REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 226 OF 2019

TRANSMARA SUGAR COMPANY LIMITED.....APPELLANT

-VERSUS-

LUKE OTIENO OUMA.....RESPONDENT

(Being an Appeal From The Ruling and Order of Hon.

M. Wachira Senior Resident Magistrate Migori dated and delivered

on the 27th day of November, 2018 in Migori CMCC No. 334 of 2018)

JUDGMENT

This is an appeal by Transmara Sugar Company Limited, the appellant herein, against the ruling and order of Hon. M. Wachira, Senior Resident Magistrate Migori dated and delivered on 27/11/2018 in Migori CMCC No. 334 of 2018.

In the instant appeal and main suit, there are a total **seventy - one (71) plaintiffs/respondents**. The respondents filed the following appeals;

Appeal Nos.

223,198,240,201,236,200,187,197,230,185,202,183,219,194,189,204,199,195,251,184,209,239,249,214,225,188,196,208,238,242,232,213,245,222,247,207,237,246,212,205,191,193,227,241,211,210,228,229,217,203,218,181,182,186,190,234,224,215,250,243,216,221,235,206,220,233,248,192,231, and 244 all of 2018.

Pursuant to the directions taken on 10/7/2019 by Hon. Mrima J, it was agreed that **Migori HCCA No. 226 of 2018 Transmara Sugar Company Limited vs Luke Otieno Ouma** shall be the lead file in this appeal and the decision arising therefrom shall apply to all the other appeals.

By a Notice of Motion dated 17/09/2018, the appellant through the firm of **Leina Morintat & Company Advocates** sought the following orders;

a. That the proceedings in this suit be stayed pending hearing and determination of the claims therein through Arbitration between the parties as provided in the Sugarcane Growing and Supply No. 0013482 dated 5/04/2010.

b. That the dispute between the parties and/or the course of action in this suit be referred to Arbitration.

c. That the defendant/ applicant be at liberty to apply for such further or other orders and direction as court may deem fit and just to grant in the circumstances.

The application was anchored on seven (7) grounds and a supporting affidavit sworn by Rajesh Bhargava on even date. The grounds of the application which are restated in the supporting affidavit can be summarised into the following **four (4) grounds: -**

i. That there exists a valid and legally binding arbitration agreement between the parties;

ii. That the arbitration proceedings were at all times envisaged by the parties as a first and last resort in the event of a

dispute.

iii. That the plaintiff/respondent brought the suit prior to the invocation and/or exhaustion of the arbitral proceedings.

iv. That the defendant/applicant is ready, willing and able to proceed without undue delay, to arbitration on any dispute arising between the parties as stipulated in the agreement.

The application was opposed. The respondent herein filed **five (5) grounds** of opposition opposing the prayers sought by the appellant as follows;

i. That the interlocutory application has not been set aside that could give room to this instant application.

ii. That the Arbitration Clause 9.1 in the agreement has got no and/or lacks mandatory word occasioning the arbitration of the dispute between the parties herein. The clause is amorphous, and this court cannot step into the applicant's shoes to aid such amorphous clause.

iii. That it is trite law that a party seeking to take a case out of the court's hands is void in all circumstances.

iv. That jurisdiction of this Honourable Court can only be ousted by an Act of Parliament as such the Contract Act is not an Act of Parliament.

v. That the application is an abuse of the court process.

The trial court delivered its ruling on the appellant's notice of motion application dated 17/9/2018 on 27/11/2018 dismissing the appellant's application with costs. The learned trial Magistrate made a finding that the application was premature as long as there was an interlocutory judgement entered against the defendant. The orders applied to the other seventy (70) suits filed. It is the impugned ruling which gave rise to the present appeal.

The appellant filed a Memorandum of Appeal dated 24/12/2018 and evenly filed. The appellant preferred and relied on the following **five (5) grounds**;

1. The learned Magistrate erred in law and fact in holding that the appellant ought to have applied to set aside the interlocutory Judgement before seeking a referral of the matter to arbitration.

2. That the learned Magistrate erred in law and fact by applying Section 6 of the Arbitration Act wrongly.

3. That the learned Magistrate erred in law and fact by departing from the authorities he relied as precedence hence arriving at an erroneous decision.

4. That the learned Magistrate erred in law and in fact by misapplying, misinterpreting and misanalysing the evidence and the law hence arriving at a wrong finding.

5. That the learned Magistrate erred in law and in fact in holding that in the event the matter is referred to Arbitration there is a possibility of an award and interlocutory Judgment existing at the same time hence causing difficulty in execution.

Based on the above grounds, the Appellant prays for the following orders;

a) That the appeal herein be allowed.

b) That the ruling dated 27/11/2018 delivered by the learned Magistrate be set aside and the application dated 17/09/2018 therein be allowed with costs.

c) Costs of this appeal be awarded to the appellant.

Directions were taken that the appeal be canvassed by way of written submissions which both parties complied.

APPELLANT'S SUBMISSION

Learned Counsel Mr. Morintant filed submissions on behalf of the appellant dated 13/11/2019 and filed on 14/11/2019 and further submissions dated 15/03/2021 filed on 16/03/2021.

The appellant submitted that parties herein entered into a written agreement dated 16/10/2018 where the parties agreed to refer any dispute arising therefrom to arbitration. A dispute did arise, and the respondent commenced court proceedings before exhausting the arbitral process.

The appellant made an application before the trial court seeking stay of its proceedings, pending referral of the case to arbitration which was dismissed. The appellant submitted **four (4) issues** of determination as follows;

1. Whether failure by the appellants to make an application to set aside the interlocutory judgement before making the application for stay was fatal to the appellant's case.

2. Whether there existed a legally binding arbitration agreement between the parties.

3. Whether the arbitration proceedings were at all times envisaged by the parties as a first and last resort in the event of a dispute.

4. Whether the respondent had exhausted the arbitral process before coming to court.

On the first issue, the appellant submitted that by declining to grant a stay order of the proceeding pending arbitration, the learned Magistrate failed to appreciate that arbitration issues are contractual in nature. The appellant relied on **Article 159 (1) of the Constitution of Kenya** which provides for alternative dispute resolution mechanism and **Section 6 (1) of the Arbitration Act** which the appellant submitted that the Magistrate erred in law by contravening it.

Further reliance was placed on the case of **Niazsons (K) Ltd vs China Road & Bridge (2001) eKLR** where the court held inter alia 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 threefold 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."

The appellant contends that although it failed to make an application to set aside the interlocutory judgement before making the stay application, the same could not be used as a ground to dismiss the said application.

It is trite law that parties are bound by the terms of their contract and that the mutuality of agreements of parties on arbitration as the choice of forum is evidenced by contracting parties.

The parties herein are bound by the terms of the agreement dated 05/04/2010 and particularly Clause 9. The terms were mandatory that parties were to solve their disputes via arbitration as their first and last resort.

In conclusion, the appellant submitted that the learned Magistrate made an erroneous finding that if the parties went to arbitration the court would be in a situation where both the award and the interlocutory judgement would be in force.

The appellant submitted that a referral to arbitration would mean that the application for stay proceedings would have been allowed hence proceedings of the court shall not be continued. Reliance was placed on the case of **Niazsons (K) Ltd vs China Road Bridge Corporation (supra)** where it was held;

"it is therefore my view, and I so hold, that section 6(2) of the Arbitration Act, 1995, does not permit parallel proceedings to be handled simultaneously.'

On the issue raised by the respondents that the Tribunal is not gazetted, the appellant submitted that the issue was well settled in **Migori High Court Civil Appeal No. 85 of 2018** in which the court held that the arbitration committee is still validly in place despite change of regime.

In its supplementary submissions, the appellant reiterated its earlier submissions and submitted that **Section 6(2) of the Arbitration Act, 1995** does not permit parallel proceedings. The reference to arbitration would automatically amount to stay of proceedings in the lower court hence no lacuna in the law.

The appellant further submitted that if it filed an application to set aside first and then followed by the application for referral to arbitration, the jurisdiction to refer the matter to arbitration would have been ousted as was stated by **Hon. Mrima J in Migori High Court Civil Appeal No. 85 of 2018**.

The appellant concluded by referring to the Court of Appeal in the case of **John Oriri Nyandaro vs Transmara Sugar Company Limited** which held that the agreement between the appellant and the respondent is valid and operational and that parties must adhere to it.

The appellant prayed the court finds that the appeal is merited and award costs to the appellant.

RESPONDENT'S SUBMISSIONS

The appeal was opposed. The respondent filed his submissions dated 01/01/2020 on 12/02/2020 and further submissions dated 07/12/2020 on 09/12/2020.

The respondent briefly submitted that the trial Magistrate did not err in giving orders that interlocutory judgement ought to have been set aside which can only be done before filing the stay application. The appellant had not attempted to set aside the interlocutory judgement.

The respondent also submitted that it is trite law that the court will not allow a party to flout the Rules of Procedure as was held in the case of **Mwangi Mbotha & Others vs Gachira Waitima & Others Civil Application No. 233 of 1993.**

The respondent submitted that the appellant skipped the procedure of setting aside the interlocutory judgement because it had to comply with the test of setting aside the judgement by showing the following:-

i. There exists a meritious defence (draft defence).

ii. Prejudy and

iii. Explanation for delay.

In his further submissions, the respondent reiterated his earlier submissions erroneously indicated as dated 17/01/2020. The respondent urged the court to uphold the finding of the trial court that the appellant ought to have first set aside the interlocutory judgement and thereafter cause an application to stay the proceedings and refer the matter to arbitration.

The respondent urged the court to be persuaded by the findings in **Migori High Court Civil Appeal No. 110 of 2019 Sukari Industries Limited vs Ezra Odondi Adero where Hon. Mrima J** held that;

"Magistrates court have got jurisdiction to deal with sugar cane disputes on breach of contract subject to settled jurisdictional limitations in law for instance pecuniary jurisdiction of courts."

Analysis and Determinations

This court has carefully read and understood the grounds of appeal, the Record of Appeal, the parties' submissions as well as the authorities relied upon. The issues

That emerge for determination are as follows;

i. Whether there is an Arbitration Agreement between the parties.

ii. Whether the Interlocutory Judgement ought to have been set aside.

iii. Whether the court can grant the orders sought.

i. Whether there is an Arbitration Agreement between the parties.

It is not in dispute that all the plaintiffs/respondents on one side and the defendant/appellant herein entered into Sugar Cane Agreements on diverse dates (hereinafter **"Agreement.")**

Clause 9.1 and 9.2 of the Agreement provided as follows:-

"All questions or differences which at any time hereafter arise between the parties hereto touching or concerning this Agreement or the construction hereof or as to the rights, duties and obligations of either party hereto or as to any subject matter in any way arising out of or connected with the committee of five people comprising:-

a) The District Officer in whose area land on which the cane supply contract relates is situated.

b) One person representing the Kenya Sugar Board.

c) One nominee of the Transmara Sugar Company Limited

d) One nominee of the Transmara Out growers Company Limited

e) The Divisional Agricultural Officer of the area where the cane in question is situated or in his absence an Agricultural Officer holding the rank of Divisional Agricultural Officer or above appointed by the District Agricultural Officer for that purpose.

9.2 The District Officer shall preside over the meeting of this Arbitration Committee.

Section 3 of the Arbitration Act No. 4 of 1995 defines an arbitration agreement as;

> ***"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."***

From clauses 9.1 and 9.2 of the agreement, it is not in doubt that parties intended to refer their disputes to arbitration. The clear intention of the parties was to oust the jurisdiction of the court and refer any dispute arising from the agreement to arbitration.

Indeed, the respondent in his submissions, does not deny or rather dispute the existence of a valid arbitration agreement between the parties. Further in paragraph 15 of his plaint the respondent pleaded:

> **"the plaintiff in vain invited the defendant to a Committee to arbitrate the dispute and upon refusal, the plaintiff issued a demand notice which the defendant did not honour hence this suit."**

In the spirit of Article **159 (2) (c) of the Constitution of Kenya 2010** which provides as follows: -

> **(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**
>
> **"(c) alternative forms of dispute resolution including reconciliation mediation, arbitration and traditional dispute resolution mechanisms shall be promoted…."**

The court shall respect the wishes of the parties to seek an alternative form of dispute resolution. I therefore find that there existed arbitration agreements between the parties.

ii. <u>Whether Interlocutory Judgement ought to be set aside.</u>

By a plaint dated 20/01/2018 filed on 18/06/2018, the respondent prayed for judgement against the defendant for: -

> **i. General damages for the 3 cycles respectively.**
>
> **ii. Costs of the suit.**
>
> **iii. Interest on (a) and (b) above at the present court rates.**
>
> **iv. Any other relief deemed fit to be granted in this circumstances of this suit.**

There is a return of service on record sworn on 13/8/2018 by **Walter Juma Opiyo** evidencing that summons to enter appearance and the pleadings were served upon the appellant on 13/7/2018. Together with the return of service, the respondent filed a request for interlocutory judgement. Subsequently, on 27/8/2019 interlocutory judgement was entered against the defendant.

Order 6 Rule 1 of the Civil Procedure Rules provides as follows:-

> **"Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons."**

From the summons on record, the time prescribed for the appellant to enter appearance was within **fifteen (15) days** from the date of service. The appellant entered appearance on 11/9/2018 approximately **three (3) months** after the date of service. In the circumstances, the respondent was within his right to apply for the interlocutory judgement.

The consequences of non - appearance is well stipulated under **Order 10 Rule 6 of the Civil Procedure Rules 2010;**

> ***"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgement against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be."***

Concurrently with the memorandum of appearance, the appellant filed an application seeking stay of the proceedings by virtue of the agreement signed between the parties which provided that disputes be referred to arbitration.

Section 6(1) of the Arbitration Act provides for stay of proceedings where a matter is to be referred to arbitration.

> ***"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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined."

The trial court dismissed the application for stay on grounds that there was a pending interlocutory judgement; that the instant application was premature and instead the appellant ought to have demonstrated through an application to set aside the said judgement that it was entered irregularly. Setting aside of judgments is provided for under Order 10 Rule 11 CPR as follows;-

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

Clearly, setting aside of an interlocutory judgement is an exercise of the court's discretion. The word ***may*** set aside is used. To set aside a regular default judgement, like in this case, the court has the discretion to consider the following grounds

1. Reasonable explanation for the delay in filing the memorandum of appearance or defense see Prime Bank Ltd v Paul Otieno Nyamodi (2014) eKLR.

2. If the defendant shows that he has a reasonable defence see Kingsway Tyres & Automart Ltd v Rafiki Enterprises Limited CA 22/1995.

3. The court will exercise its discretion to set aside if injustice or hardship will result and if the respondent be compensated in terms of costs see Shah v Mbogo (1967) EA 116.

In Pithon Waweru Maina v Thuka Mugiria (1983) eKLR, while considering other decisions stated in part;

"…The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can be reasonably compensated by costs for any delay occasioned should be considered and finally, I think it should be the last resort of the court and because it is a discretionary power, should be exercised judiciously…"

By failing to apply to set aside the interlocutory judgement, the court was denied an opportunity to consider the above principles established whether there were good grounds for setting aside the interlocutory judgement.

