Mukuha v Mukuha & 3 others (Civil Suit E267 of 2023)
[2024] KEHC 2693 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2693 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E267 OF 2023

FG MUGAMBI, J

MARCH 15, 2024

BETWEEN

GRACE WAMBOI MUKUHA ..... PLAINTIFF

AND

DAVID KIMANHI MUKUHA ..... 1ST DEFENDANT

LINET WAIRIMU MUKUHA ..... 2ND DEFENDANT

CHARLES SIMON MUKUHA ..... 3RD DEFENDANT

GAKIWAWA ENTERPRISES LTD ..... 4TH DEFENDANT

RULING

1. The plaintiff instituted this suit against the defendants vide a plaint dated 13th June 2023. Contemporaneously with the plaint, the plaintiff also filed a Chamber Summons application under section 7(1) of the *Arbitration Act*, 1995 and rule 2 of the *Arbitration Rules* 1997 as well as article 159(2) of the *Constitution* of Kenya, 2010. The application seeks interim injunctive orders pending the referral of the matter to arbitration.

2. In response to the application the defendants filed a Notice of Preliminary Objection dated 5th July 2023 in which they state that the 1st to 3rd defendants lack locus standi to answer to the plaintiff's case. They also aver that this Court lacks jurisdiction to entertain the suit before it as there exists an arbitration clause in the 4th defendant's Articles of Association.

3. The defendants further argue that the suit ought to have been instituted by way of a petition and not a plaint and that the plaintiff should have sought leave to institute the suit as a derivative claim. The application was canvassed by way of written submissions whereby the plaintiff's submissions are dated 9th October 2023 and the defendants' submissions are dated 25th September 2023.

Analysis

4. I have carefully considered the pleadings, written submissions and the authorities cited by rival parties. In its defense the plaintiff indicates that the application before the Court is one seeking interim relief pending the referral of the matter to arbitration. According to the plaintiff, the said application under section 7 should be anchored on a suit hence the use of a plaint.

5. The defendants have urged the Court not to grant the application as the remedies sought would interfere with the powers and mandate of the arbitral tribunal. The defendants further argue that the remedies will hinder the 1st to 3rd defendants who are shareholders and directors from carrying out their duties and also cripple the 4th defendant's conduct of business.

6. My reading of the pleadings and submissions herein is that the parties agree that there is an arbitration clause and that the dispute before the Court falls for arbitration under Clause 31 of the 4th defendant's Articles of Association.

7. This Court has emphasized time and again that where there is a clear intention by parties to have their dispute settled by arbitration, the options of intervention available before this Court are very limited. 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."

8. Likewise, in *Kenya Pipeline Company Limited vs. 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."

9. It would appear to me that the only issues are with the form of the application before the Court and the nature of the prayers sought therein. Regarding the issue of the format of the application, the Courts have held time and again that the principle which guides the Court in the administration of justice when adjudicating on any dispute is that unless there are grave reasons, as much as possible, disputes should be heard on their own merit. Errors should not necessarily dissuade a litigant from the pursuits of his right.

10. Fortunately, this view is well supported by the interdict under article 159 of the *Constitution*. I therefore concur with the observation of the Court in *Dominion Farm Limited V African Nature Stream & Another*, Kisumu HCCC No. 21 of 2006 that:

> "Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if

strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice."

11. I equally find it important to refer to the case of *Microsoft Corporation V Mitsumi Computer Garage Ltd & Another*, Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460. Ringera, J (as he then was) stated as follows:

> " Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the respondent has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue." (emphasis mine)

12. I align myself with the submissions made by the plaintiff that an application such as the one before the Court ought to be anchored on a formal suit. However, the critical inquiry then becomes whether instituting the said suit through a plaint, as opposed to a petition, constitutes a transgression so grave as to warrant its dismissal.

13. Further, whether instituting the suit by way of a plaint infringes upon the jurisdictional competence of this Court, or whether it imposes any form of prejudice upon the defendants. In my view, the answers to these questions are in the negative and as such, the issues of form do not render the application herein fatally defective.

14. I am also cognizant of the constrained discretion bestowed on this Court to engage with matters that are within the realm of an arbitration. It is incumbent upon the Court, by virtue of section 10 of the *Arbitration Act*, to resist any temptation to intrude upon the deliberations that fall within the purview of the arbitrator's jurisdiction. Consequently, this Court finds itself devoid of jurisdiction to entertain the issues pertaining to the rights of the parties as raised by the defendants.

15. Addressing the matter of interim measures, I find myself in agreement with the defendants' position that this Court's authority is confined to the issuance of interim measures, rather than the dispensation of final injunctive relief, in circumstances such as those before us. The Court of Appeal in the case of *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others,* [2010] eKLR set out the factors to be considered before issuing an interim measure of protection under section 7 of the Act.

16. The Court noted that it was incumbent upon the applicant to demonstrate the existence of assets or a status quo that warrants safeguarding in anticipation of the arbitration proceedings. Furthermore, the Court noted that Courts are obliged to ensure that any interim order issued does not prejudice a forthcoming arbitration proceeding. It is therefore imperative that this Court refrains from encroaching upon the arbitral process and maintains that substantive issues are deferred to the arbitrator's determination.

17. In further support of this, in *CMC Holdings Ltd & Another v Jaguar Land Rover Exports Limited*, [2013] eKLR this Court held as follows:

> " The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as

it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."

18. Turning to the matter before the Court, the injunctive reliefs sought are with respect to disposal of assets or dealing with properties belonging to the 4th defendant, the management of funds held in the accounts of the 4th defendant as particularized in prayer 5 of the application and the prevention of the defendants from executing a resolution dated 2nd May 2023, until the arbitration process is heard and conclusively determined.

19. The Court notes that the plaintiff has not provided any evidence leading to the apprehension that the said properties or monies are at a danger of dissipation, beyond the averments made. The plaintiff acknowledges that she is a director and shareholder of the 4th defendant and has access to the 4th defendant's affairs.

20. Even if this were not the case, the losses incurred if any, arising from the monies deposited in the various accounts by the defendants, if proved, can be remedies by way of accounts and compensated after the arbitration.

21. The Court further finds, in concurrence with the holding in *Elite Earthmovers Limited V Machakos County Government & Another*, [2020] eKLR that granting an order that impedes the functioning of the 4th defendant may not be beneficial in this cause. The Court held in that matter that:

> "...The court lacks jurisdiction to prevent the defendants from participating in the management of the 1st plaintiff since the said defendants are directors and shareholders of the 1st plaintiff. It would be a travesty of justice for the court to grant orders whose application and import would be to indorse a deliberate breach of contract by one of the parties."

Determination

22. For all the reasons that I have stated, the application dated 13th June 2023 is not successful. The same is dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE