Abira v Maxcure Hospitals Limited (Civil Appeal E187 of 2023)
[2024] KEHC 2992 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2992 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E187 OF 2023

RE ABURILI, J

MARCH 22, 2024

BETWEEN

NIXON OMONDI ABIRA ..... APPELLANT

AND

MAXCURE HOSPITALS LIMITED ..... RESPONDENT

(An appeal arising out of the Ruling of the Honourable D.K. Mutai in the Senior Principal Magistrate's Court at Winam delivered on the 7th November 2023 in Winam PMCC No. E130 of 2023)

JUDGMENT

Introduction

1. The appellant herein Nixon Omondi Abira sued the respondent Maxcure Hospitals Limited for breach of a legal services retainer agreement dated 1st July 2022 alleging that the respondent had failed to pay the monthly retainer fees for 9 successive months and further that the respondent terminated the said agreement in lieu of notice as enshrined in the aforementioned agreement.

2. The respondent who was the defendant entered an appearance and filed a preliminary objection to the suit contending that the parties had an arbitration clause in the aforementioned agreement at clause 5 and that thus the trial court lacked jurisdiction to hear and determine the suit and ought to have referred the suit to an arbitrator/mediator.

3. The trial court heard the preliminary objection and upheld it, finding that it was divested of jurisdiction to hear and determine the suit on merit in light of the arbitration clause and proceeded to strike out the appellant's suit with costs.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 7th November 2023 raising the following grounds of appeal:

a. The learned magistrate erred in law and in fact in arriving at his ruling of 7th November 2023 by relying on the wrong principles of law.

b. The learned trial magistrate erred in law and in fact in failing to consider submissions and arguments of counsel for the appellant and in failing to consider and apply case laws cited which are precedents binding upon the court hence arrived at a wrong decision.

c. The learned magistrate erred in law and in fact in striking out the suit with costs and he had no such powers under Section 6 of the *Arbitration Act*. There is nothing in Section 6 or the entire *Arbitration Act* that allowed him to do so. Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant's counsel submitted that Section 6 of the *Arbitration Act* does not allow stay of proceedings and referral of the matter to an arbitration after a party has entered appearance. It was further submitted that the arbitration clause and the *Arbitration Act* does not divest the Court of its jurisdiction to hear and determine disputes.

7. The appellant relied on the case of *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others* [2014] eKLR, where the Court stated at paragraph 30 that:

> "... Section 6 of the *Arbitration Act* is styled in a manner that does not per se oust the jurisdiction of the court. Perhaps, I should state, it provides for delayed jurisdiction in matters subject of arbitration agreement."

8. The appellant thus submitted that the Court was not divested of jurisdiction in the matter and that therefore, the trial Magistrate's ruling should be set aside and this Honourable Court direct that the primary suit be set down for hearing.

9. The respondent did not file any submissions.

Analysis and Determination

10. Having considered the grounds of appeal and the submissions by the appellant, the issue for determination is whether this appeal has merit. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> "....this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."

11. Jurisdiction of the court is always the focal point that every court has to determine before it can begin to wade itself into settling disputes that arise between parties. Jurisdiction is so important that various

statutes have been enacted with provisions espousing which court or quasi-judicial body or authority has which jurisdiction to hear and determine which matter. Jurisdiction is a creature of the statute and the *Constitution*. Jurisdiction cannot be vested by parties and neither can the court arrogate itself of jurisdiction that it does not possess.

12. The centrality and importance of Jurisdiction has been underscored in various decisions of the Court of Appeal, as well as the Supreme Court of Kenya. In the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, the Court of Appeal stated as follows:

> "In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae." (emphasis added)

13. The Supreme Court of Kenya on its part pronounced itself as follows on the of jurisdiction in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR:

> "In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. *Halsbury's Laws of England* (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." John Beecroft Saunders in his *treatise Words and Phrases Legally Defined* Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:
>
> > "By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given". (emphasis added)

14. Earlier on, in the locus classicus case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, it was stated thus:

> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into

the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

15. Applying the above principles to this appeal, it is not in dispute that the parties herein entered into a legal services retainer agreement dated 1st July 2022. Clause 5 of the said agreement provides for arbitration as the avenue of the first instance for dispute resolution. The appellant claims that the trial court ought not to have struck out his suit. He also asserts in submission that in any case, the respondent having entered appearance in the suit, the court could not stay the suit and or refer the dispute to arbitration. he argues further that the presence of a clause on arbitration does not divest or oust the jurisdiction of the court to hear and determine the suit. He relied on the case of Nancy Mwangi t/a Worthlin Marketers (supra)

16. I will deal with the question of whether, the respondent having entered an appearance in the court below, the trial court could stay the suit and refer it to arbitration.

