REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 235 OF 2019

GOURMET MEATS PRODUCERS & IMPORTERS LTD............PLAINTIFF/RESPONDENT

VERSUS

PAUL LAINAN NKINA..DEFENDANT/APPLICANT

RULING

1. The plaintiff herein **Gourmet Meats Producers and Exporters Limited**, sued the defendant through the plaint dated 24th November 2016 seeking the following orders: -

> ***a) A refund of the deposit paid amounting to Kshs 4,424,000.00.***
>
> ***b) Costs of improvements amounting to Kshs 4,393,156.00.***
>
> ***c) Loss of profits on investment of Kshs 15,600,000.00.***
>
> ***d) Interest on bank Loan amounting to Kshs 4,418,844.00.***
>
> ***e) Interest on (a), (b) and (c) above at court rates until payment in full.***
>
> ***f) Damages for breach of contract.***
>
> ***g) Costs of this suit plus interest thereon.***
>
> ***h) Any other relief that this Honourable court may deem fair and just to grant.***

2. The plaintiff's case is a money claim emanating from an agreement with the defendant for the purchase of the Defendant's land parcel No. Kajiado/Kitengela/30152 at an agreed price of Kshs 7,700,000. The plaintiff contends that the defendant however failed to honour its obligations under the contract thus occasioning it loss and damage.

3. The defendant filed a defence together with a Notice of Preliminary Objection (P.O.). The preliminary objection is on the grounds that there exists an arbitration clause in the parties' agreement, in which case, this court lacks the jurisdiction to entertain the suit. In a rejoinder the plaintiff opposed the Preliminary Objection on the ground that the defendant lost his right to challenge the court's jurisdiction the moment he filed his defence to the plaintiff's claim.

4. Parties canvassed the Preliminary Objection, which is the subject of this ruling, by way of written submissions which I have considered. The main issue for determination is whether the Preliminary Objection is merited. *What constitutes a Preliminary Objection is set out in the case of* ***Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd*** **(1969) EA 696,** *where it was held that:*

> ***"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration… a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be***

ascertained or if what is sought is the exercise of judicial discretion."

5. I find that the P.O. is well grounded as it based on uncontested facts and challenges the jurisdiction of the court to hear and determine the dispute. It was not contested that the parties herein had an agreement that contained an arbitration Clause which means that the parties opted for arbitration as the port of the call in the event of a dispute arising between the parties over the subject agreement. It was also not disputed that the defendant herein filed a defence to the plaintiff's claim.

6. Section 6(1) of the Arbitration Act (hereinafter "the Act") stipulates as follows: -

> ***"6. Stay of legal proceedings***
>
> ***(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."***

7. The import of the above section was discussed in ***Mt Kenya University v Step Up Holding (K) Ltd*** [2018] e KLR as follows: -

> ***"In Corporate Insurance Company versus Wachira (supra) the court held inter alia that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings."***

8. In ***Eunice Soko Mlagui v Suresh Parmar & 4 Others*** [2017] e KLR it was held; -

> "***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 the that extent. In Charles Njogu Lofty v Bedouin Enterprises Ltd, CA No. 253 of 2003, this court considered Section 61 and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and 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."***

9. Guided by the pronouncements made in the above cited cases and a reading of Section 6(1) of the Act it is crystal clear a defendant who wishes to take on the plaintiff for stay of proceedings pending referral of dispute to arbitration must do so not later that at the time that it enters appearance and before delivering any further pleading.

10. In the present case, I note that the defendant not only delivered a pleading, to wit, a preliminary objection before Environment and Land Court, but also went further to file a defence before this court after filing its Memorandum of Appearance.

11. In my considered view and guided by the above cited authorities, the filing of the statement of the defence by the defendant amounted to acknowledgement of the plaintiff's claim and the court's jurisdiction.

12. In ***Diocese of Marsabit Registered Trustees v Technotrade Pavillion Ltd*** [2014] eKLR it was held: -

> "***By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such a section 6(1) of the Arbitration Act forfeits his right to apply for and have proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right to the other party from availing itself of the judicial process of the court. With that understanding, a delay of fourteen (14) days becomes unreasonable in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail."***

13. For that above reasons, I am not persuaded that the defendants Preliminary Objection is merited and I therefore dismiss it with orders that costs shall abide the outcome of the main case.

Dated, signed and delivered via Microsoft Teams at Nairobi this 27th day of May 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Mawia for Ms Athman for Plaintiff/Respondent.

Mr. Mutahi for Macharia for Defendant/Applicant

Court Assistant: Sylvia.