



**Openworld Limited v Kenindia Assurance Co Ltd (Miscellaneous Application
258 of 2018) [2024] KEHC 884 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 258 OF 2018**

**FG MUGAMBI, J
JANUARY 30, 2024**

BETWEEN

OPENWORLD LIMITED APPLICANT

AND

KENINDIA ASSURANCE CO LTD RESPONDENT

RULING

Background

1. The dispute between the parties herein arose from a lease agreement dated 2nd September 2015. The dispute is in respect of amounts due to the respondent on account of rent, service charge and other charges of the leased property. The applicant filed an application seeking to stop the respondent from restraining it from vacating the respondent's premises and from levying distress on its assets within the respondent's premises, pending an intended arbitration. In a ruling of 6th June 2018 (the ruling), the applicant was ordered to deposit the undisputed rent arrears of Kshs. 441,124.70 in a joint interest earning account. Subsequent to the ruling, parties entered into a consent dated 3rd July 2018 in which it was agreed that the amount would be deposited in the respondent's advocate's account and the same was done.
2. The respondent has now filed the application dated 17th March 2021 seeking to have the said monies held by the respondent's advocate released to the respondent. This is premised on the fact that the arbitrator appointed had terminated the reference through an award dated 4th December 2020 due to the applicant's failure to attend the proceedings and that the applicant had since also vacated the respondent's premises.
3. The application is opposed vide a replying affidavit sworn by Dorcas Muthoni who is the Chief Executive Officer of the applicant. The applicant confirms the facts as stated by the respondent save that



at the time the consent order was issued, applicant had already signed a renewal sub-lease letter of offer dated 9th April 2014 for the premises and paid a rent deposit of Kshs. 635,397/=. A lease agreement was signed by the parties on 2nd September 2015 and lapsed on 30th June, 2018. The applicant states that the said rent deposit was yet to be refunded despite having delivered vacant possession of the premises upon the expiry of the lease agreement.

4. The applicant in the end proposes that the respondent retains the Kshs. 441,124.70 paid through its advocates and refunds to the applicant the sum total of Kshs 635,397/= paid as deposit at the onset of the lease. Alternatively, that the Kshs. 441,124.70 be paid to the applicant and a further amount of Kshs. 194,273/= to make up for the difference in full settlement of the rent deposit.
5. The respondent's position is that the issues raised by the applicant's replying affidavit are issues which ought to have been ventilated at the arbitration.

Analysis

6. I have carefully considered the pleadings, submissions and evidence presented by rival parties in support of their arguments. The only issue for determination is whether the amount of Kshs. 441,124.70 should be released to the respondent by its advocates.
7. I am alive to the fact that the orders for the deposit of the security were made in an application brought under section 7 of the *Arbitration Act*. It is uncontroverted that the parties had by the lease agreement of 2nd September 2015 submitted themselves to arbitration in respect of any dispute under the lease. The said orders were therefore meant to provide interim relief and allow the parties proceed to arbitration to fully determine the dispute between them.
8. It is now well settled that where there is a clear intention by parties to have their dispute settled by arbitration, the options of intervention are very limited for the Court. I refer to the case of *Blue Limited v Jaribu Credit Traders Limited*, Nairobi (Milimani) HCCS No. 157 of 2008 where Kimaru, J (as he then was) stated inter alia as follows:

“It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration.”
9. Likewise, in *Kenya Pipeline Company Limited v Datalogix Limited and another*, Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193, Warsame, J (as he then was) held that:

“It is clear from the reading of section 6(1) that ... the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship... It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration...Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter.”
10. The point in all this discourse is that the parties by their mutual understanding ousted the jurisdiction of this Court to entertain the dispute between them. The ruling of 6th June 2018 indeed confirms that the parties would have an opportunity to ventilate their respective claims before the arbitrator. It is therefore not in the place of this Court to make any findings on the substance of the dispute. I would



therefore concur with the applicant that the issues raised in the replying affidavit of the respondent are issues that were within the realm of the arbitration proceedings.

11. I have considered the record of the arbitral proceedings and in particular the Order for Directions No. 3 dated 4th December 2023. I note that the proceedings were terminated as a result of ‘inordinate and inexcusable delays’ on the part of the applicant. It is obvious that the arbitrator made numerous attempts to accommodate the applicant before eventually terminating the proceedings.
12. The applicant cannot have its cake and eat it. Having failed to take part in the arbitration proceedings and ventilate its issues at that forum, it is not open for it to now make proposals that ought to have been settled in arbitration. The security was the price for the interim orders that the applicant obtained. These have now been overtaken by events as the subject proceedings were terminated. It is therefore only fair that the security be remitted to the respondent.

Determination

13. The long and short of this is that the respondent’s application dated 17th March 2021 is allowed. The respondent shall have the costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE

