



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 302 OF 2014

HASHIM MOHAMED KHER.....1ST PLAINTIFF

AL HEELEM HOLDING LTD.....2ND PLAINTIFF

-VERSUS-

GULF AFRICAN BANK LTD.....1ST DEFENDANT

DATA RUSH SERVICES LTD.....2ND DEFENDANT

RULING

1. I will begin by setting out the background of this dispute so as to enable better understanding of the Preliminary Objection raised herein and which is the subject of this Ruling.

2. The Plaintiffs, Hashim Mohamed Kher and Al Heelem Holding Ltd. were customers of Gulf African Bank Ltd. The Plaintiffs had facilities with the Bank which facilities were secured by the Plaintiff's immovable properties. The Plaintiffs desired to transfer their facilities to another Bank and also desired to sell one of the immovable properties, whose title was held by the Bank. The Plaintiffs by this case alleges various wrong doings by the Bank amongst which is the allegation that the Bank delayed in releasing their title document to facilitate sale of the property and to facilitate them to obtain some facilities with another Bank.

3. The Bank filed a defence denying the Plaintiffs' claim and a counter claimed against Data Rush Services Ltd. (hereinafter the Courier) who the Bank alleged lost the title document of the Plaintiffs. The Bank by its Counter Claim prays for a declaration that the Courier is wholly liable to indemnify the Bank against all loss, damage or liability incurred by the Bank resulting from the loss of a letter containing title deeds and security documents.

4. It is that Counter Claim which provoked the Courier to file Preliminary Objection dated 23rd October 2018.

5. Bearing in mind the holding of **MUKHISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD [1969] EA 6** I find Objection No. 4 and 5 raise factual issues which cannot be dealt with on a Preliminary Objection. in the case of **MUKHISA BISCUIT (Supra)** the Court held:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a Preliminary point may dispose of the suit.... It raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct.”

6. Objection 4 and 5 raised by the Courier do not fit in the definition of a Preliminary Objection as discussed in **MUKHISA BISCUIT (Supra)**. Those Objections 4 and 5 are in the following terms:

“4. The Counter Claim is premature given the reason that there has been no loss, damage or liability whether criminal or civil which has been established to have been suffered or incurred by the 1st defendant (Bank) or claimed by any third party and as such no cause of action has arose against the 2nd defendant.

5. The suit/Counter Claim herein against the 2nd defendant is thus an abuse of the Court process, bad in law, incompetent and the same ought to be struck out forthwith.”

7. A careful consideration of the Objections, above, will show that they seek this Court to exercise judicial discretion. For the above reason Objection 4 and 5 are overruled.

8. The Objection 1, 2 and 3, which the Courier has raised, refer to the Arbitration Clause between the Bank and the Courier and seek the Court's finding that it lacks jurisdiction to entertain the dispute between the Bank and the Courier. Those Objections are in the following terms:

“1. This Honourable Court currently lacks the requisite jurisdiction to entertain any suit between the 1st defendant and 2nd defendant by reason of Arbitration Clause (Clause 20) in the agreement between the 1st defendant and 2nd defendant dated 1st October 2012 which forms the subject matter of the counter claim between the two parties.

2. The counter claim is therefore in contravention of the Arbitration Clause.

3. The parties are bound by Section 6 of the Arbitration Act to resolve the dispute by way of Arbitration.

9. Arbitration Clause 20 which is contained in the agreement between the Bank and the Courier, provides:

“20.1 All disputes or differences arising between the parties at any time under this agreement must be referred to single arbitrator in Kenya whose decision is final and binding to both parties.

20.2 Such arbitrator will be agreed upon by both parties.

20.3 In default of agreement the arbitrator will be nominated by the Chairman for the time being for the Chartered Institute of Arbitration in accordance with the Arbitration Act (Act Number 4 of 1994) or any statutory modification or re-enactment of it for the time being in force.”

10. Both the Bank and the Courier confirm that after the Bank filed and served the defence and counter-claim on the Courier, the Courier filed a defence to the counter claim, after having filed a Memorandum of Appearance.

11. It is after filing those pleadings that the Courier filed the Preliminary Objection which is based on the provisions of Section 6 of the Arbitration Act. That Section provides:

“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.

12. In my view, contrary to the submissions in support of the Objection, the provisions of that Section are very clear. That Section provides that where there is an Arbitration agreement, as in this case, a party seeking to stay Court proceedings, to enable the matter proceed to Arbitration, must file its application for stay of proceedings ‘not later than the time when the party enters appearance.’ In other words, the Courier should have filed seeking stay of this proceedings immediately after filing a Memorandum of Appearance but before filing a defence to the Counter Claim. That is the jurisprudence of Section 6 Arbitration Act.

13. That has been the holding of various decisions. One such decision by the Court of Appeal, cited by the Bank, is **CORPORATE INSURANCE COMPANY V LOISE WANJIRU WACHIRA (1996) eKLR** where the Court stated:

“While we agree with the proposition that a Scott v Avery Arbitration Clause can provide a defence to claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the Clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to reply on the Clause.”

14. Relying on that decision, I will repeat, for the benefit of the Courier, that if it wished to rely on Clause 20, it was obliged to seek to stay this suit after entering an appearance but before filing a defence. In filing its defence, it shut the door to recourse to Arbitration.

15. It is for the above reason that I overrule the Courier on Objection 1, 2 and 3.

16. In the end, the Preliminary Objection dated 23rd October 2018, filed by Data Rush Services Ltd. is without merit and is dismissed. Having been dismissed, the costs must follow the event. The costs of that Preliminary Objection are awarded to Gulf African Bank Ltd.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE 1ST PLAINTIFF

..... FOR THE 2ND PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT