Highway Car Cushion and Upholstery Limited v Athi River Housing Company Limited & another (Tribunal Case E785 of 2023) [2024] KEBPRT 1569 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1569 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE E785 OF 2023

GAKUHI CHEGE, CHAIR & J OSODO, MEMBER

NOVEMBER 8, 2024

BETWEEN

HIGHWAY CAR CUSHION AND UPHOLSTERY LIMITED ..... TENANT

AND

ATHI RIVER HOUSING COMPANY LIMITED ..... LANDLORD

AND

ICON AUCTIONEERS ..... RESPONDENT

RULING

A.Dispute Background

1. Before us is a preliminary objection dated 27th August 2024 by the 1st Landlord/Respondent wherein it cites the following grounds: -

    i. That the Reference is incompetent, fatally defective and a non-starter for having been filed in a Court without jurisdiction and therefore offends the mandatory provisions of Sections 11 and 15 of the *Civil Procedure Act*.

    ii. That the Reference is incompetent, misconceived, bad in law and lacks jurisdictional basis as Clause 10 of the Lease Agreement dated 1st April 2021 has an arbitral clause for resolution of disputes through arbitration.

    iii. That the Reference is therefore in contravention of the arbitration clause.

    iv. That the parties are bound by Section 6 of the *Arbitration Act*,1995 [Revised 2012] to resolve dispute by way of Arbitration.

    v. That the Court has no jurisdiction to entertain the Application for grant of the interim Orders herein, such jurisdiction vests in the High Court under Section 7 of the *Arbitration Act*, 1995

[Revised 2012] and paragraph 2 of the Arbitration Rules 1998, which has not pronounced itself in this matter.

vi. That the interim orders herein are in contravention of Section 10 of the *Arbitration Act*,1995 [Revised 2012] and ought to be vacated.

vii. That the Court has no jurisdiction to entertain the Application, such jurisdiction vests in the Arbitrator under Section 17 of the *Arbitration Act*, 1995 [Revised 2012], and who is yet to be appointed in the matter.

viii. That the Application offends Article 159 of *the Constitution* of Kenya, 2010.

2. The Tenant filed its response dated 3rd September 2024 wherein it is deposed that the reference by the Tenant is competent and has a jurisdictional basis as the Lease between the Tenant and the 1st Respondent is a protected tenancy. While the Lease between the Tenant and the 1st Respondent has an arbitral clause, the 1st Respondent has allowed this Honourable Tribunal to assume jurisdiction when it filed its Notice of Appointment and response to the reference.

3. As such, any Application for stay of proceedings cannot be made after an Applicant has entered appearance or after the Applicant has filed pleadings or after an Applicant has taken any other step in the proceedings, and that the latest permissible time for making an application for stay of proceedings is the time that an Applicant enters appearance. It is therefore contended that the reference is therefore not in contravention of the arbitral clause for the 1st Respondent has willingly and deliberately allowed this Honourable Tribunal to assume jurisdiction by having filed a Notice of Appointment, having filed a response to the reference, having participated actively in the dispensation of the Tenant's application dated 15th August 2023.

4. According to the Tenant, the parties are no longer bound by Section 6 of the *Arbitration Act*, 1995 (Revised 2012) to resolve the dispute by way of Arbitration. By virtue of the conduct of the Tenant and the 1st Respondent, this Honourable Tribunal has assumed jurisdiction on the dispute and has the jurisdiction to grant any interim orders in this matter.

5. It is the Tenant's contention that the interim orders that have been granted by this honourable Tribunal are proper and there is no basis whatsoever of having them vacated. It is further contended that this honourable Tribunal has the jurisdiction to entertain any application on this matter and the reference and that the 1st Respondent missed the opportunity of having the dispute referred to arbitration when it filed a Notice of Appointment and a response to the reference and participated actively in the dispensation of the Tenant's application dated 15th August 2023. The Tenant therefore prays for dismissal of the preliminary objection with costs.

6. The preliminary objection was directed to be disposed of by way of written submissions. We have however only seen the 1st Respondent's submissions dated 10th September 2024.

7. The 1st Respondent relies on the provisions of Sections 6 & 7 of the *Arbitration Act*, 1995 and the decisions in the cases of Mukisa Biscuits Manufactruring Co. Ltd Vs West End Distributors Ltd (1969) E.a 696, Oraro Vs Mbaja (2005) Eklr, Owners Of Motor Vessel Lilian "s" Vs Caltex Oil (kenya) Ltd (1989) Eklr , Reppublic Vs Chief Registrar Of The Judiciary & 2 Others Ex-parte Riley Services Limited (2015) Eklr & Republic Vs Public Procurement Administrative Review Board Ex-parte Intertek International Limited; Accunting Officer, Kenya Bureau Of Standards & 6 Others (interested Parties) (2022) eKLR in support of the preliminary objection.

8. We have perused the court record and have observed that this matter has been litigated before this Tribunal ever since 15th August 2023. Both parties have filed a myriad of documents including a response by the 1st Respondent/landlord to the application dated 15th August 2023 and the Reference of even date.

9. Indeed, the current application was filed on the eve of hearing of the case. Among the documents filed by the 1st Respondent in this matter is a replying affidavit sworn on 5th September 2023 by Patel Ravji Lalji in response to the application dated 15th August 2023 and submissions dated 20th December 2023 together with a list of authorities of even date. There have been various court attendances by both parties during which the issue of the arbitration clause was never cited.

10. On 11th January 2024, this Tribunal delivered a ruling on the Tenant's application dated 15th August 2023 in which it granted the injunctive reliefs sought therein and no appeal was preferred against it by the Respondents.

11. The interpretation of Section 6 of the *Arbitration Act*, 1995 has been subject matter of various decisions by our Superior Courts and we only need to cite two such cases before concluding this ruling.

12. In the case of Corporate Insurance Company V Loise Wanjiru Wachira [1996] eKLR , the Court of Appeal held as follows; -

> 'In the present case, the appellant did more than just enter an appearance. It delivered a defence, which is of course a pleading, raising clause 10 of the policy as a defence. The appellant made no application for stay of proceedings. The appellant was a party to an arbitration agreement within the meaning of section 6 of the Act but Mr. Muthoga's submission before us was that because of the nature of the clause, the appellant was not bound to apply for a stay of proceedings but could raise it as a defence to the claim. Arbitration clauses such as clause 10 in the policy are known as "Scott v Avery" arbitration clauses named after a leading case decided by the House of Lords in England way back in 1856 in which their efficacy was considered and have long been accepted as valid. These clauses do more than provide that disputes shall be referred to arbitration. They also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favourable award has been obtained. While we agree with the proposition that a Scott v Avery arbitration clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence, the appellant lost its right to rely on the clause.'

13. Further in the case of Mt. Kenya University Vs Step Up Holding (k) Ltd [2018] Eklr, the High Court held as follows;-

> " In Corporate Insurance Company versus Wachira (supra) the court held inter alia that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In UAP Provincial Insurance Company Ltd Versus Michael John Beckett (supra), the court added that the current legal position with regard to applications for stay

of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the *Arbitration Act*. In the said case, the court had this to say: "16. In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part: .....

17. It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.

18. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b) to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to order an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

19. The provisions in section 6 (1) (b) of the *Arbitration Act* are similar to the provisions of Section 1(1) of the *Arbitration Act*, 1975 of England before its amendment by the *Arbitration Act*, 1996." In Adrec Limited versus Nation Media Group Limited [2017] eKLR, the court added that: "Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration" See also Eunice Soko Mlagui versus Suresh Parmar & 4 others [2017] eKLR, for similar reflections on this provision as follows;

> "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 arbitration where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to

regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration. See also the ruling of the High Court, (Gikonyo, J) in *Diocese of Marsabit Registered Trustee –vrs Techno trade Pavilion Ltd, HCCC No. 204 of 2013*. ..... The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty versus Bedouin Enterprises ltd, *CA No. 253 of 2003*, this court considered section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above 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 appearance or is made after the filing of the defence. (See also Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12, Corporate Insurance Co. versus Loise Wanjiru Wachira, *CA 151 of 1995* and Kenindia Assurance Co. Ltd versus Patrick Muturi, *CA No. 87 of 1993*)." (emphasis added)

14. Guided by the said decisions, we find and hold that the 1st Respondent having actively participated in the instant proceedings cannot now turn around and seek to rely on Section 6 of the *Arbitration Act* to argue that this Tribunal has no jurisdiction to hear and determine the instant dispute. The preliminary objection therefore has no merit and is dismissed with costs.

15. The matter shall proceed to hearing as earlier ordered.

It is so ordered

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF NOVEMBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

HON. JOYCE OSODO

(MEMBER)

In the presence of:

Maranga for the Landlord

Kipkurui for the Tenant