Hamptons Hospital Ltd & another v Medileads Agencies Limited (Civil Appeal E067 of 2022) [2024] KEHC 7257 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEHC 7257 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E067 OF 2022

MS SHARIFF, J

APRIL 30, 2024

BETWEEN

HAMPTONS HOSPITAL LTD ..... 1ST APPELLANT

TUMAZ AND TUMAZ ENTERPRISES LTD ..... 2ND APPELLANT

AND

MEDILEADS AGENCIES LIMITED ..... RESPONDENT

(Being an Appeal from the ruling and order of Hon. K Cheruiyot (SPM) in Kisumu CMCC No 521 of 2019 delivered on 9th June 2021)

JUDGMENT

1. The instant appeal springs from trial magistrate's ruling dismissing the Appellant's application dated 31/1/2022 which had principally sought the striking out of the plaint and an alternative for the referral of the dispute to arbitration.

2. In the court's ruling on the application, the trial magistrate found and held that the plaint disclosed a reasonable cause of action and that there was no arbitration agreement. The court also awarded costs to the Respondent herein.

3. Aggrieved by the ruling, the Appellants moved this court vide memorandum of appeal dated 4th July, 2022 raising the following grounds;

    a. The learned trial Magistrate erred by failing to find the suit automatically abated by operation of the law when the respondent failed to take out fresh summons to accompany the amended plaint and thus arrived at an erroneous decision.

b. The learned trial Magistrate erred in finding that the arbitration clause in the LPO dated 31st October, 2018 was not binding on the Plaintiff when the Plaintiff had produced and relied on various clauses of the said LPO as the basis of its claim against the Appellants.

c. The learned trial Magistrate misdirected himself on the issue of summons to enter appearance which is a question of jurisdiction and not one of technicalities of procedure which are amenable to the malleability of Article 159 and therefore arrived at an unjust decision.

d. The learned trial Magistrate exercised his discretion injudiciously by invoking Article 159 of *the Constitution*, notwithstanding that article 159 does not cure defects on jurisdiction but only excuses undue regard to technicalities of procedure' in the interest of justice.

e. The learned trial Magistrate erred in failing to establish the jurisdiction of the court before the invocation of article 159 principle to excuse strict compliance with the technical procedure for the exercise of such jurisdiction.

f. The learned trial Magistrate erred in favouring the Respondent's evidence and submissions and ignoring the Appellant's evidence and submissions thus arriving at lopsided ruling in that;

   i. The Respondent's affidavit and submissions did not address the issue as to why it tried so hard to conceal the LPO from the honourable court.

   ii. The respondent's affidavits and submissions did not raise any compelling reason to oppose the appellant's application.

   iii. The respondent through its affidavit and submissions admitted that it did not take out fresh summons following the amendments.

   iv. The exercise of his discretion in dismissing the application was not founded on any evidence or law.

g. The learned trial Magistrate erred in trivializing the factual and legal issues raised by the Appellant.

h. The learned trial Magistrate erred in failing to consider, apply and uphold binding decisions of the court of appeal on the issue before him and thereby arrived at a wrong decision.

i. The learned trial Magistrate acted unreasonably and unfairly by delivering a ruling that is bad in law and contrary to the public policy.

4. By directions of the court, the appeal was disposed of by way of written submissions. The parties complied.

Analysis And Determination

5. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. v Associated Motor Boat Co. Ltd [1968] EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni v Kenya Bus Service Ltd. [1982-88] 1 KAR 278.

6. I have perused the application as well as the impugned ruling and it is my view that the issues for determination in this appeal are;

i. Whether the trial court erred by declining to strike out the amended plaint;

ii. Whether the dispute under review is one governed by the *Arbitration Act* and therefore ousts the jurisdiction of the court.

7. On the first issue, the Appellant deponed that the plaint disclosed no reasonable cause of action and secondly that the suit had abated for failure to be accompanied by summons to enter appearance. The trial Magistrate after considering the rival positions presented by the parties found that a prima facie case has been described, not as a case that will surely succeed, but a reasonable one has chances of success.

8. The application being one seeking striking of a suit, there are plethora of authorities on the subject which are to the effect that striking of a suit ought to be the last resort as it has the effect of driving a litigant from the seat of justice. In D.T. Dobie & Company (Kenya) Ltd. v Muchina [1982]KLR 1 at p. 9 where it was stated as follows:

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

9. Order 2 Rule 15 of the *Civil Procedure Rules* makes provision for striking of pleadings by providing that;

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> a) it discloses no reasonable cause of action or defence in law; or
>
> b) it is scandalous, frivolous or vexatious; or
>
> c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. "

10. I have equally perused the amended plaint and find that the cause of action relates to supply of goods which the appellants did not pay for. It is established that a suit which discloses no cause of action is liable for striking out however in this case, I am of the firm view that an allegation of breach of contract is a dispute that ought to be referred to arbitration pursuant to clause 17.1 of the LPO.

11. The other issue raised in this appeal is that the action contravenes the mandatory provisions of Section 10 of the *Arbitration Act* which provides;

> Except as provided in this *Act*, no court shall intervene in matters governed by this *Act*.

12. Further provisions on the applicability of arbitration are found in Section 4 of the Act which enacts;

> "(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract".

13. In the instant case, the Appellants' contention is that the arbitration clause is contained in Clause 17.1 of the Local Purchase order (LPO). This contention is opposed by the Respondent who argues that it did not sign the document or that that the clause does not amount to an arbitration agreement as contemplated by the *Act*.

14. The learned trial Magistrate indeed considered this and held that there was no evidence the LPO was executed by the respondent and therefore held that it was not binding on it.

15. I have looked at the clause 17.1 in the LPO dated 31st October, 2018 and I note that the same was acted upon wherefore the respondent is bound by the terms thereto and is estopped from pleading avoidance on grounds of being a non-signatory to the L.P.O. By performing its part of the contract as stipulated in the LPO without making any prior disclaimer, the Respondent is bound and the provisions of section 4 of the Act cannot be construed to it's advantage to the detriment of the Appellants.

16. Parties are bound by their contractual terms and obligations and it is not open for this court to rewrite the said terms of parties. This court can only entertain a matter subject to an arbitration clause when moved under the provisions of section 37 of the *Act*. (see *Tumaz & Tumaz Enterprise Ltd & Others v Amar Hardware Ltd*, Kisumu HCCA No E118/2021).

17. In the circumstances, I do find that the appeal is well merited wherefore I do hereby allow it and I make the following orders:

i. The proceedings in the in Kisumu CMCC N0 521 of 2019 are hereby stayed.

ii. The dispute between the parties is hereby referred to arbitration pursuant to Clause 17.1 of the Local Purchase Order.

18. It is hereby so ordered.

19. This file is marked as closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF APRIL 2024

M. S. SHARIFF

JUDGE