



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO.14 OF 2020

BETWEEN

1. JOHN GITATA MWANGI

2. STEPHEN NJUGUNA MWANGI

3. CHRISTOPHER MWAURA MWANGI.....PLAINTIFFS

VS

JOSPHAT NJOROGE MWANGI

MENENGAI FARMERS LIMITED.....DEFENDANTS

RULING

1. **JOHN GITATA MWANGI** and **STEPHEN NJUGUNA MWANGI** and **CHRISTOPHER MWAURA MWANGI** (collectively referred to as plaintiffs) have sued their brother **JOSEPH NJOROGE MWANGI** (referred as **Njoroge**) and **MENENGAI FARMERS LTD** (hereinafter **Menengai**) seeking orders relating to 48 shares in Menengai.

BACKGROUND

2. The plaintiffs and *Njoroge* were children of the **Late Mwangi Mbothu** deceased and **Hannah Ziporah Nyagichuhi** deceased. Their father left a Will.

3. The plaintiffs, *Njoroge* and their mother entered into a Deed of Family Arrangement (Deed) whereby their rights of inheritance of their father's estate were changed from what was provided in the Will. The plaintiffs by this case allege that *Njoroge* has acted in breach of that Deed in obtaining the transfer of the 48 shares in Menengai in his name. The plaintiffs by this action seek prayer for declaration that the transfer of Menengai share was unlawful; that the said transfer of shares be cancelled and the shares do revert to the estate of their mother; for special damages of Kshs.20,960,000; and for general and exemplary damages.

APPLICATIONS

4. There are two applications for consideration in the ruling. The first in time was filed by *Njoroge* dated 19th October, 2020. By that application, *Njoroge* seeks stay of the further proceedings in this suit and for this dispute to be referred to Arbitration as provided under the Deed of Family Arrangement. *Njoroge* seeks in the alternative this suit be struck out.

5. The Deed contains an arbitration clause as follows:-

“All disputes or differences whatsoever which shall at any time hereinafter arise between the parties hereto or any of them touching or concerning this deed or its construction or effect or as to the rights duties or liabilities of the parties hereto or any of them under or by virtue of this deed or otherwise or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this deed shall be referred to a single Arbitrator to be agreed upon by the parties hereto or in default of agreement to nominated by Mr. O.P. Nagpal Advocate in accordance with a subject to the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force. “

6. The plaintiffs are opposed to that application on two grounds. Firstly, that *Njoroge* or his advocate have been uncooperative to facilitate

reference to arbitration and secondly because the claim against Njoroge is intricately connected to the plaintiff's claim against Menengai.

7. The second application is filed by the plaintiffs and is dated 27th January, 2021. By that application, the plaintiffs seek injunction to restrain Menengai from issuing dividends or any allowances to Njoroge. The plaintiff additionally seek an order for Menengai to produce and supply the plaintiffs with record of payment of dividends and allowances to Njoroge.

ANALYSIS AND DETERMINATION

8. All the parties acknowledge that the Deed contains an arbitration clause. In my analysis of the two applications, I will be careful not to delve into the merits of the parties' dispute because that is the province of the arbitrator. Njoroge by his application has invoked the provisions of **Section 6** of the Arbitration Act as follows:-

“6(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.”

9. None of the parties has alleged that the arbitration clause is null and void nor have they argued that there is no dispute capable of being referred to an arbitrator. It follows that there is no apparent reason why stay of these proceedings should not be granted. This is more so because the plaintiffs had wished to refer the dispute to an arbitrator but for what they alleged was Njoroge's failure to cooperate with the appointment of an arbitrator.

10. The plaintiff however vacillated between their wish to appoint an arbitrator and their contention that the dispute cannot be referred to arbitration because of the presence of Menengai a party who is not bound by the Deed.

11. I have considered the plaintiff's argument and bearing in mind the plaintiffs' pleadings. I find there is not claim against Menengai other than the plaintiffs' have prayed that the 48 Menengai shares of Njoroge be retransferred. This is very clear in the plaintiffs' pleadings where they solely allege that it is Njoroge who violated the Deed. Menengai in as far as I can see from the pleadings was not bound by the terms of that Deed. It follows that the dispute between the plaintiffs and Njoroge is separable from whatsoever claim the plaintiffs may have against Menengai. In this regard, I rely on the decision of the case **DIRECTLINE ASSURANCE CO. LTD & 4 OTHERS VS. SUNINVEST & 15 OTHERS (2019) eKLR:-**

“It follows that justice would in this case demand that the Plaintiffs' claims against those two other parties be stayed until determination of the Arbitration between the shareholders and Directors of Directline. That finding is in keeping with a similar decision, which is persuasive, in the case YAWORSKI V GOWLING LAFLEUR HENDERSON LLP, 2012 ABQB 424 (CanLII) viz:-

“In The Law of ADR in Canada An Introductory Guide, (Glaholt, Duncan and Rotterdam, Markus LexisNexis, Canada 2011) at page 101 the authors state that:-

‘Where third party claims are involved, Courts have ordered that litigation with regard to matters within the Arbitration agreement and between the principal parties be stayed pending Arbitration, and, with regard to third party matters not governed by the Arbitration agreement, have ordered a stay of proceedings for the estimated time it would take the principal parties to complete their Arbitration. Thus, while a Court has no jurisdiction to order third parties to submit to Arbitration, the Court can stay third party claims pending Arbitration when it appears just and equitable to do so.’” (Emphasis added)

12. The opposition to Njoroge's application is rejected. The application is merited in view of the fact parties to the Deed selected the forum of their dispute resolution that is by arbitration.

13. The plaintiff by their application have invoked section 7 of Arbitration Act which provides:-

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

14. The plaintiffs seek to injunction Menengai from paying Njoroge dividends and allowances due to him by virtue of the 48 shares he holds in that company. The centre of this dispute is those 48 Menengai shares. The plaintiff contends that Menengai should be restrained from paying Njoroge the dividends until the dispute is resolved. The Court of Appeal in the case **SAFARICOM LIMITED VS. OCEAN VIEW BEACH LIMITED & 2 OTHERS (2010) eKLR** held as follows while discussing interim measure of protection:-

“Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of

protection are:-

- 1. The existence of an arbitration agreement.*
- 2. Whether the subject matter of arbitration is under threat.*
- 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?*
- 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?"*

15. Considering the above holding, there is indeed an arbitration agreement and the plaintiffs allege there is threat to the subject matter. It is however important to note that Section 7 of Arbitration Act empowers the court to issue interim measure of protection. I repeat, interim. It follows that the measure the court is minded to issue will last until the arbitrator is seized of this matter. The order will therefore be time limited.

16. There is no merit in the prayer by the plaintiff for Menengai to supply record of dividends. The plaintiffs allege Njoroge acted unlawfully in obtaining the 48 shares and they have quantified the special damages, in the plaint, representing that alleged wrong. It follows that Menengai will not be required to disclose to the plaintiffs since the plaintiffs have quantified their claim. That prayer by the plaintiffs fails.

CONCLUSION

17. In the end, I grant the following orders:-

- (a) A temporary injunction is hereby issued for only 60(sixty) days from this date hereof restraining the 2nd defendant from issuing dividends or allowance to the 1st defendant. After 60 (sixty) days from today, this injunction shall be vacated.
- (b) However, if an arbitrator is not appointed by the parties hereof due to the failure of **JOSEPH NJOROGE MWANGI** to cooperate in the appointment of such an Arbitrator the injunction in (a) above shall subsist until such appointment.
- (c) This case is hereby stayed pending reference of this dispute to arbitration.
- (d) Each party will bear their costs to the applications dated 19th October, 2020 and 27th January, 2021.
- (e) At the reading of this ruling, a date for mention shall be fixed for parties to confirm to the court whether the dispute has been referred to arbitration.
- (f) There shall be liberty to apply

RULING DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Nancy

For the Plaintiffs: Mr. Mwangi

For the 1st & 2nd Defendant: Ms. Nduta Kamau H/B Dr. Kuria

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE