



REPUBLIC OF KENYA



**Gitau & another v Stepwise INC & another (Commercial Case E176 of 2022)
[2023] KEHC 24655 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E176 OF 2022**

MN MWANGI, J

MAY 26, 2023

BETWEEN

CAROLINE WANJIKU GITAU 1ST PLAINTIFF

SHIRISH LILADHAR SHAH 2ND PLAINTIFF

AND

STEPWISE INC 1ST DEFENDANT

CHRISTOPHER SCOTT HARRISON 2ND DEFENDANT

RULING

1. The defendants filed a Notice of Motion dated 10th June, 2022 brought under the provisions of Article 159 of the *Constitution* of Kenya, 2010, Sections 2 and 6 of the *Arbitration Act*, the *Arbitration Rules*, 1997, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and all other and further enabling powers and provisions of the law. The defendants seek the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. That this Honourable Court be pleased to refer the dispute herein for resolution in strict compliance with the dispute resolution mechanism set out under Clause 16(d) of the Stock Restriction Agreement executed between the parties herein; and
 - iv. That this Honourable Court be pleased to stay any/all proceedings in this suit pending the exhaustion of all the dispute resolution mechanisms available to the parties under Clause 16(d) of the Stock Restriction Agreement.



2. The application is premised on the grounds on the face of it and is anchored on a supporting affidavit and a further affidavit sworn by Christopher Scott Harrison, the 2nd defendant herein and the 1st defendant's director on 10th June, 2022 and 30th June, 2022, respectively. In opposition thereto, the plaintiffs filed a replying affidavit sworn by Caroline Wanjiku Gitau, the 1st plaintiff herein.
3. The instant application was canvassed by way of written submissions. The defendants' submissions were filed by the law firm of Walker Kontos Advocates on 5th July, 2022 whereas the plaintiffs' submissions were filed on 5th July, 2022 by the law firm of Saluny Advocates LLP.
4. Mr. Omino, learned Counsel for the defendants relied on the provisions of Order 13 of the Civil Procedure Rules, 2010, and the Court of Appeal decision in the case of *Research International East Africa Ltd v Julius Arisi & 123 others* – C.A 321 of 2003 (Nai) cited with approval by the Court in the case of *Epharaim Mbae & others v Gilbert Kabere M'mbijiwe & 2 others* [2007] eKLR and submitted that in the absence of written authority as required by the law, the 1st plaintiff cannot purport to swear any affidavits on behalf of the 2nd plaintiff. That in the absence of an affidavit by the 2nd plaintiff in opposition to the instant application, the application ought to be deemed unopposed by him and allowed as prayed against him.
5. The defendants' Counsel referred to the provisions of Article 159 of the *Constitution* of Kenya, 2010 and stated that the instant application is anchored on the provisions of clause 16(d) of the Stock Restriction Agreement entered into by the parties herein. He stated that the said dispute resolution clause applies to this case since the plaintiffs have filed the instant suit in an attempt to enforce their right to be bought out as shareholders of the 1st defendant, which right, and the corresponding duty of the 1st defendant to buy out the plaintiffs is founded on the Stock Restriction Agreement. He submitted that the circumstances that would trigger such a buy-out are set out at clauses 2, 3, 4, & 5 of the Stock Restriction Agreement, whereas the formula and mode of calculation of the buy-out price is contained at clause 6 of the said Agreement.
6. Mr. Omino stated that at paragraphs 6, 7 & 8 of the plaint, the plaintiffs admit that their claim is premised on the stock repurchase option provided for in the Stock Restriction Agreement, and that the only prayer sought by the plaintiffs in the plaint is an order that their shares in the 1st defendant company be bought out at a sum of USD. 118,750. He submitted that the determination of whether the plaintiffs have a right to be bought out and if so at what price, can only be determined with reference to the Stock Restriction Agreement.
7. Mr. Omino referred the Court to the case of *Burn Manufacturing USA LLC v Sage South Africa (PTY) Limited* [2020] eKLR and submitted that having determined that the Stock Restriction Agreement is applicable to the dispute herein, the dispute ought to be referred for determination in accordance with the provisions of the said Agreement. He stated that even if the Court were to find that the Stock Restriction Agreement does not apply in the circumstances of this case, the purported Stock Purchase Agreement referred to by the plaintiffs in support of their case has a similar dispute resolution provision at clause 12.10.
8. Mr. Saluny, learned Counsel for the plaintiffs submitted that Order 1 Rule 13 of the Civil Procedure Rules, 2010 should only be strictly applied at the point of institution of a case and in respect to verifying affidavits. He stated that in this case, the 2nd plaintiff swore a separate verifying affidavit hence the question of authority to appear, plead, or act for him does not arise. The plaintiffs' Counsel referred to the case of *Peter Onyango Onyiego v Kenya Ports Authority* [2004] eKLR and stated that the affidavit in question was filed in response to the instant application, and it is confined to facts within the knowledge of the 1st plaintiff as stipulated under Order 19 Rule 3(1) of the *Civil Procedure Rules*, 2010. He stated that the 1st plaintiff rightfully swore the replying affidavit herein on behalf of the 2nd



plaintiff. He nevertheless stated that even assuming that the 2nd plaintiff has not filed a response to the application herein, this Court would still be called upon to hear and determine the said application on merits, on the strength of the response filed by the 1st plaintiff.

9. Mr. Saluny asserted that although the 2nd defendant is a director of the 1st defendant, he is not in his personal capacity a party to the Stock Restriction Agreement he seeks to enforce therefore, as a stranger, he cannot apply for a stay of proceedings and the enforcement of the alternative dispute resolution clause in the Stock Restriction Agreement. To this end, Counsel relied on the case of *Chevron Kenya Limited v Tamoil Kenya Limited* [2007] eKLR, where the Court held that only a party to the arbitration agreement has the right to apply for a stay of proceedings.
10. He submitted that the dispute herein is not within the scope of the Alternative Dispute Resolution (ADR) clause sought to be enforced by the defendants for reasons that the plaintiffs have a claim against the 2nd defendant who is not a party to the Stock Restriction Agreement, and the plaintiffs fault the defendants for fraud and breach of contract. Mr. Saluny contended that the plaintiffs being shareholders of the 1st defendant are aggrieved by the actions taken by the defendants to conceal the 1st defendant's assets in Daproim Africa Limited and the threatened bankruptcy proceedings which they have not been duly notified of. In submitting that the above issues do not arise under the Stock Restriction Agreement and that there is no mutual consent to refer the said dispute to ADR, Mr. Saluny relied on the case of *UAP Provincial Insurance Company Ltd v Michael John Becket* [2013] eKLR.
11. He stated that although the plaintiffs accuse the defendants of failing to follow through on the stock repurchase, they have not expressly sought a declaration that the defendants have breached the Stock Restriction Agreement. It was stated by Mr. Saluny that the 1st defendant purports to have initiated mediation/arbitration proceedings but no dispute declaration has been issued to the plaintiffs to enable them and this Court fully appreciate the exact provisions of the Stock Restriction Agreement that the 1st defendant relies on. He contended that the documents annexed to the 2nd defendant's affidavits do not specify the dispute or specific provisions of the Stock Restriction Agreement or any other agreement that it is premised on.
12. Mr. Saluny submitted that the defendants have not adhered to the procedure for applying for an order for stay of proceedings as provided for under Rule 2 of the Arbitration Rules, 1997 which states that an application under Sections 6 and 7 of the Act shall be made by Summons in the suit. He contended that the application herein having been brought vide a Notice of Motion is fatally defective and it should be dismissed.

Analysis And Determination.

13. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the plaintiffs and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the application herein is fatally defective having been filed vide a Notice of Motion;
 - ii. Whether the 1st plaintiff rightfully swore the replying affidavit on record on behalf of the 2nd plaintiff; and
 - iii. If the instant application is merited.
14. In the affidavit filed by the defendants they deposed that the dispute herein relates to the defendants repurchase option under the Stock Restriction Agreement entered between the plaintiffs and the 1st defendant, and as such, the said dispute falls within the scope of the dispute resolution clause



set out under clause 16(d) of the Stock Restriction Agreement which clause is valid and capable of enforcement. They averred that they are ready and willing to participate in the dispute resolution mechanisms therein hence these proceedings should be stayed and the dispute referred to, be dealt with in accordance with the said clause.

15. The plaintiffs in their replying affidavit deposed that they entered into a Stock Restriction Agreement dated 24th March, 2020 with the 1st defendant which gave the latter an irrevocable option to repurchase all its capital shares held by them at fair market value, as agreed by the parties, or determined by appraisal, in the event that the 1st plaintiff ceased to be employed by the 1st defendant or Daproim Africa Limited for any reason.
16. They averred that as shareholders of the 1st defendant, their cause of action is not anchored of the Stock Restriction Agreement dated 24th March, 2020 thus the arbitration clause therein is inapplicable. They indicated that they only pleaded the details of the Stock Restriction Agreement so as to give this Court context. It was stated by the plaintiffs that it is not disputed that the 1st defendant is about to commence bankruptcy proceedings in the United States of America, and it is in the process of disposing of its shares in Kenyan companies including Daproim Africa Limited.
17. They asserted that Daproim Africa Limited is still a going concern and the intended transfer of all the shares held by the defendants to the Management of the company is meant to defeat their stake in the 1st defendant. In addition, that the threatened bankruptcy proceedings are a calculated move by the defendants to avoid acquiring for value the capital shares held by the plaintiffs. It was the plaintiffs' contention that they ought to have been notified of any intended bankruptcy proceedings by the 1st defendant and any resolution by it to dispose of its assets/shares in various companies since they remain shareholders of the 1st defendant as they are yet to receive consideration for the share repurchase.
18. The plaintiffs stated that from the plaint, it is evident that they are neither seeking to enforce the Stock Restriction Agreement herein nor asking this Court to make an order discharging them from their obligations. Therefore, the instant application is only meant to delay their quest for justice and embarrass the process of this Court.
19. In a rejoinder, the defendants deposed that whereas the 1st plaintiff alleges to have sworn the replying affidavit on her own behalf and on behalf of the 2nd plaintiff with his authority, no such authority has been exhibited, therefore it can be concluded that the 2nd plaintiff does not oppose the instant application.
20. They averred that the plaintiffs are unequivocal about the application of the Stock Restriction Agreement to this dispute at paragraphs 6 and 7 of the plaint. In addition, that the 1st plaintiff admitted at paragraph 8(c) of her replying affidavit that the plaintiffs' claim is based on the failure on the part of the defendants to follow through with the Stock repurchase. They deposed that the plaintiffs' entire claim is hinged on the provisions, rights and duties set out in the Stock Restriction Agreement and any dispute arising therefrom, should be adjudicated in accordance with the dispute resolution mechanism set out under the said agreement.
21. The defendants stated that they have already initiated the dispute resolution mechanism process as provided for under the Stock Restriction Agreement, thus the plaintiffs ought to be ordered to comply with the said process. Further, that the purported Stock Purchase Agreement also has a similar word for word dispute resolution clause at clause 12.10 of the said agreement.



Whether the application herein is fatally defective for having been filed vide a Notice of Motion.

22. The instant application has been brought under the provisions of Section 6 of the Arbitration Act. Rule 2 of the Arbitration Rules, 1997 provides that–

“Applications under sections 6 and 7 of the Act shall be made by summons in the suit”

23. It is evident that the defendants ought to have filed an application by way of a Chamber Summons instead of a Notice of Motion. This Court has to determine whether the said shortcoming renders the application fatally defective.

24. Courts are called upon to do substantive justice for the parties by giving effect to the overriding objective of Sections 1A and 1B of the Civil Procedure Act in the interpretation of its provisions and Rules which include; the just determination of the proceedings; efficient disposal of the dispute; efficient use of available judicial and administrative resources, and the timely disposal of the proceedings at a cost affordable to the respective parties. To this end, I am guided by the Court of Appeal holding in the case of Stephen Boro Gittha v Family Finance Building Society & 3 others [2009] eKLR, where it was held that –

“The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way... I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”

25. Based on the above decision, this Court finds that the fact that the defendants moved the Court through a Notice of Motion instead of Chamber Summons, affects the form rather than the substance of the application, since the information contained in the instant application would remain the same even if the defendants were to move the Court vide a Chamber Summons. For this reason, it is my finding that this issue is one of procedural technicality provided for under Article 159(2)(d) of the Constitution of Kenya, 2010, thus not a fatal error.

Whether the 1st plaintiff rightfully swore the replying affidavit on record on behalf of the 2nd plaintiff.

26. It is not disputed that at paragraph 2 of the plaintiffs’ replying affidavit to the application herein, the 1st plaintiff stated that she had been authorized by the 2nd plaintiff to swear the said affidavit on her behalf however, the said authority has not been exhibited.

27. Order 1 Rule 13 of the Civil Procedure Rules, 2010 states that –

“1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any



one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

- 2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

28. The defendants contended that in as much as the 1st plaintiff alleges to have sworn the replying affidavit on her own behalf and on behalf of the 2nd plaintiff with his authority, no such authority has been exhibited and it can be concluded that the 2nd plaintiff does not oppose the instant application. The plaintiffs on the other hand submitted that the provisions of Order 1 Rule 13 of the *Civil Procedure Rules*, 2010 strictly apply only at the point of institution of a case and in respect to verifying affidavits.

29. As per the provisions of Order 1 Rule 13 of the *Civil Procedure Rules*, 2010, the 1st plaintiff ought to have exhibited written authority from the 2nd plaintiff authorizing her to swear the replying affidavit herein on his behalf regardless of the fact that she is deponing to facts that are within her knowledge. In the case of *Abdulla Absbir & 38 others vs. Yasmin Farah Mohamed* [2015] eKLR, the Court when faced with a similar situation as is in this instance stated as follows –

“From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead or act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority properly signed by the party giving the authority, must be filed in the proceeding.”

30. The said Court further held that –

“On the other hand, in paragraph 1 of the Supporting Affidavit the 1st Applicant states that he is authorized by the rest of the Applicants to swear the Affidavit on their behalf. Whilst there is no requirement in applications that authority to swear Affidavits be in writing or be filed, I think that there having been no original authority signed and filed as relates the suit, that averment is not adequate and is of no consequence. It cannot save the position of the rest of the 37 Applicants who never swore any Affidavit in support of the application. Accordingly, their application is hereby struck out.”

31. In this case, there is no evidence of the filing of an original authority signed by the 2nd plaintiff as relates to the instant suit. The plaintiffs submitted that the 2nd plaintiff swore a separate verifying affidavit hence the question of authority to appear, plead, or act for him does not arise. My finding is that the 1st plaintiff cannot purport to swear the replying affidavit herein on behalf of the 2nd plaintiff in the absence of a written authority.

32. I agree with the Counsel for the defendants that in the absence of a written authority and/or a replying affidavit by the 2nd plaintiff in opposition to the instant application, the application as against the 2nd plaintiff is deemed to be unopposed. Nevertheless, this Court has to determine the instant application on merits as the 1st plaintiff did file a replying affidavit in her own right.

If the instant application is merited.

33. Section 6 of the *Arbitration Act* No. 4 of 1995 states as follows –

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 legal proceedings in respect of any matter is of no effect in relation to those proceedings.”
34. The Court’s obligation on being moved under the above provisions has been the subject of numerous Court decisions. In [Niazsons \(K\) Ltd v China Road Bridge](#) [2001] KLR it was held that-

“All that an applicant for a stay of proceedings under section 6 (1) of the [Arbitration Act](#) of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:

- a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
 - b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - c. Whether the suit intended concerned a matter agreed to be referred to arbitration”
35. In the instant application, it is not in dispute that the plaintiffs and the 1st defendant entered into a Stock Restriction Agreement dated 24th March, 2020. It is also not disputed that the 2nd defendant was not a party to the said agreement, therefore he cannot move the Court for an order of stay of proceedings, and/or an order for referral of the dispute to arbitration in his personal capacity. The 1st defendant being a party to the said agreement, is however at liberty to move the Court under Section 6 of the [Arbitration Act](#). Since the instant application has been brought not only by the 2nd defendant but the 1st defendant as well, it is properly before this Court.
36. In [UAP Provincial Insurance Company Ltd v Michael John Beckett](#) (supra), the Court of Appeal when dealing with a similar issue held as follows-

“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 (sic) 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:

.....



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....

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...”

37. On whether there is a dispute between the parties herein, on perusal of the plaint, it is evident that the plaintiffs’ case is that vide a Stock Purchase Agreement dated 28th February, 2020, they sold their respective shares in Daproim Africa Limited to the 1st defendant for a disclosed consideration of both cash and stock, with the stock being 50,000 shares of common stock of the 1st defendant. Subsequently, the plaintiffs and the 1st defendant got into a Stock Restriction Agreement dated 24th March, 2020, which gave the 1st defendant an irrevocable option to repurchase all its capital shares held by the plaintiffs in the event that the 1st plaintiff ceased to be employed by the 1st defendant or Daproim Africa Limited for any reason.
38. The plaintiffs contended that the 1st plaintiff resigned from all her positions with the 1st defendant and Daproim Africa Limited and thereafter, the 1st defendant invoked the provisions of the Stock Restriction Agreement by exercising its option to repurchase the shares held by the plaintiffs. As a result, the 2nd defendant initiated negotiations with the plaintiffs leading to a draft Stock Repurchase Agreement dated 14th February, 2022, where it was agreed that the 1st defendant would repurchase the said shares at USD. 118,750.00. The Stock Repurchase Agreement was executed by the plaintiffs signaling their acceptance of the terms therein. The plaintiffs asserted that to date, they are yet to receive a duly executed copy of the said agreement from the defendants and the 1st defendant is yet to settle the negotiated purchase price for the stock re-purchase.
39. It was stated by the plaintiffs that the 1st defendant is about to commence bankruptcy proceedings in the United States of America and it is also in the process of disposing of its shares in Kenyan companies. In addition, it was stated that the 1st defendant intends to transfer for free all its shares in Daproim Africa Limited to the Company’s Kenyan management team, in a bid to defeat the plaintiffs’ stake in the 1st defendant. They further stated that the defendants’ actions are a calculated move to avoid acquiring for value the capital shares held by the plaintiffs, who remain shareholders of the 1st defendant as they are yet to receive consideration for the said share re-purchase.
40. From the above summation, it is apparent that there is a dispute between the 1st defendant and the plaintiffs, as the 1st defendant is yet to settle the amount due to them. It is worth noting that in the plaint, the plaintiffs are seeking judgment against the defendants for the sum of USD. 118,750.00 together with interest among other orders. The plaintiffs have prayed for judgment in the sum of USD. 118,750.00, which is due and owing to them pursuant to the Stock Repurchase Agreement dated 14th February, 2022. It is this Court’s finding that the allegation of breach of contract referred to by the plaintiffs at paragraph 11 of the plaint is in relation to the said agreement. Additionally, I find that it cannot be said that there is no dispute capable of being dealt with through ADR.