17. Section 6(1) of the *Arbitration Act* provides that:

> "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 the 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."

18. In *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] the Court of Appeal held that:

> "All that an applicant for stay of proceedings under Section 6(1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application Promptly. This court will be obliged to consider three things: whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there are any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration."

19. There is no doubt that there is a clause in the legal services agreement requiring parties to refer any dispute arising that thy cannot solve between themselves in good faith, to arbitration. The law requires that no other steps be taken by an applicant other than entry of appearance and filing of the application.

20. In the instant case, the respondent entered appearance and filed a preliminary objection on the grounds that the trial court lacked jurisdiction in light of the arbitration clause, to entertain any dispute arising between the parties. Accordingly, I find and hold that the preliminary objection was brought within the ambit of the law and at the right time and stage of the case.

21. The appellant has also not argued that the agreement to refer the matter to arbitration is null and void. That means the clause in the legal services retainer agreement is a valid one and a binding agreement between the parties on disputes arising from the legal services retainer agreement.

22. Courts have taken the position that they cannot purport to rewrite a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded. (See *National Bank of Kenya v Pipelastic Samkolit (K) Ltd & another* [2001] eKLR).

23. Further in *Nyutu Agrovet Limited v Airtel Networks Ltd* [2015] eKLR it was held:

> " Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporated the Arbitration agreement into their contract and at times even include the finality clause as was the case here..."

24. I observe that no application had been made by the either of parties to the dispute and suit to stay the suit and refer the matter to arbitration. However, the learned trial magistrate observed that the suit was premature at that stage and that the court was divested of jurisdiction to hear and determine the dispute.

25. Section 10 of the *Arbitration Act* provides that:

> " Except as provided in this Act, no Court shall intervene in matters Governed by the Act."

26. This section must be read together with Section 6 of the *Arbitration Act* in order to provide unassailable perspective and context of the law on this matter. I shall reproduce Section 6 of the Act here for emphasis and it provides as follows:

> " A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to the 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."

27. In the case of *Lofty v Bedouin Enterprises Ltd* – EALR (2005) 2 EA: the Court of Appeal was categorical that:

> " We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]

28. The rationale for the decision in the *Lofty case* is that an arbitration clause ought to be invoked when the Applicant enters appearance and not after the Applicant has taken any other step like filing of pleadings. The object of Section 6(1) is therefore to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.

29. On the foregoing, I must restate, however, that an arbitration clause does not necessarily take away a party's right of action in court to enforce his claim. It is also true that an arbitration clause may be nothing more than a collateral term of the contract between the parties by which a tribunal for determining disputes is provided. See *Maimuna Hassan Yusuf v Charity Mnyazi Mwarumba* [2020] eKLR.

30. Article 159 (2) (d) of the *Constitution* enjoins courts to administer justice without undue regard to procedural technicalities. The same Article obligates courts to encourage alternative dispute resolution mechanisms under article 159 (2) (c) of the *Constitution* including arbitration.

31. As was correctly submitted by the appellant advocate and as was held in the case of *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others* (supra), where the Court stated at paragraph 30 that:

> "... Section 6 of the *Arbitration Act* is styled in a manner that does not per se oust the jurisdiction of the court. Perhaps, I should state, it provides for delayed jurisdiction in matters subject of arbitration agreement."

32. Thus, the fact that an arbitration clause exists in an agreement or a contract does not necessarily oust the jurisdiction of the court from hearing and determining the suit, save that the court shall stay suit and refer the dispute for arbitration in compliance with section 6(1) of the *Arbitration Act*.

33. For the above reasons, I find that this appeal has merit. It is allowed to the extent that the order made on 7th November, 2023 striking out the appellant's suit with costs is set aside and substituted with an order reinstating the suit and staying the said suit. I further order that the dispute shall be referred to arbitration for hearing and determination of the arbitration proceedings as per clause 5 of the legal services retainer agreement.

34. Each party to bear their own costs of this appeal.

35. This file is closed and the lower court file to be returned.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF MARCH, 2024

R.E. ABURILI

JUDGE