Growth Studio Ventures v Lipa Later Limited & another (Commercial Suit E525 of 2024) [2025] KEHC 3863 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3863 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E525 OF 2024

H NAMISI, J

MARCH 28, 2025

BETWEEN

GROWTH STUDIO VENTURES ..... PLAINTIFF

AND

LIPA LATER LIMITED ..... 1ST DEFENDANT

LIPA LATER GROUP INC ..... 2ND DEFENDANT

RULING

1. In a Plaint dated 30 August 2024, the Plaintiff commenced these proceedings against the Defendants seeking reliefs against the Defendants for breach of contract. The Plaintiff is an early-stage venture capital firm deploying capital and a suite of support capabilities with a localized approach to promising businesses in Africa. It deploys capital in various ways including through short term loans with the sole mission to drive sustained value for its portfolio companies and partners.

2. The Defendants are in the business of enabling e-commerce through providing access to credit to its retail customers through its centralized and fully integrated online platform.

3. Along with the Plaint, the Plaintiff filed Notice of Motion dated 30 August 2024. Soon thereafter, the Defendants filed Chamber Summons dated 16 September 2024.

Plaintiff's Notice of Motion dated 30 August 2024

4. The Application seeks the following orders:

    i. (spent)

    ii. Judgment be entered against the 1st Defendant for the admitted sum of USD 169,125 being the principal and interest as per the Investment Agreement dated 18th October 2023;

iii. Judgment be entered against the 1st Defendant for the admitted sum of USD 42,521.67 being the principal and interest as per the Investment Agreement dated 28th February 2024;

iv. Interest on 2 above at 30% per annum from 18th April 2024 when the sum became due until payment in full as per the terms of the Investment Agreement dated 18th October 2023;

v. Interest on 3 above at 30% per annum from 28th May 2023 when the sum became due until payment in full as per the terms of the Investment Agreement dated 28th February 2024;

vi. Pending hearing and determination of this Application the 1st Defendant be restrained from transferring any of its assets, property or money held in its local and foreign bank accounts to the 2nd Defendant;

vii. Until it has fully satisfied the judgment entered against it, the 1st Defendant be restrained from transferring any of its assets, property or money held in its local and foreign bank accounts to the 2nd Defendant;

viii. Costs of the Suit.

5. The Application which is supported by an Affidavit sworn by Mark Karake, sole Director of the Plaintiff, and premised on the following grounds:

a. The Plaintiff advanced USD 190,000 to the 1st Defendant in short term loans via an Investment Agreement dated 18th October 2023, and an Investment Agreement dated 28th February 2024 (collectively the "Investment Agreements").

b. The 2nd Defendant is the 1st Defendant's sole shareholder and has the same directors as the 1st Defendant. As per the Investment agreements; USD 150,0000 was deployed to a bank account held by the 2nd Defendant, and USD 40,000 to a bank account held by the 1st Defendant;

c. The Investment Agreements were drafted solely by the 1st Defendant and clearly set out the investment amounts, investment rate, total interest and the investment maturity. The upshot of this clarity is that it is crystal clear what sums are owed by the 1st Defendant.

d. It was a common term of the Investment Agreements that upon maturity of the investments, the 1st Defendant would make a bullet payment consisting of the principal and interest.

e. The investments under the Investment Agreements have both matured. The Investment Agreement dated 18th October 2023 matured on 18th April 2024. The Investment Agreement dated 28th February 2024 matured in 28th May 2024. To date, no payments have been by the 1st Defendant to the Plaintiff on account of the Investment Agreements.

f. The 1st Defendant has in correspondence exchanged with the Plaintiff unequivocally admitted that the sums are owed, and proposed terms of settlement but has to date failed to make any payments to settle the debts;

g. For the avoidance of doubt the 1st Defendant has admitted the sum of admitted sum of USD 169,125 being the principal and interest as per the Investment Agreement dated 18th October 2023, and the sum of USD 42,521.67 being the principal and interest as per the Investment Agreement dated 28th February 2024.

h. There is no dispute between the parties, the 1st Defendant has simply failed to honour its obligations under the Investment Agreements.

i. This Court is duty bound to handle all matters presented before it for the purpose of attaining the efficient disposal of the business of the Court and the timely disposal of the proceedings. Granting this Application the Court will achieve this objective by bringing these proceedings to a quick end;

j. It is in the interest of justice that the orders sought in the Application be granted.