The pendency of any judgement which has not been set aside, would only mean the decree - holder is at liberty to execute as they deem fit. The resultant aftermath of arbitration proceedings is an arbitral award which is capable of execution. In the absence of setting aside the interlocutory judgement, the respondent would have two different awards which they can execute in different forums. This is contrary to **Section 6 (2) of the Arbitration Act** which prohibits parallel proceedings before the court and arbitral tribunal.

I am duly guided and persuaded by the findings of the Court of Appeal in **West Mont Power(K) Ltd v Kenya Oil Company Ltd C.A. 154/2003,** the Court of Appeal held:-

"...We would emphasize strongly that it was incumbent upon the Learned Judge to allow the application for referral to arbitration dated 13th March 2002 to be heard on its merits and that could only be possible if the exparte judgment was vacated."

This court agrees with the findings of the learned trial Magistrate that the interlocutory judgement ought to have been vacated in the first instance before proceeding with the stay application.

In the alternative and in the best interest of saving judicial time, the appellant should have included the prayer of setting aside the interlocutory judgement in its application for stay and have the parties ventilate the issues at once.

It is the view of this court that in the absence of a formal application challenging the jurisdiction of a court, the court can only proceed with a matter as it has been filed before it.

Although it has been held that a court can address the issue of its jurisdiction ***suo moto,*** **(See Pacis Insurance Limited vs Mohamed F. Hussein MSA HCC 92 of 2015 (2017) eKLR and Farmers Choice Company Limited v Dorleen Anyango Wasinga & another (2015) eKLR)**; the matter before the trial court proceeded ***ex parte*** since the appellant failed to enter appearance within stipulated timelines.

There was nothing else that the trial court would have done apart from proceeding with the party before it. Even if the trial court were to address the issue of its jurisdiction and appreciated the presence of an arbitration agreement, the trial court could not have referred the respondent to arbitration alone in the absence of the appellant. The court could not pronounce itself in favour of a party who had not entered appearance and who perhaps was not keen on the arbitration procedure.

Equity comes to the aid of the vigilant and not the indolent. The appellant is the author and tailor of its own misfortune by failing to enter appearance on time and failing to make the necessary application for setting aside of the interlocutory judgement with the full knowledge that parties had agreed to refer any dispute to arbitration.

Finally, the respondent submitted that the appellant ought to have annexed a defence to its application. I respectfully disagree with Learned Counsel's proposition.

In Court of Appeal at Nyeri **Civil Appeal No. 75 of 2017 ADREC Limited vs Nation Media Group Limited the Court of Appeal held:-**

> ***"Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the Arbitration Act. It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position." (emphasis mine).***

In **Civil Suit No. 410 of 2013 Africa Spirits Limited vs Prevab Enterprises Limited Hon. G.K. Kimondo J** held as follows:-

> ***"What section 6 requires is the defendant to file the summons to refer the matter to arbitration at the earliest: that is, at the time he enters an appearance in the matter. If the defendant files a defence first before filing the summons for stay, he would run afoul of the Act and be deemed to have resigned his fate to the jurisdiction of the court." (emphasis mine).***

I see no reason why the appellant ought to demonstrate that they have a meritious defence while parties had agreed to proceed by arbitration ousting the jurisdiction of the court.

The upshot is that:-

1. **The appeal is devoid of merit.**

2. **The Ruling and Order of the Honourable Magistrate dated 27/11/2018 is upheld.**

3. **Costs of this appeal is awarded to the respondent.**

4. **This judgment applies to the 70 other related matters listed at paragraph 2 of this judgment.**

DATED, SIGNED and DELIVERED at MIGORI this 29th day of June, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Ms. Apondi holding bief Mr. Monwant for the Appellant.

Mr. Jura holding brief Mr. Odongo for the Respondent.

Nyauke Court Assistant