

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 454 OF 2012

WESTERN PUMP SERVICE LIMITED.....APPELLAN/RESPONDENT

VERSUS

KOBIL PETROLEUM.....DEFENDANT/APPLICANT

RULING

This suit was filed on 14th September, 2012. The cause of action was breach of agreements dated 1st July, 2003 and 1st April 2004 entered between the plaintiff and the defendant. The plaintiff had been contracted by the defendant to maintain equipment at various service stations in Kenya, Uganda Tanzania and Zambia. As at the time of filing the plaint, some payments were due to the plaintiff from the defendant and therefore the plaintiff moved the court to restrain the defendant from cancelling the contracts and also for the payments of the sums due.

Alongside the plaint, there was filed an application for interlocutory injunction, followed by an application for interlocutory judgment which was entered in favour of the plaintiff. Upon service of a notice of the entry of the said judgment, the defendant filed the current application dated 17th July, and filed on 20th July 2017 to stay execution of the ex parte judgment, to set aside the ex parte judgment and any decree issued as a consequence thereof.

The main ground is that the installation and maintenance contracts signed by the parties had an arbitration clause and therefore the court had no jurisdiction to entertain the suit. The application is supported by grounds set out on the face thereof alongside an affidavit sworn by the legal officer of the defendant. The application is opposed and there is a replying affidavit sworn by the managing director of the plaintiff.

Both parties have filed the submissions herein which I have noted. The cited provisions of law are Article 50 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act Order 10, Rule 11 Order 22 rule 22 and Order 51 Rule 1 of the Civil Procedure Rules.

I have read the rival averments of the parties herein. There is no prayer in the application that the defendant should be given an opportunity to file its defence. On the contrary, they seek a direct order for referral of the matter to arbitration. In effect, the defendant is saying this court has no jurisdiction to entertain the dispute because of the arbitration clause provided in the agreement.

It is not disputed that after service of summons to enter appearance, the defendant did not file any defence. It is also on record that the plaintiff applied for interlocutory judgment on 21st November, 2016 which was four years after the filing of the plaint herein. It was only after service of the notice of the said judgment that the defendant moved to file this application.

It is the plaintiff's case that if the defendant intended to invoke the arbitration clause, this should have been done immediately after service of the summons and not wait for more than five years to move the court in that direction. It is also submitted that an arbitration clause is not a ground for failure to file a defence, for it is the practice that a defence should be filed and include the issue of the application of the arbitration clause. In any case, the existence of an arbitration clause does not oust the jurisdiction of the court.

I do not deem it necessary to delve into whether or not this matter should be referred to arbitration because of the following reasons. This is fairly and old case and there is correspondence showing that there are sums due and payable by the defendant to the plaintiff which may not be in dispute. If the matter were to be referred to arbitration, the same issues would be canvassed.

That notwithstanding, I see this matter capable of a settlement and in that regard, I direct that the parties shall submit themselves to Court Annexed Mediation to resolve the dispute. That being the case, the Deputy Registrar shall initiate the mediation process by informing the parties to appear on a specified date for such directions. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 15th Day of March, 2019.

A. MBOGHOLI MSAGHA

JUDGE