41. Turning to whether the aforementioned dispute is with regard to matters agreed to be referred to ADR, I have perused the Stock Restriction Agreement and it is evident that clause 16(d) provides for an ADR mechanism, a fact which is admitted by all the parties herein. The said clause states in part that–

“...The parties shall use their best efforts to amicably settle any dispute arising under or relating to this agreement. If informal negotiations among the parties fail to resolve the dispute, the dispute shall be submitted to mediation. Within 30 days after either party refers a dispute to mediation, the parties shall agree upon an impartial mediator experienced in commercial law, and upon a procedure and schedule for (1) exchange of information related to the dispute, and (2) conducting the mediation. Unless otherwise agreed, the mediation shall be conducted in Wilmington, Delaware using a mediator certified by the Delaware Superior Court. If a mediation fails or if any party so chooses, the parties agree to settle the dispute by binding arbitration administered by a single arbitrator, in accordance with the International Arbitration Rules published by the International Centre for Dispute Resolution. Accordingly, each party irrevocably waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this agreement to the extent permitted by law. If the parties are unable to agree on the arbitrator within 30 days of the first date when a party gives notice of the identity of a proposed arbitrator, the arbitrator shall be appointed pursuant to the rules. The arbitration shall be conducted in Wilmington, Delaware...”

42. The plaintiffs’ case is that the dispute herein is not within the scope of the provisions of clause 16(d) of the Stock Restriction Agreement for reasons that they have a claim against the 2nd defendant who is not a party to the said agreement, and that the case against the defendants herein is for fraud and breach of contract. More specifically, by initiating a process to conceal the assets of the 1st defendant in Daproim Africa Limited, the threatened bankruptcy proceedings, and failure to follow through on the stock re-purchase.

43. The defendants on the other hand contend that the dispute herein is within the scope of clause 16(d) of the Stock Restriction Agreement since the plaintiffs have brought the suit herein in an attempt to enforce their right to be bought out as shareholders of the 1st defendant which is founded on the Stock Restriction Agreement more specifically, clauses 2, 3, 4, 5 & 6.

44. From this Courts’ analysis, the genesis of the dispute herein is the Stock Restriction Agreement dated 24th March, 2020 between the plaintiffs and the 1st defendant, where the 1st defendant bought the plaintiffs’ stock at Daproim Africa Limited in both cash and stock, with the stock being 50,000 shares of common stock of the 1st defendant which constituted 10% of the issued and outstanding shares of the 1st defendant. Thereafter, the 1st defendant invoked its right to re-purchase the said stock from the plaintiffs in accordance with clause 3 of the terms of the Stock Restriction Agreement. As a result, parties engaged in negotiations and they agreed on a purchase price of the said stocks. The plaintiffs stated that to date, they have not been paid the agreed purchase price of their stock in the 1st defendant and the defendants are engaging in activities that are meant to defeat the plaintiffs’ stake in the 1st defendant.

45. It is my finding that the cause of action and/or the dispute herein arises out of and/or relates to the Stock Restriction Agreement dated 24th March, 2020 therefore, it falls within the scope of clause 16(d) of the said agreement reproduced hereinabove. It is trite that parties are bound by the terms of their agreement. The parties herein voluntarily agreed to subject their disputes to ADR mechanisms and



as a result, waive their right to a trial. They cannot now be seen to run away from the terms of their agreement.

46. It is not disputed that the plaintiffs did not even at the very least attempt to comply with the provisions of clause 16(d) of the Stock Restriction Agreement dated 24th March, 2020 before opting for the Court process. I find that clause 16(d) is binding to the parties herein and this Court cannot depart from the clear intentions of the parties. Further, Article 159(2)(c) of the Constitution mandates this Court to promote alternative forms of dispute resolution including mediation and arbitration. It is my finding that the dispute herein is with regard to matters agreed to be referred to arbitration.
47. In the result, I find that the application dated 10th June, 2022 is merited. I allow it in the following terms –
- i. This Court hereby refers the dispute herein for resolution in strict compliance with the dispute resolution mechanisms set out under clause 16(d) of the Stock Restriction Agreement executed between the parties herein;
 - ii. This Court hereby stays all proceedings in this suit pending the exhaustion of the dispute resolution mechanisms available to the parties under clause 16 (d) of the Stock Restriction Agreement; and
 - iii. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Omino for the defendants/applicants

Mr. Wekesa h/b for Mr. Saluny for the plaintiffs/respondents

Ms B. Wokabi – Court Assistant.

