REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 276 OF 2014

EUNICE SOKO MLAGUI.....APPELLANT

AND

SURESH PARMAR.....1STRESPONDENT

P C PATEL.....2NDRESPONDENT

PRAMOD PATEL.....3RD RESPONDENT

ASHWIN PATEL.....4TH RESPONDENT

ASHWIN BROTHERS.....5TH RESPONDENT

***(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Kamau, J.) dated 20th September 2013* in HCCC NO. 348 OF 2010)**

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JUDGMENT OF THE COURT

At issue in this appeal is whether the High Court (***Kamau, J***.) erred when she dismissed an application by ***the appellant, Eunice Soko Mlagui***, for stay of proceedings and referral of the dispute between the parties in this appeal to arbitration. The learned judge held that ***section 6(1)*** of the ***Arbitration Act*** did not allow the dispute to be referred to arbitration because upon being served with summons to enter appearance by the appellant, the respondents duly and unconditionally delivered their defences to the claim. That is the conclusion that the appellant contends is erroneous and should be reversed.

Before we consider the merits of the appeal, it is apt to set out in outline its background. At all material times, the appellant, ***Suresh Parmar (1st respondent),*** and ***Rajinder K. Patel*** (who is deceased and was represented in the High Court and in this appeal by ***PC Patel*** and ***Pramod Patel***, respectively ***the 2nd*** and ***3rd respondents*****)**, were shareholders and directors of a limited liability company known as ***Software Applications Ltd*** which was wound up and deregistered in or about 2003. Thereafter the three shareholders incorporated a successor company known as ***Software Applications (Kenya) Ltd(the Company)*** in which the appellant held 32% of the shares while the other two shareholders held 43% and 25% shares respectively.

The company was in turn wound up and deregistered in or about 2007, the appellant contends, without her knowledge or consent. Subsequently a dispute arose regarding the distribution of the assets of the company to the shareholders. Convinced that the proposed distribution scheme was unfair and biased in favour her co-shareholders, the appellant, on 24th May 2010, filed a suit in the High Court praying for an order for fair distribution of the assets of the company; interest at 18% per annum from 10th December 2008, being the date of the proposed distribution scheme, until payment in full; an order for all monies belonging to the company to be deposited in an interest earning account in the joint names of the shareholders; an order for delivery to her of the audited accounts of the company for the years 2008 and 2009; and costs of the suit.

From the pleadings, the appellant did not make reference to any arbitration clause or the necessity for the dispute to be referred to arbitration; indeed, as framed, she wanted the dispute to be heard and determined by the High Court. On the same day that she filed the suit, she applied for interlocutory orders compelling the 1st, 2nd, and 3rd, respondents to furnish her with all the company's bank statements pertaining to the funds to be distributed to the shareholders; for the deposit, in a joint interest earning account in the names of all the shareholders, of all monies earmarked for distribution to shareholders; and for delivery to her of the audited accounts for the years 2008 and 2009 of a company known as ***Software Applications Uganda Ltd***. The application was heard *inter partes* and granted by ***Njagi, J***. on 3rd February 2011.

On 5th July 2012 the 1st, 2nd and 3rd respondents filed their joint defence in which they denied the appellant's claim contending, *inter alia*, that the suit did not disclose any cause of action or was otherwise frivolous and vexatious. They further contended that external auditors, on the instructions of all the shareholders including the appellant, prepared the statement of distribution of assets of the company and that all the appellant's queries were fully and satisfactorily addressed by the said auditors. Together with the defence, thethree respondents also delivered their witness statements and list of documents.