6. The Supporting Affidavit expounds on the grounds on the face of the Application.

7. The Defendants filed a Replying Affidavit in which they averred that under Clause 9 of the respective Investment Agreements parties agreed that any disputes would be handled by way of arbitration. Clause 9 provides as follows:

9.1: This agreement shall be governed by and construed in accordance with the Laws of Kenya;

9.2: Should any dispute arise between the Company and the Investor at any time out of any aspect of the Investor Agreement, including, but not limited to the performance of the Agreement, the remittance of the investment or any other reasonable dispute, the Company and the Investor will confer in good faith to resolve promptly such dispute.

9.3: In the event that the Company and the Investor are unable to resolve their dispute and should either desire to pursue a claim against the other party, both the Company and the Investor agree to have the dispute resolved by one Arbitrator who shall be appointed by the Chairperson of Chartered Institute of Arbitrators, Kenya Branch, whose decision shall be final and binding. The attendant costs arising out of the Arbitration shall be determined by the Arbitrator. The Company and Investor agree that the Arbitration shall be held in Nairobi County.

8. The Defendants aver that the Plaintiff has never disputed nor challenged the arbitration clause. The Defendants further aver that the Plaintiff has not attempted to confer with the 1st Defendant to resolve any issues pursuant to clause 9.2 of the Agreement. The Plaintiff did not issue a demand letter or seek to initiate dispute resolution under Clause 9.3. Therefore, the Plaintiff's suit is prematurely before the Court as it contravenes and/or offends the provisions of the arbitration clause.

9. The Defendants aver that the contents in the emails produced by the Plaintiff have been altered and/or the same do not constitute a clear and unequivocal admission as alleged by the Plaintiff.

10. The Plaintiff filed a Further Affidavit reiterating the contents of its Supporting Affidavit and refuting the claims by the Defendant. The Plaintiff avers that the Agreement produced by the Defendants were the wrong ones, aimed at confusing the Court and muddying the waters. The Plaintiff refuted claims that the email correspondence produced was altered. Further, the Plaintiff avers that there is no dispute between the parties. The 1st Defendant has simply refused to honor its obligations under the Investment Agreements.

The Defendants' Chamber Summons dated 16 September 2024

11. The Application seeks the following orders:

i. (spent)

ii. (spent)

iii. (spent)

iv. That this Honourable Court be pleased to stay all proceedings pending before the Honourable Court and refer the matter to arbitration pursuant to section 6 of the *Arbitration Act* No. 4 of 1996;

v. That the costs of this Application be borne by the Plaintiff

12. The Application is supported by the Affidavit of Michael Maina and premised on the following grounds:

a. By a Plaint and Application dated 3 September 2024, the Plaintiff sought various prayers from this Honourable Court arising from Investment Agreements dated 9 October 2023 and 28 February 2024 between the Plaintiff and the 1st Defendant;

b. That the aforementioned Investment Agreements under Clauses 9.3 and 10.3 respectively provided that any dispute between the parties herein would be referred to arbitration and in the circumstances the matter ought to be referred to arbitration for hearing and determination;

c. That the aforesaid arbitration agreements are valid and binding upon the parties and the Plaintiff has neither challenged nor disputed the arbitration agreement;

d. That the Plaintiff's suit is therefore premature before this Honourable Court as it contravenes and/or offends the mandatory provisions of the arbitration agreements which ousted the jurisdiction of this Honourable Court in the first instance to hear and determine the dispute;

e. That the Defendants are apprehensive that the Plaintiff shall proceed with this suit in contravention of the *Arbitration Act* No. 4 of 1995;

f. Such other or further grounds to be adduced at the hearing hereof

13. The Plaintiff filed a Replying Affidavit averring that while the Defendants seek to have this matter referred to arbitration, they have failed to identify the genuine dispute between parties that would be heard and determined in arbitration. The Plaintiff avers that this is a simple matter of an admitted debt that the 1st Defendant has simply refused to pay.

14. Additionally, the Plaintiff filed Grounds of Opposition as follows:

i. There is in fact no genuine dispute between the parties to be referred to arbitration. The 1st Defendant has admitted the debt and even made proposals for the settlement of the debt which it has failed to honour. (UAP Provincial *Insurance Company Ltd v Michael John Beckett Civil Appeal No. 26 of 2017*)

ii. Courts cannot be called be called upon to enforce an arbitration clause in agreements where the claim is not disputed and the 1st Defendant has simply refused to pay. The 1st Defendant has admitted the debt, the only issue is its failure to pay the debt. (Clearspan Construction (A) Limited v East African Gas Co. Ltd [2008] eKLR)

iii. This is a clear case for judgment on admission that should not be referred to arbitration. The 1st Defendant has clearly and unequivocally admitted the debt and the Plaintiff has filed an application for judgment on admission dated 30th August 2024 based on the admissions. (Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 WLR 726).

iv. The Application is frivolous vexatious and an abuse of the Court process designed to delay the determination of the Plaintiff's Application dated 30th August 2024 seeking judgment admission which the Defendants have not responded to.

15. The Applications were canvassed by way of written submissions.

Analysis and Determination

16. I will address the Defendants' Chamber Summons first.

17. Section 6 of the *Arbitration Act* on stay of legal proceedings provides as follows:

    (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.

18. The above provision is mandatory. However, there is a limitation provided, that is, where the arbitration agreement is null and void, inoperative or incapable of being performed, or where there is no dispute between the parties with regard to the matters to be referred to arbitration. In this instance, there has been no dispute or challenge by either party as to the validity of the arbitration clause, Clause 9, contained in the two Investment Agreements. A reading of the said provision reveals that the same is not only valid, but also capable of being performed. The intentions of the parties were clear that if any dispute arises, they oust the jurisdiction of the court and have the dispute resolved through arbitration.

19. Nonetheless, there seems be disagreement between the parties as to whether or not there is a dispute between the parties capable of being heard and determined in arbitration. Whereas the Plaintiff insists that the matter is simply a refusal by the Defendants to honor their obligation despite having admitted and even proposed a mode of settlement, the Defendants aver there are matters that are disputed. The Defendants claim that the figure stated in the Plaint is erroneous since the Plaintiff has failed to take into account the sums already paid. Further, that the interest rate of 30% per annum on loan denominated in US dollars is unconscionable and unenforceable. The Plaintiff's response to this is that the interest rate is contained in the Agreements that were drafted solely by the Defendants.

20. From the foregoing, it is clear that there is some disagreement between the parties as to what the Defendants owe. This is truly the definition of a dispute, and the same is capable of being referred to arbitration. In line with the provisions of Article 159 (2) (c) of *The Constitution*, this Court seeks to promote other forms of dispute resolution where circumstances of the case so allow. Consequently, this matter ought to be referred to arbitration as envisaged by the parties in their Agreements.

21. I now turn to the Plaintiff's Application dated 30 August 2024, though the same would simply be an academic exercise in light of the foregoing. The Application is brought under Order 13 Rule 2 of the

Civil Procedure Rules, 2010 and Sections 1A (1) (2), 1B (1) (b)(d) of the *Civil Procedure Act*. Order 13 Rule 2 provides as follows:

> Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.

22. The question of judgment on admission has been determined by various Courts. In the case of Cassam v Sachania (1982) KLR 91, the Court of Appeal held that summary determinations are to be made with constraint on the part of the Court in exercise of its discretion. It was determined inter alia:

> " Summary determinations are for plain cases both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial."

23. The upshot is that the admission has to be unequivocal in that material facts are capable of being established and the law argued without the benefit of a trial. Looking at the arguments and counter arguments herein, it cannot be said that the admission herein by the Defendants is unequivocal. Most certainly evidence would have to be led by parties and a determination made thereon.

24. Therefore, in view of the foregoing, the Plaintiff's Notice of Motion dated 30 August 2024 is dismissed. The Defendants' Chamber Summons dated 16 September 2024 is allowed in terms of prayer 4. This matter is hereby referred to arbitration pursuant to section 6 of the *Arbitration Act*, No 4 of 1995. The costs for both applications will be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF MARCH 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Samuel Chege & Mr. Kiarie.....for the Plaintiff

David Janjo h/b Kisinga.....for the Defendants

Libertine Achieng ..... Court Assistant