Blue Nile Rolling Mills Limited v African Trade Insurance Agency (Commercial Case E436 of 2024) [2025] KEHC 7805 (KLR) (Commercial and Tax) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E436 OF 2024

JWW MONG'ARE, J

MAY 29, 2025

BETWEEN

BLUE NILE ROLLING MILLS LIMITED .... PLAINTIFF

AND

AFRICAN TRADE INSURANCE AGENCY .... DEFENDANT

RULING

1. The Defendant has approached the Court by way of the Chamber Summons dated 15th September 2023 made, inter alia, under section 6 of the *Arbitration Act* (Chapter 49 of the Laws of Kenya) and Rule 2 of the Arbitration Rules, seeking inter alia that this suit be stayed and the dispute between the parties be referred to arbitration. The application is supported by the grounds set out on its face and the supporting affidavit of Lucy Machel, the Defendant's Principal Claims and Recoveries Officer, sworn on 15th September, 2023. It is opposed by the Plaintiff through the replying affidavit of its Director, Botu Rao, sworn on 22nd November 2023. The parties have also supplemented their arguments by filing written submissions which together with the pleadings I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

2. The main issue for the court's determination is whether the instant suit/dispute ought to be referred to arbitration. The Defendant's application is reliant on the exhaustion doctrine which posits that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction is invoked (see the Court of Appeal decision in Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others [2015] KECA 304 (KLR)]. I agree with the Defendant's submission that this principle is consistent with Article 159 of *the Constitution* which enjoins the court

to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect.

3. The Defendant has also rightly relied on section 6 of the *Arbitration Act* which provides in part as follows:

> 6(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.

4. It has not been disputed that the contractual relationship between the parties was consummated by a Trade Credit Insurance Agreement where the Plaintiff sought indemnification from the Defendant but the Plaintiff now claims in its suit that the Defendant has failed to honour its obligations under the Agreement. It is also not in dispute that the Agreement provides for that any dispute, controversy, or claim arising out of or related to the Policy Agreement, or the breach or termination or validity thereof shall be submitted to arbitration at the agreed forum, being the London Court of International Arbitration. However, the Plaintiff has responded by stating that there is no dispute capable of being referred to arbitration as the Defendant has been adamant that they will not pay any moneys under the scheme.

5. According to the Plaintiff, the issue between the parties is not a dispute but instead a debt due from the Defendant to the Plaintiff, which the former has refused to honour. That the Defendant has admitted the debt and accrued interest and had agreed to return the monies due. In support of this position, the Plaintiff has annexed a bundle of correspondences between the parties in its deposition. Going through the same, I agree with the Defendant that there is no express or implied admission of the debt by the Defendant and if anything, the Defendant has always maintained that the claim is not complete and that the demand by the Plaintiff is misconceived and misdirected (see the Defendant's response dated 7th December 2017 and the emails of 20th April 2021 and 23rd June 2021). Indeed, as admitted by the Plaintiff in its deposition, this matter has never been resolved by the parties and thus, remains a live issue between them.

6. As to whether this issue is a "real dispute" or not, I am bound by the Court of Appeal decision cited by the Defendant in UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] KECA 205 (KLR) where the appellate court held as follows:

> 19. The provisions in Section 6(1)(b) of the *Arbitration Act* are similar to the provisions of Section 1(1) of the *Arbitration Act*, 1975 of England before its amendment by the *Arbitration Act*, 1996. Section 1(1) of the English *Arbitration Act* of 1975 provided:
>
> > "If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect

> of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperable or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." [Emphasis]

20. In interpreting that provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no "real dispute". Lord Swinton Thomas LJ, captured the significance of the words "there is not in fact any dispute between the parties" as used in the 1975 English *Arbitration Act*, and which appear in our section 6(1)(b), in the English case of Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 W L R 726 which presents striking similarity with the circumstances in the present appeal. We bear in mind that that case was decided under the 1996 *Arbitration Act* of England.

21. In Halki Shipping Corpn v Sopex Oils Ltd, shipowners applied for summary judgment against charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties and the charterers applied to stay those proceedings pending reference to arbitration. The issue in that case was whether there was a dispute within the meaning of the arbitration clause. Lord Swinton Thomas LJ stated at page 755 that:

> "The words used in clause 9 of the charterparty in relation to a referral to arbitration were "any dispute." The words in section 1 (1) of the Act of 1975 are: "there is not in fact any dispute between the parties." To the layman it might appear that there is little if any difference between those words. However, the legislature saw fit to draft section 1 using the phrase "not in fact any dispute." The legislature did not use the words "there is no dispute" and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrase "any dispute" and "not in fact any dispute" is of central importance in understanding what underlies the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of Order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words "not in fact any dispute" as opposed to "no dispute" have from time to time been interpreted by the courts as meaning "no genuine dispute," "no real dispute," "a case to which there is no defence," "there is no arguable defence", and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed "is indisputably due." The approach of the courts has on occasions been similar to that

adopted by them in Order 14 proceedings in cases where there is no arbitration clause.

In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord. 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence."

7. From the positions taken by the parties in this matter, it is clear that there is a divergence which forms the basis of a dispute. The arbitration clause in the parties' Agreement provides that it is "Any dispute, controversy or claim arising out of or relating to the Policy…" that is to be referred to arbitration and with such broad terms, any type of dispute arising can be referred to arbitration and this list not exhaustive. I am in agreement with the Defendant's submission that whether or not they are liable to compensate the Plaintiff from the claim under the Policy Agreement is a real and genuine dispute capable of determination and that this can only be done by way of arbitration in line with the parties' agreement.

Disposition

8. In the foregoing, I make the following dispositive orders:

   1. The Defendant's Chamber Summons dated 15th September 2023 is allowed
   2. The Court finds that as between the parties, they have their choice of forum as arbitration and there is a dispute to be determined through arbitration.
   3. The import of the above is that this Court lacks jurisdiction to hear and determine the dispute as canvassed in the underlying suit in the Plaint dated 28th February 2023.
   4. The instant proceedings are stayed and the dispute is referred to Arbitration under Clause 15 of the General Conditions of Insurance as read with Clause 7 of the Insurance Offer Letter dated 30th May 2016
   5. The Defendant is awarded costs of the Chamber Summons

   It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY 2025

………………….

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Ochieng for the Plaintiff/Respondent.

2. Ms. Musyoka for the Defendant/Applicant.

3. Amos - Court Assistant