Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited (Interested party) (Petition E001 of 2021) [2022] KEHC 48 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation number: [2022] KEHC 48 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Petition E001 of 2021

DAS Majanja, J

January 31, 2022

IN THE MATTER OF OKOA FINANCE LIMITED

Between

Justus Murenga Wanjala

1st Petitioner

Damaris Nyabonyi Nyang'au

2nd Petitioner

Henry Peter Gathogo Kimani

3rd Petitioner

and

Registrar of Companies

1st Respondent

Western Community Health Association Limited (WECOHAS)

2nd Respondent

Charles Chunge

3rd Respondent

and

Okoa Finance Limited

Interested party

Ruling

1.Under a Shareholders Agreement dated 15th February 2018 ("the Agreement") between the 2nd Respondent (WECOHAS) and the Interested Party (OKOA), it was agreed that the two entities shall form a joint company for the purpose of providing banking services to members of WECOHAS. The company would have an initial share capital of KES 1,000,000.00 divided between WECOHAS, OKOA and other interested local parties who were not part of the Agreement. In addition to the share capital, each shareholder was obliged to give a shareholder loan to the company with WECOHAS expected to remit KES 33,000,000.00.

2.On 5th January 2021, the Petitioners, who are owners of OKOA approached the court by way of a Petition dated 15th December 2020 citing WECOHAS and its director, the 3rd Respondent for inter alia breach of the Agreement. They claim to have transferred their shares in OKOA to WECOHAS and the 3rd Respondent but that WECOHAS has never invested the KES 33,000,000.00 shareholders loan as promised in the Agreement. The Petitioners thus seek to rescind the transfer of shares, compel the 1st Respondent to rectify the records in respect of OKOA's shareholding by striking out WECOHAS and the 3rd Respondent as shareholders and restrain them from presenting themselves as shareholders of OKOA or act in any capacity as its shareholders.

3.WECOHAS and the 3rd Respondent ("the Respondents") have now approached the court with the Chamber Summons dated 24th March 2021 and made under section 6 of the Arbitration Act, 1995 and Rule 2 of the Arbitration Rules, 1997 seeking to stay these proceedings and have the dispute referred to arbitration. The application is supported by the 3rd Respondent's affidavit sworn on 24th March 2021 and opposed by the Petitioners through the 1st Petitioner's affidavit sworn on 19th June 2021. The parties have also filed written submissions in support of their respective positions.**The Application and submissions**

4.The Petitioners oppose the application for referral to arbitration. They aver that the said arbitral clause is uncertain, unenforceable and fails to provide for the method of appointment of the arbitrator. Further, that there is in fact no dispute capable of being referred to arbitration as the Respondents do not contend that they paid the consideration as per the Agreement. The Petitioners accuse the Respondents of leaving it to the court to discern the dispute which is quite undesirable in any judicial proceedings.

5.It is the Petitioners' further position that 1st Respondent is not a party to the Agreement and the issues herein cannot be effectively determined in an arbitral tribunal in its absence. Therefore, the Petitioners state that the application is misconceived, scandalous, frivolous, an utter abuse of the solemn court process and should be treated with extreme prejudice and that it is in the interest of justice that it be dismissed with costs**Analysis and Determination**

6.The Respondents' position is that Clause 14 of the Agreement contains an arbitration agreement and thus the dispute should be referred to arbitration. Their application is premised on the exhaustion doctrine which provides that where an alternative dispute resolution mechanism exists, it should be exhausted before the court's jurisdiction should be invoked (see Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR and In the Matter of the Mui Coal Basin Local Community [2015] eKLR). They urge that the principle is consistent with Article 159 of the Constitution which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect.

7.The arbitration is dependent on the existence of a dispute resolution clause in the agreement between the disputant parties which is a reflection of the role of consent as the basis of arbitration. That the

Agreement contains an arbitration clause is not in dispute. Clause 14 thereof provides as follows:This Agreement shall be governed by the substantive law of Kenya If any dispute, controversy or claim arises out of or in connection with this Agreement and/or the Subscription Agreement, or the breach, termination or invalidity thereof, the parties shall seek to resolve it on an amicable basis.They shall, if appropriate, consider the appointment of a mediator to assist in that resolution. No party shall commence legal or mediation proceedings unless 30 days' notice has been given to the other party.If the dispute cannot be resolved pursuant to Section 14.2, it shall be finally settled by arbitration administered by the applicable Court in Nairobi. The language of the proceedings (including documentation) shall be English.

8.As stated, the Respondents' application is grounded under section 6 of Arbitration Act which part material to this application provides as follows:6 (1)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 that 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.(2)……..

9.The Court of Appeal in UAP Provincial Insurance Company Ltd v Michael John Beckett NRB CA Civil Appeal No. 26 of 2007 [2013] eKLR construed section 6(1) above as follows:
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, 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 undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the 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.

10.The Petitioners, while acknowledging the existence of the arbitration clause, submit that it is inoperative and incapable of being performed as it does not provide for how an arbitrator is to be appointed. Further, that there is in fact no dispute between the parties capable of being referred to arbitration.

11.I have considered the Petition and as stated in the introductory part, the Petitioners' grievance is on alleged breach of the Agreement. The arbitration agreement provides for mediation and arbitration of any disputes arising from and in connection with the Agreement including breach. From the Petition and the Respondents' reply to the petition, I have no doubt that there exists a dispute of breach of the

Agreement that arose and revolves around that Agreement, which dispute ought to be first settled by way of mediation and if the same remains unresolved, then by way of arbitration. I say there is in fact a dispute because from the Respondents' response to the Petition, the allegations of breach are denied and the Respondents blame and accuse the 1st Petitioner of frustrating the Agreement by filing vexatious suits, operating unauthorized accounts, refusing to surrender OKOA's books for auditing, diverting members' funds and refusing to change the mandate of signatories to OKOA's bank account. This response, coupled with the allegation of fraud by the Petitioners call for an examination of evidence and demonstrates the existence of a dispute.

12.The arbitration agreement is also couched in mandatory terms that "no party shall commence legal or mediation proceedings unless 30 days' notice has been given to the other party". The dispute resolution clause contains two condition precedents before legal proceedings are taken. First, an attempt to resolve the matter amicably and second, the issue of the 30-day notice before proceeding to mediation or instituting any suit. In this case, there is no evidence that the Petitioners attempted to mediate this dispute or served a 30-day notice on the Respondents prior to instituting this suit. I therefore hold that for this reason the application is premature as was held in the case of Nanchaing Foreign Engineering Company (K) Limited v Easy Properties Kenya Ltd ML HCCC No. 487 of 2013 [2014] eKLR where the court declined to stay the suit under section 6 of the Arbitration Act where the condition precedents to arbitration had not been met. The court observed as follows:
[22]It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the Plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant's application would automatically fail as referral to arbitration would be premature.

13.The Petitioners also assail the application on the ground that the arbitration agreement is incapable of being enforced for the reason that it fails to provide for the method of appointment of the arbitrator. According to the Agreement, if mediation fails, the dispute shall be "finally settled by arbitration administered by the applicable Court in Nairobi". This clause is vague as it is not clear how arbitration is to be administered by the applicable court. How is arbitration to be administered" What is the applicable Court in Nairobi" How is the arbitrator to be appointed under the Agreement" The Respondents insist that under section 12 of the Arbitration Act, it is not mandatory for the procedure of appointing arbitrators to be part of the arbitration agreement and that the parties are free to agree on the procedure after the dispute arises. The Petitioners on the other hand maintain that the arbitration agreement is inconsistent and impractical.

14.Arbitration under the Arbitration Act is a consensual and party driven process where the parties are expected to provide for the appointment or mode of appointment of the arbitrator. The court cannot impose on the parties a particular arbitrator or a method of choosing the arbitrator. The court in Danki Ventures Limited v Sinopec International Petroleum Services Limited ML HCCC No. 158 of 2014 [2014] eKLR explained this position as follows:As alluded to earlier, the said arbitration clause appears to be incomplete as it does not specify the person who should be appointed as the Arbitrator. The Arbitration Act does not have a chairman. Therefore, even if there was a dispute that could be referred to arbitration, the party wishing to invoke the arbitration clause would not know the person who it should make an application to…. As the organization whose chairman could have appointed an arbitrator was not identified by the arbitrators, that renders the arbitral clause inoperative …. The court cannot impose on the parties either a particular arbitrator or a method for choosing the arbitrator. In the event, as the

arbitral clause is inoperative, I reject the defendant's application to refer the case to arbitration.

15.As I have stated, the Arbitration Act proceeds from the position that the arbitration process is consensual and court intervention is only necessary to assist the parties carry out their stated intention crystallized in the arbitration agreement. Hence section 12 of the Arbitration Act dealing with appointment of arbitrators, does not supplant the parties' right to appoint or prescribe the mode of appointment of the arbitrator but only sets out a default procedure for the court to intervene should the either fail to comply with the contractual provisions for appointment of an arbitrator. The court can only intervene in matters appointment if the agreement provides for appointment and either party fails to comply with the agreement. In this case, the arbitration clause does not provide for appointment of an arbitrator or process for such appointment hence the court cannot re-write the parties' agreement by taking upon itself to appoint an arbitrator.

16.While I agree that the parties intended to refer their disputes to arbitration under the Agreement, this intention was incomplete as the words from which the court derives intention are vague and unclear as to the mode and process of appointment. In conclusion, I find and hold that the arbitration agreement is vague and incapable of being enforced. Consequently, the application for stay of these proceeding pending reference to arbitration is dismissed.**Disposition**

17.The Chamber Summons dated 24th March 2021 is dismissed with costs to the Petitioners.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D. S. MAJANJAJUDGE Court of Assistant: Mr M. OnyangoKiamah Kibathi Advocates LLP for the Petitioners.Mr Situma instructed by Situma Nyongesa and Company Advocates for the 2nd and 3rd RespondentsMr Odhiambo for the Registrar of Companies