



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL CASE NO. 4 OF 2020**

**PREMIER HOME & PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**NAIVAS LIMITED .....DEFENDANT**

**RULING**

1. This ruling disposes of the application dated 28<sup>th</sup> February, 2020, brought pursuant to section 6 of the Arbitration Act, 1995, Rule 2 of the Arbitration rules, 1997, Order 7 rule 1 of the Civil Procedure rules, 2010 and sections 3A and 63 (e) of the Civil Procedure Act. The application seeks an order referring this matter to arbitration in terms of the lease agreement between the parties; that parties appoint an arbitrator within 30 days after the order and, in default, the President of the Law Society of Kenya appoint an arbitrator to settle the dispute between the parties.
2. The application is premised on the grounds on its face and on the applicant's affidavit sworn on even date. The grounds are, that; the respondent, the registered owner of parcel No. Ngong/Ngong/2/269, leased the building to the applicant to operate a supermarket for a period of 10 years from 1<sup>st</sup> August, 2012. The applicant has been operating a supermarket for the last 8 years with a clientele of about 2000 shoppers daily until sometime in October, 2019 when the National Government commenced construction of the Kiserian–Ngong Town road which passes next to the supermarket. The road was excavated resulting into blocking access to the supermarket and caused it to lose business and had to close down the shop.
3. According to the applicant, the respondent is to blame for constructing the building close to the road and without leaving a buffer zone for smooth access to the shop. The lease agreement has therefore been frustrated by lack of proper access to the suit premises and the issue is whether it is entitled to terminate the lease and whether it is liable to pay rent for the unexpired period amounting to Kshs. 52, 306, 053.20.
4. In the affidavit sworn by Evelyne Njeri Wanjau, she reiterated the facts and the grounds of the face of the application. She deposed that blocking access to the premises affected the business and flow of customers which is about 35%, and attempts to engage the respondent were futile. This left the applicant with no choice but to close down.
5. The respondent filed a replying affidavit by Jane Wangui Maina and filed on 27<sup>th</sup> April, 2020 opposing the application. She deposed that the application does not disclose any dispute within the meaning of the arbitration clause for arbitration and that it should be dismissed and proceedings allowed to proceed.
6. The deponent admitted that the premises were leased to the applicant and that the premises were customized as per the applicant's request to conform to its needs for purposes of operating a supermarket store and outlet. She further deposed that the applicant requested for a 10 year fixed term with no termination clause.
7. According to the respondent, the lease had been running smoothly until 31<sup>st</sup> December, 2020 when the applicant terminated it prematurely and that there had never been a dispute in respect to the lease or at all. She deposed that the allegations on the manner in which the premises were built long after entering into the lease and post termination of the lease was a new argument that did not qualify as a dispute. She denied that the respondent had been engaged by the applicant over the issue.
8. The deponent stated that the applicant had suffered loss of Kshs. 52, 670, 434. 35 as a result of the applicant's premature termination of the lease and the suit is for recovery of the that amount. In the deponent's view, the reason advanced for termination, namely, road rehabilitation, is neither provided for nor contemplated by the lease. In any case, the applicant had recourse against the relevant road authority on whose behalf the road was being constructed. It is the applicant's case, that the applicant should have disclosed the points in issue and the dispute prior to invoking the arbitration clause.
9. The application was canvassed through written submissions. The applicant filed its submissions dated 19<sup>th</sup> October, 2020 submitting that the suit should be referred to arbitration. According to the applicant, the suit was filed in violation of clause 5.1.4 of the lease which requires

that a dispute between the parties over the lease be referred to arbitration

10. It is the applicant's submission that it has brought this application promptly and in compliance of section 6(1) of the Arbitration Act and that it has not taken any further procedural steps in the matter other than the steps allowed under section 6 of the Act. The applicant argues that it is ready and willing to submit to the arbitration process; that referring this suit to arbitration will not be futile since the dispute is unresolved; the arbitration process has not been overtaken by events and there are no legal impediments on the validity, operation or performance of the arbitration clause in the lease agreement. It relied on *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR and *MTS Electrical Company Limited v Mitsubishi Electric Corporation* [2018] eKLR.

11. The respondent filed its submissions dated 9<sup>th</sup> October, 2020, arguing that the claim does not fall under the ambit of the arbitration clause; it is against a third party and, therefore, it cannot be referred to arbitration. According to the respondent, the applicant should have sought recourse from the relevant authority. It relied on section 6(1) of the Act, 1995; Section 56 of the Kenya Roads Act No. 2 of 2007 and *Eunice Soko Mlaqui v Suresh Parmar & 4 others* [2017] eKLR

12. The respondent further argued that no dispute had ever arisen with respect to the lease or at all; that the issues raised that could warrant termination of the lease are where there would be floods, fire or earthquake, making the premises unfit for use. According to the respondent, its claim is for a liquidated amount of Kshs. 52, 670, 454.53 rent for the unexpired term of the lease for premature termination. It urged the court to find that the matter of road rehabilitation is not a dispute within the scope of the arbitration clause. It relied on *UAP Provincial Insurance Co. Ltd v Michael John Beckett* (CA No. 26 of 2007); *Abdul Aziz Suleiman v South British Insurance Co. Ltd* (Civil Appeal No. 779 of 1964) [1965] E.A, 66 at pg 70; *Halki Shipping Corpn v Sorex Oils Ltd* EWCA 1997 and *Ellis Mechanical Services Ltd v Wates Construction Ltd* (Note) [1978] 1 Lloyd's Rep 33.

13. The respondent also relied on *Esmailji v Mistry Shamji Lalji & Co.* (1984) KLR 159, where the Court of Appeal set out the principles governing the grant of stay of proceedings.

14. Regarding jurisdiction, the respondent relied on Article 165 (3)(a) of the Constitution and *Owners of the Motor Vessel "Lillian S" v Caltex (Oil Kenya) Ltd* (1989) KLR 1 for the argument that the issues raised are for this court to determine and not the arbitrator. It therefore urges the court to dismiss the application for lack of merit.

15. I have considered the application, the response and submissions by parties. I have also considered the decisions relied on by parties. The applicant has sought stay of these proceedings and reference of the suit to arbitration. It argues that the lease between the parties requires that any dispute arising in respect of the lease should be referred to arbitration. According to the applicant, the issue at hand touches on the terms of the lease and, therefore, it is an issue that should be referred to arbitration as required by the terms of the lease.

16. The respondent holds a different view. According to the respondent, the issue at hand is default in rent payment which is not an issue for arbitration. This is because, it argues, the applicant had taken up the premises for 10 years and had been running a supermarket for 8 years until the premature termination blamed on the rehabilitation of the road. The respondent argues, therefore, that the matters raised by the applicant regarding the construction of the premises and why its business went down cannot be matter for arbitration.

17. The respondent's plaint states at paragraph 10 that the applicant issued an illegal notice prematurely terminating the lease of a fixed term which was to expire on 31<sup>st</sup> July 2022. The respondent sought a number of reliefs, including rent for the remainder of the term and general damages. That is the suit the applicant seeks to have referred to arbitration.

18. The plaint and application for interim orders were filed on 31<sup>st</sup> January 2020. On 2<sup>nd</sup> March 2020, the applicant entered appearance and simultaneously filed the application dated 28<sup>th</sup> February 2020 to stay proceedings and refer the matter for arbitration.

19. Clause 5.1.4 of the lease states:

***Any dispute arising in connection with any matter relating to this agreement shall be referred to a single arbitrator to be appointed in default of agreement by the [President] for the time being of the Law Society of Kenya.***

20. Section 6(1) of the Arbitration Act states that:

***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 the 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.***

21. There is no doubt that there is a clause in the lease requiring parties to refer any dispute arising in connection with any matter relating to the agreement, (read lease), to arbitration. The law requires that no other steps be taken by an applicant other than entry of appearance and filing of the application.

22. The application to refer the matter to arbitration was filed contemporaneous with the entry of appearance as required by section 6(1) of the Arbitration Act. The application was, therefore, brought within the ambit of the law and the respondent has not argued otherwise.

23. The applicant has also not argued that the agreement to refer the matter to arbitration is null and void. That means the clause in the lease is a valid agreement between the parties on disputes arising from the lease.

24. The issue that I have to decide is whether there is a dispute between the parties capable of being referred to arbitration. The applicant argues that there is an issue while the respondent maintains that there is none.

25. The respondent filed the suit claiming, among other reliefs, rent for the unexpired term of the lease. The applicant on its part, states in its grounds in support of the application, that construction of the road where the premises are which commenced sometime in October 2019, led to excavations around the leased premises blocking access to the building and, therefore, its business. According to the applicant, the premises covered boundary to boundary leaving no parking or ample entry space for shoppers. The applicant states that the blocking of access to the business had a severely adverse effect on its business to the extent of making the business unsustainable, thus frustrating the lease. It is for this reason that the applicant maintains that there is a dispute and in terms of the arbitration clause, the matter should be referred to arbitration.

26. Against the applicant's argument, the respondent contends that there is no dispute to refer to arbitration since the suit seeks to recover rent for the unexpired term and that the lease had been terminated and, therefore, there is no lessor-lessee relationship.

27. I have considered parties' respective arguments and perused the record. One of the documents attached to the respondent's pleadings include letter dated 30<sup>th</sup> December 2019 from the applicant to the respondent informing it that it was unable to continue paying rent because of inaccessibility to the building due to ongoing road construction. It is clear this court that the applicant raised an issue why it was not going to meet its obligations under the lease for rent payment. It argues that performance of the lease was frustrated by the unforeseen construction of the road which lead to the premises being inaccessible by customers, leading to closure of the business.

28. To my mind, whether or not there was frustration of the lease agreement, is ***"a dispute arising in connection with any matter relating to [the lease] agreement, and therefore, a matter within the arbitration clause.*** Similarly, whether or not rent was payable for the unexpired period is an issue arising from the terms of the lease and therefore a dispute arising in connection with the lease.

29. Having considered the application, the response and submissions, as well as the decisions cited by parties, I am satisfied that the matter raised in the pleadings is an issue that falls within the arbitration clause and one which should be referred to arbitration. I therefore find merit in the application to refer this matter to arbitration.

30. Consequently, and for the above reasons, the application dated 28<sup>th</sup> February 2020 is allowed and I make the following orders:

***(a) This matter be and is hereby referred to arbitration in terms of clause 5.1.4 of the lease dated 30<sup>th</sup> July 2012.***

***(b) Parties herein do appoint an arbitrator within 30 days from the date hereof to determine the dispute and, in default, the President of the Law Society of Kenya do appoint an arbitrator.***

***(c) Each party shall bear its own costs of the application.***

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 23RD JULY 2021.**

**E C MWITA**

**JUDGE**