On 25th October 2012, the appellant applied for leave to amend her plaint. The proposed amendments introduced substantial changes to the plaint and prayed for additional remedies such as a declaration,a permanent injunction, and interest at commercial rates. In addition, the appellant prayed for an order joining the external auditors of the company, namely ***Ashwin Patel (the 4th respondent)*** and ***Ashwin Brothers (the 5th respondent)*** as parties in the suit. That application was granted on 14th November 2012 and among other orders, the court granted the 1st, 2nd and 3rd respondents leave to amend their defence, which they duly did on 13th March 2013. For their part, the 4th and 5th respondents, upon being joined in the suit, entered appearance on 23rd February 2013 and filed their defence on 26th April 2013. For completeness of this background, it is apt to point out that the appellant filed her witness statements and list of documents on 27th November 2012 and that even after amendment of the pleadings, there was absolutely no reference to arbitration or the arbitration clause by any of the parties.

Although it appeared at that stage that the suit was finally ready for hearing and determination by the High Court, that turned out to be a mirage because on 13th March 2013, the appellant filed the application which has led to this appeal, praying for stay of proceedings and referral of the dispute between the parties to arbitration within 21 days. The grounds on which the application was based were that the Articles and Memorandum of Association of the company contained an arbitration clause,which required any dispute or differences between the members of the company to be referred to arbitration. The appellant also contended that by dint of ***section 6*** of the ***Arbitration Act***, the court was obliged to stay the proceedings and refer the dispute to arbitration.

While the 1st, 2nd, and 3rd respondents did not oppose the application, the 4th and 5th respondents vigorously opposed the samecontending that there was no arbitration clause in force between them and the appellant or between them and the other respondents. In addition they faulted the appellant for filing suit in the High Court and allowing all the respondents to file their defences before belatedly purporting to invoke the arbitration clause. In their view the appellant's right to apply for stay of proceedings and referral of the dispute to arbitration could only be exercised upon appearance by the respondents, but before the filing of their defences, and that once the defences were filed, the court could not stay proceedings and refer the dispute to arbitration, unless with the consent of all the parties, which was not the case.

As we have already stated, the 4th and 5th respondents' arguments found favour with the learned judge who dismissed the appellant's application with costs, resulting in this appeal, which by consent was canvassed by written submissions.

For the appellant it was submitted that the learned judge erred by ignoring the appellant's further affidavit sworn on 30th April 2013 in support of the application, after holding that it introduced new and prejudicial facts, which were extraneous to the application before her. In the appellant's view, that affidavit merely responded to and clarified averments by the respondents and therefore ought to have been considered by the learned judge. Relying on the ruling of the High Court in ***Mohamed Ali Mursal v. Saadia Mohamed & 2 Others*****,*****HC Petition No. 1 of 2013***, it was contended that it was necessary for the appellant to place before the court all the relevant evidence to enable it reach a just and fair determination. By failing to consider the affidavit, it was urged, the learned judge had denied the appellant the right to be heard.

It was also argued that the learned judge should have allowed the application because the 1st, 2nd and 3rd respondents, who were the main parties to the dispute, had no objection to the dispute being referred to arbitration. We were urged to find that it was only the 4th and 5th respondents, who the appellant considered peripheral parties to the dispute, who were opposed to referral of the dispute to arbitration.

As regards the holding by the High Court that section 6(1) of the Arbitration Act did not allow referral of a dispute to arbitration after parties had entered appearance and filed defence, we were urged to find such requirement to be a mere technicality curable by ***Article 159*** of the ***Constitution*** and the overriding objective. In support of that view, the appellant relied upon the ruling of this Court in ***Stephen Boro Gitiha v. Family Finance Building Society & 3 Others, CA No. Nai. 263 of 2009*** regarding application of the overriding objective.

Lastly, relying on the ruling of the High Court in ***True North Construction Ltd v. Kenya National Highways Authority***, ***HCCC No. 164 of 2013***, the appellant argued that under ***Order 46 Rule 20*** of the ***Civil Procedure Rules***, the learned judge had unfettered discretion to refer the dispute to arbitration, even on her own motion and without the consent of the parties. The learned judge was therefore faulted in the manner in which she exercised that discretion.

The 3rd and 4th respondents opposed the appeal, contending that the ruling of the High Court was based on sound interpretation and application of the law. As regards the appellant's further affidavit, it was submitted that the same was properly ignored because it introduced new matters that were detrimental to the respondents.

On section 6(1) of the Arbitration Act, the two respondents argued that only a defendant can apply for stay of proceedings and referral of a dispute to arbitration and that the appellant was barred from invoking that provision because all the respondents had filed their defences before the appellantbelatedly filed the application for stay of proceedings and referral of the dispute to arbitration. Citing ***UAP Provincial Insurance Co Ltd v. Michael John Becket, CA No. 26 of 2007***, the 3rd and 4th respondents also contended that there was no dispute between them and the appellant that was amenable to resolution by arbitration, because they were auditors, not directors, shareholders or members of the company. In any event, they added, they did not consent to the matter being referred to arbitration as required by Order 46 rule 20 (1) of the Civil Procedure Rules.

Lastly the 3rd and 4th respondents submitted that the requirements of section 6(1) of the Arbitration Act and Order 46 rule 20 of the Civil Procedure Rules are not mere technicalities, which could be overlooked by dint of Article 159 of the Constitution and the overriding objective. Relying on ***Ayub Murumba Kakai v. Town Clerk of Webuye County Council, CA No. 107 of 2009*** they submitted that the overriding objective is not a magic wand that automatically compels the court to suspend procedural rules.

We have carefully considered the record of appeal, the ruling by the learned judge, the grounds of appeal, the submissions by learned counsel for the parties and the authorities that they relied upon. We shall first dispose of the question of the appellant's further affidavit sworn on 30th April 2013, which the learned

judge declined to consider. In the affidavit the appellant accused the 3rd and 4th respondents of winding up the company without her knowledge or authorization, which she claimed had criminal ramifications. She also accused them of distributing the company's assets in a skewed manner favourable to the 1st, 2nd and 3rd respondents and to her detriment, and of making false statements, again bordering on criminal conduct, regarding distribution of the assets of the company.

The issue before the learned judge was simply whether there was a valid arbitration clause, which, within the confines of section 6(1) of the Arbitration Act, could justify an order for stay of proceedings and referral of the dispute to arbitration. The application before the learned judge did not call upon her to determine the merits of the dispute, which is the line that the appellant was pushing in her further affidavit. In any event, the appellant readily admitted that the arbitration clause was operational as between the directors and shareholders of the company, which the 4th and 5th respondents were not. In our view, it was not necessary for the learned judge to delve into the further affidavit to determine the application before her, because the issues it raised were relevant for the determination of the actual dispute, either by the court or the arbitrator, as the case may be. We find this ground of appeal to lack any merit.

The more substantial issue is whether the learned judge erred by declining to stay proceedings and refer the dispute to arbitration in the circumstances of this appeal. There is no gainsaying that by dint of Article 159 (2) (c), courts are obliged to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, subject to the latter being consistent with the Constitution. On the same footing, Order 46 of the Civil Procedure Rules allows parties who are not under any disability, ***by consent*** to refer any dispute to arbitration. Further rule 20 of that order empowers the court, on application by the parties, or on its own motion, to adopt and implement any means of dispute resolution.

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, thepurpose of that provision is to regulate and facilitate the realisation 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 provisions, 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 ifthere 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 ***Diocess of Marsabit Registered Trustees v Technotrade Pavilion Ltd, HCCC No. 204 of 2013)***.

As amended in 2009, section 6 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) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legalproceedings in respect of any matter is of no effect in relation to those proceedings."

Prior to the 2009 amendment, the pertinent part of section 6(1) provided 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 that party enters appearance or filesany pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration..."

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 v 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) ofare satisfied, the court would still be entitled to reject an application for stay of proceedingsand 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 ***Niazons (K) Ltd v. China Road & Bridge Corporation Kenya [2001] KLR 12, Corporate Insurance Co. v. Loise Wanjiru Wachira, CA No. 151 of 1995*** and ***Kenindia Assurance Co. Ltd v. Patrick Muturi, CA No. 87 of 1993)***.

In this appeal, by the time the appellant made the application for stay of execution and referral of the dispute to arbitration, the 1st, 2nd and 3rd respondents had already filed and even amended their defence while the 4th and 5th respondents had entered appearance and filed their defences. As this Court explained in ***Charles Njogu Lofty v Bedouin Enterprises Ltd*** (supra) and***Niazons (K) Ltd v. China Road & Bridge Corporation Kenya*** (supra) section 6(1) of the Arbitration Act obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings. We are therefore satisfied that the learned judge did not err in any manner when she refused, in the circumstances of this appeal, to stay proceedings and refer the dispute to arbitration.

We also agree with the respondent that there was an additional reason why the learned judge was justified in refusing to refer the dispute to arbitration, namely the provisions of section 6(1) (b) of the Arbitration Act. In ***UAP Provincial Insurance Co Ltd v. Michael John Beckett, CA No. 26 of 2007***, this Court considered that provision and stated as follows:

"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 inquiry 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."

The arbitration clause in the Articles of Association of the company stipulated as follows:

> ***"Arbitration-Differences to be Referred Whenever any differences arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand touching on the true intent or construction or the incidents or consequences of these Articles, or the statutes, or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, or otherwise relating to the premises, or to these Articles or to any statute affecting the company, or to any of the affairs of the company, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."***

The above clause applies in the event of disputes between members and the company and between members *inter se*. It does not apply to disputes with employees like the 4th and 5th respondents, who were external auditors of the company. To that extent therefore, and as contemplated by section 6(1)(b) of the Arbitration Act, there was no dispute between the appellant and the 4th and 5th respondents, which the parties had agreed to be referred to arbitration.

While it is true that the 1st, 2nd and 3rd respondents did not object to the dispute between them and the appellant being referred to arbitration, the 4th and 5th respondents were vehemently opposed to such arbitration. The appellant, having willingly and consciously joined the 4th and 5th respondents to the proceedings, could not ask the court to severe the dispute so that one part is heard by an arbitrator and another by the court. As this Court stated in ***Niazons (K) Ltd v. China Road & Bridge Corporation Kenya*** (supra), the policy of the law disapprovesconcurrent or parallel proceedings before two or more distinct forums.

Lastly, we must point out that although under Order 46 rule 20 the High Court has discretion whether or not to refer a dispute to arbitration, that is subject to the express provisions of section 6(1) when the application for referral of a dispute to arbitration is founded on the Arbitration Act. In such a case the court cannot ignore the conditions set out in section 6(1), which must be satisfied before the dispute is referred to arbitration. Moreover, under Order 46 rule 20, subject to the requirement that the discretion should be exercised judiciously, this court will be slow to interfere with the exercise of discretion by the High Court unless it is satisfied that it misdirected itself in some matter and as a result arrived at a wrong conclusion or it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and as a result there was misjustice. (See ***Mbogo & Another v. Shah [1968] EA 93).*** This Court will not interfere merely because it may have reached a different decision if it was the one exercising the discretion.

We are not persuaded that the learned judge erred in the exercise of her discretion because she paid due regard to the conditions to be satisfied before a dispute can be referred to arbitration under section 6(1) of the Arbitration Act. With respect, the conditions set out in section 6(1) are anything but mere procedural technicalities that may be waived courtesy of the overriding objective. In ***Lamanken Aramat v. Harun Maitamei Lempaka, SC Petition No 5 of 2014*** the Supreme Court explained the limits of Article 159 of the Constitution regarding technicalities when it stated:

> ***"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the Constitution (or the law) links certain vital conditions to the power of the Court to adjudicate a matter."*** (Emphasis added).

In our view, this is one such case.

Ultimately we are satisfied that this appeal is bereft of merit and the same is hereby dismissed in its entirety with costs to the 4th and 5th respondents. It is so ordered.

Dated and delivered at Nairobi this 3rd day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR