration agreement was operative, the Court was not restricted from granting interim orders pending arbitration.

30. Having considered the applications, the issues that arise for determination are: -

    i. Whether the petition should be referred to arbitration; and

    ii. Whether the applicants have made out a case to warrant the grant of the injunctive reliefs sought herein.

31. On the first issue, the Court's jurisdiction to refer disputes to arbitration is provided for under section 6 of the *Arbitration Act* No. 4 of 1995 which states as hereunder –

> " 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."

32. In UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR, the Court of Appeal held: -

> "In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration

agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part:

.....

It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration."

33. In Niazsons (K) Ltd v China Road Bridge [2001] KLR, it was held that: -

> " All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:
>
> a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
>
> b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
>
> c. Whether the suit intended concerned a matter agreed to be referred to arbitration."

34. It is not in dispute that the 1st respondent's application seeking orders for referral of this petition to arbitration was filed alongside the 1st respondent's notice of appointment of Advocates under protest dated 17/8/2023. In the premise, this Court finds that the 1st respondent's Chamber Summons application was filed promptly.

35. From the pleadings filed, it is manifest that the applicants do not dispute that there exists an arbitration agreement between the parties as provided for under Clause 32 of the Shareholders Agreement and Clause 80 of the Articles of Association, and that the dispute between the parties herein falls within the scope of the disputes contemplated thereunder.

36. However, their contention is that the said arbitration agreement is inoperative as the 7th & 8th respondent are not parties to or are not bound by the Shareholders Agreement, yet they are involved in these proceedings. They submitted that the dispute herein is interconnected among all parties, making it impossible to sever the 7th & 8th respondents from the case.

37. It is not in contest that by the time the applicants filed this petition, the 1st applicant had already been removed as a Director of the 1st respondent and this status had been updated at the Company's registry. For this reason, the 7th respondent is bound by the provisions of the 1st respondent's Articles of Association, more specifically Clause 80 thereof.

38. The applicants in this petition challenge the mode/process leading to the removal of the 1st applicant as a Director of the 1st respondent. A perusal of the petition will show that the only relief sought against the 8th respondent is a declaration that it is non-operational, thus rendering any vote by it void and illegal. This means that the participation of the 8th respondent to these proceedings is limited to demonstrating whether or not it is operational.

39. Clause 32.1 of the Shareholders Agreement provides that –

> "All disputes arising out of or in connection with this agreement, including any dispute relating to non-contractual obligation arising out of or in connection with this agreement (each a "Dispute") shall be finally settled under the Rules of Arbitration (the "Rules) of the International Chamber of Commerce the "ICC") as amended below."

40. In view of the foregoing, the Court's opinion is that the issues between the parties herein relate to issues covered by the 1st respondent's Articles of Association and the Shareholder agreement. That notwithstanding, the 8th respondent has not expressed any objections to the matter being referred to arbitration for hearing and disposal of the dispute between the parties despite the fact that it is not a shareholder of the 1st respondent company.

41. To this end, I concur with the Court's finding in the case of Scales and Software Limited v Web Commercial Systems Limited & another (supra) where it was held that –

> "I am in agreement with the Plaintiff that the court will not enforce an arbitration clause against a third party. The basis of arbitration under the Act is consent of the parties. In the absence of consent, a third party cannot be compelled to submit to arbitration under the Act. This case however raises a different issue and it is whether by merely joining another defendant not party to the arbitration agreement to the proceedings, a plaintiff can resist reference to arbitration."

42. This Court is alive to the hallowed legal principle that it is not the business of Courts to rewrite contracts between parties unless coercion, fraud or undue influence are pleaded and proved, but to facilitate its interpretation and implementation. In the circumstances, the applicants' assertions that referring this petition to arbitration may impose significant financial burdens on the applicants and they may face difficulties in enforcing an arbitration award within the Kenyan legal framework after the process concludes have no probative value to these proceedings.

43. Accordingly, this Court finds that the applicants have made out a case to warrant this Court to exercise its discretion and issue an order referring this petition to arbitration in line with the provisions of Clause 32 of the Shareholders Agreement and Clause 80 of the 1st respondent's Articles of Association.

44. The second issue is whether the applicants have made out a case to warrant the grant of the injunctive reliefs sought. Having found that there is a valid arbitration agreement between the parties herein, any further injunctive orders and/or interim measures of protection given by this Court in favour of any of the parties herein, can only be given pursuant to the provisions of section 7 of the *Arbitration Act* which states that –

> 1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
>
> 2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

45. From the foregoing, it is clear that this Court's jurisdiction to issue an interim measure of protection is invoked under the aforesaid provisions. It is not disputed that the applicant's amended Notice of

Motion application dated 24/8/2023 has not been brought pursuant to the said provisions. This means that this Court's jurisdiction has not been properly invoked for it to entertain the said application.

46. In the circumstances, this Court finds that the 1st respondent's Chamber Summons application dated 17/8/2023 is merited while that of 10/7/2023 is unmerited. The Court makes the following orders: -

    a. There be a stay of these proceedings and the matter is referred to arbitration.

    b. Costs of this application to be borne by the applicants.

    It is so ordered.

SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE