African Service Maintenance Limited v Comarco Supply Base (EPZ) Limited & another (Civil Appeal 160 of 2019) [2022] KECA 1264 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1264 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 160 OF 2019

AK MURGOR, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 18, 2022

BETWEEN

AFRICAN SERVICE MAINTENANCE LIMITED ..... APPELLANT

AND

COMARCO SUPPLY BASE (EPZ) LIMITED ..... 1ST RESPONDENT

PURMA HOLDINGS LIMITED ..... 2ND RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Mombasa (N. Mwangi, J.) dated and delivered on 16th November, 2018 in Mombasa High Court Commercial Case No. 15 of 2018)

JUDGMENT

1. This appeal is against a ruling of the High Court dated November 16, 2018 arising out of a preliminary objection filed by the 1st respondent Comarco Supply Base (EPZ) Limited, against a suit filed by the appellant, African Service Maintenance Limited for the reason that the dispute between the parties ought to have been referred to arbitration in London, England.

2. The facts briefly were that the appellant had filed a suit dated March 7, 2018, in the High Court at Mombasa against the 1st respondent, and the 2nd respondent, Purma Holdings Limited, where it claimed damages from the 1st respondent for delay in the shipment of 21,500 metric tonnes of Non-GMO white corn (maize) from the Port of Dar-es-Salaam to the Port of Mombasa, under a charter party agreement dated October 11, 2017.

3. The appellant's grievance was that the barge that was to ferry the goods, namely Comarco 3651 broke down at Nyali Beach, Mombasa. The 1st respondent sought to commission another barge, known as Osprey K232 with a dead weight of 2,500 MT, but the appellant refused the arrangement because it would require 10 voyages to be made to transport 21,500 metric tonnes which was not cost effective.

As a result, the 1st respondent considered the charter party agreement of October 11, 2017 to have been satisfied, and declined to commission any other vessel to ferry the cargo.

4. Determined to transport the maize, the appellant entered into a second charterparty agreement with the 1st respondent dated November 2, 2017, to transport 24,000 metric tons of maize from Dar es Salaam to Mombasa on MV Voula Sea. After 21,350 metric tons was loaded, there was a delay of 10 days before the barge which resulted in further accrual of demurrage. After the consignment arrived at the Port of Mombasa on December 22, 2017, it could not be cleared due to disputes between the appellant, and the 1st respondent as to who should pay the accrued demurrage charges. The 1st respondent involved the 2nd respondent in the dispute which was to culminate in a tripartite agreement on the mode of settlement of the demurrage charges amongst other costs by the parties.

5. Notwithstanding the provisions of the tripartite agreement, the appellant claimed that neither the 1st or the 2nd respondent has fully complied with the terms of the agreement, as a consequence of which it instituted the suit against them.

6. In response, the 1st respondent filed a memorandum of appearance and a preliminary objection dated March 19, 2018 against the appellant's suit on the grounds that;

    1. "The Honourable court lacks jurisdiction to hear and determine this matter by virtue of the fact that the charterparty agreements between the plaintiff and the 1st defendant dated October 11, 2017 and November 2, 2017, respectively clearly state that the transactions therein are governed by English law and that disputes shall be settled by way of arbitration with the seat of the said arbitration being in London, England;

    2. The aforementioned charterparty agreement dated October 11, 2017 states English Law and London Arbitration as the governing law and the dispute resolution mechanism both in box 25 and in the notes to the charterparty in clause 19(a);

    3. Similarly, the aforementioned charterparty agreement dated November 2, 2017 states English law and London Arbitration as the governing law (sic) and the dispute resolution mechanism both in box 25 and in the notes to the charterparty in clause 19(a) which actively cancels out the other options in respect of jurisdiction;

    4. Further to the above, the "rider" to the charterparty agreement dated November 2, 2017 reiterates the governing law in the said charterparty agreement to be English law and the mode of dispute resolution as London Arbitration in clause 28 of the said "rider";

    5. Pursuant to the doctrine of "privity of contract" and the general rule that requires that this Honourable court upholds the intentions and bargain of the parties in respect of the aforementioned agreements, this Honourable court ought not to interfere with the parties' exclusive jurisdiction clause;

    6. Additionally, the plaintiff/applicant has not shown this Honourable court any extenuating or exceptional reason why this Honourable court should depart from the said doctrine or rule...."

7. Upon considering the parties' submissions, the trial judge, upheld the preliminary objection in part, and struck out the appellant's suit against the 1st respondent, while maintaining the dispute against the 2nd respondent.

8. The appellant was aggrieved by the ruling and filed this appeal on the grounds that; the trial court was in error in holding that the court lacked jurisdiction to hear and determine the suit between the appellant and the 1st respondent; in construing the arbitration clauses in the charterparty agreements dated

October 11, 2017 and November 2, 2017 as ousting the jurisdiction in disregard of the jurisdiction conferred by Article 165 of the *Constitution*; in upholding the 1st respondent's notice of preliminary objection, based on disputed facts; in dismissing the suit between the appellant and the 1st respondent while also sustaining the suit between the appellant and the 2nd respondent yet the claims emanated from a tripartite agreement dated December 22, 2017 where no agreement to refer disputes to arbitration existed; in failing to appreciate that the terms of the tripartite agreement superseded the charterparty agreements; in failing to appreciate that the 1st respondent had not complied with the provisions of section 6 (1) of the *Arbitration Act* No 4 of 1996 to apply to refer the dispute to arbitration at the time of filing its appearance and that therefore the 1st respondent had waived its right to refer the dispute to arbitration by filing a notice of preliminary object.

9. Both the appellant and the 1st respondent filed written submissions. The appeal came up before us on a virtual platform and learned counsel Mr Gikandi appeared for the appellant while Mr Asige represented the 1st respondent. The 2nd respondent did not participate in the appeal.

10. Highlighting the appellant's submissions, Mr Gikandi begun by submitting that the trial court had jurisdiction to hear and determine the suit before it notwithstanding the reference to arbitration, since the High Court's jurisdiction did not flow from a contract executed by parties but from the *Constitution*. Counsel further submitted that the preliminary objection challenging the jurisdiction of the court, required the trial court to evaluate the facts, and to ascertain whether to rely on the charterparty agreements or the tripartite agreement, which ascertainment of facts meant that the preliminary objection did not meet the threshold of a preliminary objection as set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors [1969] EA 696*.

11. Further, counsel argued, by executing the charter party agreement dated November 2, 2017, the appellant and the 1st respondent abandoned the earlier charter party agreement which demonstrated that they intended to change or vary the contract terms; that the tripartite agreement which did not have an arbitration clause incorporated the appellant, 1st respondent and the 2nd respondent, whose disputes could not be dissected or determined separately. It was asserted that under Articles 47, 48 and 50 of the *Constitution*, the appellant has a right to approach the court to enforce the tripartite agreement and it was wrong for the court to turn them away from the seat of justice.

12. Finally counsel submitted, the learned judge failed to find that the 1st respondent had waived its right to refer the dispute to arbitration, when it not only sought to strike out the suit on account of jurisdiction, but went beyond the ambit of section 6 of the *Arbitration Act*, 1995, in failing to have the dispute referred to arbitration; that section 6 (1) of the Act requires that a party files an application for stay of proceedings, "...not later than the time that party enters appearance to the action..." the 1st respondent entered appearance on March 19, 2018 and did not seek to have this dispute stayed or transferred to an arbitrator as provided for in the Act.

13. On his part, Mr Asige submitted that the appellant voluntarily entered into the subject agreements with the 1st respondent which stated in the General Conditions, in Clause 19(a) and in Clause 28 of the rider to the charterparty agreement that any dispute will be resolved by way of arbitration; that the appellant was attempting to disregard established common law principles under Contract law to avoid the arbitration provisions by asserting that the High Court has 'unlimited' jurisdiction under the current Constitution.

14. It was submitted that the preliminary objection by the 1st respondent objected to the jurisdiction of the High Court, and further the whole contract entered into by the appellant and the 1st respondent was not in dispute, and neither were clauses pertaining the arbitration; that the High Court correctly

determined that it had no jurisdiction to hear and determine the dispute between the appellant and 1st respondent and rightly struck out the suit between them.

15. We have considered the appeal, the parties' submission and the law. The question for our determination is whether the learned judge properly exercised her discretion to allow the preliminary objection, or whether this Court should interfere with that decision because the trial court misdirected itself or acted on matters on which it should not have acted or failed to take into consideration matters which it should have taken into consideration, and by so doing arrived at a wrong conclusion. See *Mbogo v Shah [1968] EA 93*.

16. Bearing the aforegoing in mind, we consider that the question in this case turns on whether the High Court had jurisdiction to hear and determine the parties' dispute owing to the requirements of section 6 of the *Arbitration Act*, or whether, the existence of the arbitration provisions of the two charter party agreements between the appellant and the 1st respondent dated October 11, 2017 and November 2, 2017 ousted the court's jurisdiction; or whether by virtue of the existence of a tripartite agreement dated December 2, 2017, the parties disputes should be settled by the courts in Kenya.

17. In addressing the jurisdiction of a court in the case of Owners and Masters of *The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367*, this Court expressed itself thus;

> "The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

18. In the instant case, the trial court found that the two charterparty agreements provided for arbitration as the mode of settlement of the parties' disputes under the agreements. And in so finding, the court determined that it lacked jurisdiction to hear the dispute between the appellant and the 1st respondent. The appellant nonetheless argued that, the 1st respondent had not complied with the requirements set out in section 6(1) of the *Arbitration Act*, and instead had filed a memorandum of appearance together with a preliminary objection, thereby waiving its right to have the dispute referred to arbitration. Section 6 of the Act stipulated that;

> "(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."

19. The import of the above section is to set down a procedure for referring disputes to arbitration, where suit is instituted in court yet, the contract in question provides for arbitration. It specifies that where it is asserted that the proceedings are subject to an arbitration agreement, such party shall enter appearance and simultaneously with that, apply for stay of proceedings of the suit, "...not later than the time when the party enters appearance, or otherwise, acknowledges the claim against which the stay of proceedings is sought." Then, rule 2 of the Arbitration rules 1997 states that, "Applications under section 6 and 7 of the Act shall be made by summons in the suit". Further, under order 51 rule 1 of the *Civil Procedure Rules 2020*, all applications to the court shall be by motion and shall be heard in open court unless the court directs otherwise.

20. In other words, the 1st respondent was required to file, by way of notice of motion an application for stay of proceedings, pursuant to which the dispute would require to be referred to arbitration.

21. This Court citing the case of *Fairlane Supermarket Limited v Barclays Bank Limited Nai HCCC No 102 of 2011* with approval in the case of *Adrec Limited v Nation Media Group Limited [2017] eKLR* stated thus;

> " In the case of *Corporate Insurance Company v Wachira (1955-1958) 1 EA 20*, it was held that if the appellant had wished to invoke the clause, it ought to have applied for stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost the right to rely on the arbitration clause by filing a defence..."

And in the case of *Yooshin Engineering Corporation v AIA Architects Limited [2020] eKLR* this Court observed that;

> " ... the appellant filed a Notice of Preliminary Objection on grounds as stated earlier. The appellant went beyond the scope of existence of an arbitration agreement as the basis for urging the court to find and hold that it had no jurisdiction to determine the matter...For the trial court to determine all the issues raised in the preliminary objection, it had to consider the substance and propriety of the suit. By so claiming, the appellant had submitted itself to the jurisdiction of the court and was estopped from challenging the same, having tasked the court with the responsibility of looking into the substance and merits of the claim..."

22. In the instant appeal, the 1st respondent filed a memorandum of appearance and simultaneously with that, filed a notice of preliminary objection, instead of applying to stay the proceedings. The effect of the 1st respondent's preliminary objection was to compel the court to evaluate the facts, so as to discern, whether between the charterparty agreements and the tripartite agreement, it had jurisdiction to hear the suit.

The court stated;

> " ... there is no doubt in my mind that the terms of the charter parties between the plaintiff, and the 1st defendant have no ambiguity on the forum they want to resort to in the event of a dispute between them with regard to carriage of the maze in issue. The contestation

herein with regard to the PO raised (sic) if the plaintiff and the 1st defendant are bound by the contract giving rise to the suit to refer the dispute to arbitration…"

The court discerned that;

> " The agreement between the 2nd defendant was not governed by the charterparties but by the tripartite agreement. As such any losses that the 2nd defendant incurred as against the plaintiff and vice versa can only be actionable in a separate suit between the plaintiff and the 2nd defendant. The plaintiff should have resorted to arbitration to resolve the dispute between it and the 1st defendant".

23. The preliminary objection as filed required the court to go above and beyond the scope of the *Arbitration Act* and the arbitration agreements to arrive at a finding that it had no jurisdiction to hear and determine the suit, with the result that, not only did the objection compromise the 1st respondent's right to rely on the arbitration clause, it also failed to meet the threshold enumerated in Mukisa Biscuit Manufacturing Co Ltd (*supra*).

24. Essentially, by the asking the court to delve into the substance and merit of the dispute to determine its preliminary objection, the 1st respondent had subjected itself to the jurisdiction of the court, and having done so, it was estopped from challenging the court's jurisdiction.

25. It is also worthy of note that the 1st respondent was also a party to the tripartite agreement and by denying the appellant the right to ventilate the dispute arising from the tripartite agreement against the 1st respondent, the trial court denied it the right to be heard.

26. It is evident that the learned judge did not appreciate that by failing to adhere to the requirements of section 6 of the *Arbitration Act* and filing the preliminary objection, the 1st respondent had conceded to the jurisdiction of the court, and therefore, the court ought not to have struck out the appellant's claim against the 1st respondent. On this basis, we find it is necessary to interfere with that decision.

27. In sum, the appeal is merited, and is allowed with costs to the appellant, and we make the following orders;

    1. The appellant's suit against the 1st respondent in Mombasa High Court Commercial Case No 15 of 2018 be and is hereby reinstated. The suit to be determined by another judge of the High Court other than N Mwangi, J.

    2. Costs to the appellant.

    It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER, 2022.

A K MURGOR

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JUDGE OF APPEAL

P NYAMWEYA

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JUDGE OF APPEAL

J LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR