



REPUBLIC OF KENYA



**KENYA LAW**  
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**Amiran Kenya Limited v Kwale International Sugar Co Ltd (Civil Suit E012 of 2023)  
[2024] KEHC 1669 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E012 OF 2023  
FG MUGAMBI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**AMIRAN KENYA LIMITED ..... PLAINTIFF**

**AND**

**KWALE INTERNATIONAL SUGAR CO LTD ..... DEFENDANT**

**RULING**

**Background**

1. For determination is the defendant's Notice of Motion application dated 24<sup>th</sup> February 2023 brought under section 1A, 1B, 3 & 3A of the *Civil Procedure Act*. The defendant prays that the suit herein be struck out for violating the exhaustion doctrine and in the alternative, should the suit be sustained, that the same be transferred to the High Court in Mombasa.
2. The application is supported by the affidavit of Benson Musili, the defendant's legal counsel sworn on 24<sup>th</sup> February 2024. It is opposed by way of a replying affidavit sworn on 9<sup>th</sup> May 2023 by Dave Govender, the plaintiff's Managing Director. The application was canvassed by way of written submissions. The plaintiff's submissions are dated 29<sup>th</sup> June 2023 while the defendant's submissions are dated 14<sup>th</sup> June 2023.
3. The uncontroverted facts are that the parties herein entered into an Engineering, Procurement & Construction Contract dated 1<sup>st</sup> January 2019 (the "EPC Contract") for the provision and installation of a bulk water supply system at the defendant's premises. The EPC Contract was a culmination of several documents executed by the plaintiff and the defendant including the Special Conditions of Contract (the SCC) and the General Conditions of Contract (the GCC). Subsequently, the plaintiff filed this suit claiming a total of USD 2,111,284.24 for alleged breach of contract.



4. The defendant argues that there is contention regarding the breach of contract as claimed and the plaintiff's entitlement to USD 2,111,284.24. Furthermore, the defendant maintains that the plaintiff's case relies on letters that are not admissible as evidence, thus failing to prove the defendant's obligation to the plaintiff.
5. The defendant also contends that the plaintiff failed to adhere to the agreed-upon dispute resolution procedures outlined in the contract before filing this lawsuit. As a result, the defendant argues that the case breaches the principle of exhaustion of remedies and should be dismissed. In the alternative, the defendant avers that if the court would find that the suit is properly before the Court then it ought to be transferred to the High Court in Mombasa as the construction that gave rise to the dispute was carried out in Msambweni area Kwale County and the defendant's expert witnesses are based in Kwale county where the manufacturing plant is.
6. In response, the plaintiff states that out of the nine letters presented to the Court, four are not labeled as without prejudice and thus are admissible as evidence. Moreover, the plaintiff asserts that the rule regarding without prejudice communications does not prevent the admission of the contested letters. The plaintiff argues that even relying solely on the undisputed letters would demonstrate the defendant's acknowledgment of the debt, evidenced by partial payments made towards its settlement and the outstanding balance still owed to the plaintiff.
7. The plaintiff's main point is that no real dispute exists since the defendant has recognized the debt and attempted to reduce it through several payments, even going as far as terminating the contract. Consequently, the plaintiff believes the defendant is legally barred from disputing the debt's existence.
8. Regarding the arbitration claim, the plaintiff notes that according to clause 6.1 of the contract, an arbitrator was supposed to be appointed by the Registrar of the Nairobi Centre for International Arbitration (NCIA). However, due to the absence of a proper framework within the NCIA, the plaintiff argues that this case is an exception to the principle that all remedies must be exhausted before resorting to Court.
9. In opposition to the request to transfer the lawsuit, the plaintiff contends that since the defendant's primary business location is in Nairobi, the case is appropriately filed in this Court and should not be moved to the High Court in Mombasa.

## Analysis

10. I have carefully considered and analysed the pleadings, evidence and submissions filed by respective parties in this matter. Of the issues that arise for determination, the jurisdiction of the Court to adjudicate this dispute is paramount, touching directly on the foundational aspects of the case. This consideration is framed within the backdrop of the *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd*, a landmark decision by the Court of Appeal.
11. The resolution of this jurisdictional question is critical; should it be determined that this Court lacks the requisite authority to proceed, I am compelled to cease further deliberation or action in this matter immediately.
12. Arbitration, as a mechanism for resolving disputes, is fundamentally rooted in the principle of party autonomy, indicating that it is a voluntary process. The authority of an arbitrator to resolve disputes originates directly from the arbitration agreement between the disputing parties.
13. This principle of autonomy is so pivotal within the *Arbitration Act* that the legislation strictly limits court intervention in arbitration matters. Specifically, Section 10 of the *Act* mandates that courts



- should not interfere in matters covered by the Act, except as explicitly allowed within it. This framework is designed to ensure the predictability and efficiency of arbitration proceedings.
14. In Civil Appeal No. 10 of 2015 - Geoffrey Muthinja & Another V Samuel Muguna Henry and 1756 Others, [2015] eKLR the Court underscored the necessity of exhausting the dispute resolution mechanisms outlined in the arbitration clause before seeking judicial intervention. The court emphasized that it should be considered a last resort, not the initial avenue for resolving disputes.
  15. This position is supported by jurisprudence, including the case of Blue Limited V Jaribu Credit Traders Limited, [2008] eKLR, where Kimaru J (as he then was) affirmed the obligation of Courts to respect the agreement of parties to resolve disputes through arbitration by staying court proceedings in favor of arbitration. Similarly, in Kenya Pipeline Company Limited V Datalogix Limited and Another, [2007] eKLR, Warsame, J (as he then was), highlighted the Court's duty to enforce arbitration agreements as per the contract terms, noting that preventing parties from utilizing their chosen method of dispute resolution contravenes public policy.
  16. These cases illustrate a consistent judicial philosophy that Courts should facilitate, not hinder, the arbitration process agreed upon by parties. This approach honors the contractual relationship and the explicit intentions of the parties. The Arbitration Act, being a comprehensive statute, dictates in section 10 thereof, that the Act should govern the resolution of disputes unless stipulated otherwise, thus underscoring the autonomy of parties in choosing arbitration as their preferred dispute resolution mechanism.
  17. Against this background, a cursory look at Clause 6.2 of the GCC confirms the existence of an arbitration clause. It provides for a tiered dispute resolution clause which provides firstly for mutual consultation; secondly adjudication and a last resort would be arbitration.
  18. I note that these proceedings are brought under the Civil Procedure Rules and not the Arbitration Act and therefore the best that I can do is to deal with the prayers before me as they are. Either way, it is the duty of this Court to uphold party autonomy in arbitration cases and not to circumvent the arbitration clause that parties agreed to and that the respondent signed up to. In my view, the reasons that the respondent gives for finding the arbitration clause inoperative or unenforceable should be raised within the confines of the Arbitration Act.
  19. Based on the arbitration clause and the principles governing arbitration as stated, I conclude that this Court does not possess the jurisdiction to adjudicate the dispute currently before it. The resolution of this dispute should proceed according to the agreed-upon arbitration process, respecting the autonomy of the parties and the legal framework established to support such mechanisms.

### **Determination**

20. For these reasons the application dated 24<sup>th</sup> February 2023 is allowed and the plaintiff's suit is hereby struck out with costs to the respondent. The respondent shall also have the costs of this application

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

