



Board of Trustees, National Social Security Fund v Sokomania Limited (Civil Suit E149 of 2022) [2023] KEHC 21827 (KLR) (Civ) (15 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E149 OF 2022**

JWW MONG'ARE, J

AUGUST 15, 2023

BETWEEN

**THE BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY
FUND PLAINTIFF**

AND

SOKOMANIA LIMITED DEFENDANT

RULING

1. On April 1, 2022 the plaintiff filed a plaint seeking for judgment for Kshs 26,770,689/- being rent arrears due and owing from the defendant as at September 2020. The plaintiff also sought for interest from September 1, 2020 to April 1, 2022 for Kshs 5,934,169.40/- plus interest at commercial rated and costs thereto.
2. The defendant entered appearance and on October 3, 2022 filed an application seeking to have the matter stayed and the parties referred to arbitration to resolve their disputes therein in accordance with the Car Park License Agreement. At the same time, the Deputy Registrar, on application by the plaintiff on October 3, 2022, entered judgment in default of defence against the defendant. Thereafter and on October 27, 2022, the defendant applied to the court to stay the execution of the said judgment and set it aside to allow the matter to proceed to arbitration, as earlier sought in its application of October 3, 2022.
3. The plaintiff has filed its grounds of objection to this application dated October 31, 2022. Both parties put in written submissions and attended court to orally highlight the same. I have listened to the arguments put forth by the parties herein and carefully considered the two applications filed by the defendant herein, on October 3, 2022 and October 27, 2022 respectively. I have also carefully considered the grounds of opposition filed by the plaintiff to the said applications. I will consider the said applications sequentially and in reverse order. On the application filed on October 27, 2022



the defendant is urging the court to vacate the judgment in default of defence. I note from the pleadings that the defendant upon being served with the plaint herein entered appearance and filed the application dated October 3, 2022 seeking to have the matter referred to arbitration.

4. The plaintiff argues that as a result of the judgment herein this court is *functus officio* and is therefore bereft of jurisdiction to entertain any further applications from the parties. The plaintiff in their submissions extensively sought to demonstrate why this is so. The applicant argues that the dispute between the parties was a result of a Car Park License Agreement and that the said car park license agreement contained an arbitration clause mandating disputes arising from the same to be referred to arbitration and that by the application filed on October 3, 2022, on the same date the court entered judgment in default filing a defence, the applicant had sought for the court to stay these proceedings and refer the entire suit to arbitration. The defendant has now moved the court seeking to stay the execution of the judgment herein and send the matter to arbitration.
5. The plaintiff in opposing this application has argued that the court has no jurisdiction to make any other orders in this case. That once judgment was entered by the court, what was left for the defendant was to appeal the said judgment and not to attempt to have the same set aside.
6. I have considered the rival arguments by both parties. The issue that the court needs to determine is whether entry of judgment in default of a defence effectively ousts its jurisdiction. From a perusal of the pleadings herein, the judgment herein was entered before the defendant could file its defence but after entering appearance in the matter. I note from the pleadings that the defendant had at the same time filed an application to refer this matter to arbitration in accordance with section 6 of the [Arbitration Act](#), which provides 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”
7. In addition to the above clause ousting the jurisdiction of the court once the matter has been referred to arbitration, I have also considered what is meant by a court being *functus officio*. [Black’s Law Dictionary](#) 11th edition defines the term *functus officio* as follows:-

“having performed his or her office; an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

From my evaluation of the facts herein the judgment herein having been a default judgment entered while the defence was actively making efforts to refer the matter to arbitration cannot be deemed to be



a judgment on merit. In any event, order 51 rule 15 of the Civil Procedure Rules allow a court to relook at such a default judgment and make appropriate orders when moved to do so by a party. order 51 rule 15 provides that “The court may set aside an order made ex parte.” It is my considered view that the jurisdiction of this court has not been ousted as the judgment entered herein was done so ex-parte and without the benefit of considering the interim application seeking to at the same time send the matter to arbitration. I also note that the period taken by the defendant to apply to have the same set aside was considerably short in the circumstance and I am persuaded that this application was not brought with inordinate delay. I therefore find that the application to set aside is successful and I shall allow the same.

8. Simultaneously as the court was entering judgment in default of a defence, the defendant filed on the October 3, 2022 filed an application seeking to have the dispute referred to arbitration. The defendant cited the arbitral clause 13 contained in the license agreement that provided as follows;

“Any dispute arising out of or in connection with this lease shall be referred to arbitration with a single arbitrator to be appointed by the agreement between the parties or in default of such agreement within fourteen(14) days of the notification of a dispute by one party to the other upon the application of any party, by the chairman for the time being of the Kenya Branch of the Chartered Institute of arbitrators. Such arbitration shall be conducted in Nairobi in accordance with the provisions of the Arbitration Act (1995) or any modification or substitution thereof, to the extent permissible by law, the determination of the Arbitrator shall be final and binding upon the parties”.

9. Section 6 (1) of the Arbitration Act cited above requires a court faced with an application to stay the proceedings and refer the matter to an arbitrator to do so. It appears that the Deputy Registrar while entering the default judgment in this matter did not consider the application and proceeded as if the court had not been moved or at all. Courts have over time held that the intention of parties to a contract must be maintained. Courts have maintained that parties to a contract determine how the same should be treated by the terms and conditions they put into the same. Justice Mativo(as he then was) in the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (2021)eKLR while reinforcing the principle that courts should give effect to the arbitration clause stated that:-

“Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the readers understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and understanding of this purpose will influence the way in which one interprets the language.”

I agree entirely with the opinion of the court in the said matter and I am therefore persuaded that in the matter before me, the parties intention was to resolve disputes arising from the said Car Park License Agreement through arbitration. They have settled under the said clause 13 on the seat of the arbitration being, Nairobi Kenya and the mode of appointment of a sole arbitrator, if parties do not mutually agree. I therefore find and hold that the said application of October 3, 2022 has merit and I shall allow the same as prayed.

10. In conclusion and from the above findings, both applications herein succeed with costs of these applications granted in favour of the defendant against the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF AUGUST 2023



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J. W. W. MONG'ARE

JUDGE

In The Presence Of

Eredi for Decree Holder/Respondent.

Omboki for the Defendant.

Sylvia- Court Assistant

