



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 81 OF 2017

NAIROBI PARENTING CLINIC LTD1ST PLAINTIFF

CATHERINE SYENGO MUTISYA.....2ND PLAINTIFF

VERSUS

GIMCO CO. LTD.....1ST DEFENDANT

KENYA MEDICAL ASSOCIATION.....2ND DEFENDANT

KENYA MEDICAL PROPERTIES LTD.....3RD DEFENDANT

DOCTORS PROJECT MANAGEMENT LTD.....4TH DEFENDANT

KENYA MEDICAL INVESTMENT CO LTD5TH DEFENDANT

RULING

1. Vide a Complaint dated 12th April, 2017 the Plaintiffs filed suit against the Defendants seeking orders, *inter alia*, to compel the Defendants to produce a list of the owners of the offices in KMA building. That the Defendants do provide a detailed report of the monies collected as rent, service charge, parking fees and sales of the offices to third parties; an audit report in the alternative and that the 3rd Defendant do issue share certificates for the Plaintiffs' two shares.

2. The Defendants filed a memorandum of appearance and also filed the Notice of Preliminary Objections dated 4th May, 2017 on the following grounds.

“That the Honourable Court lacks jurisdiction to hear and determine the application dated 12th April, 2017 and/or the suit in that the Dispute herein is subject to Arbitration in line with the Lease Agreement dated 23rd April, 2015 and 3rd February, 2015 and thus the suit ought to be stayed pursuant to section 6 (1) of the Arbitration Act 1995 Laws of Kenya.”

3. The Plaintiffs filed grounds of opposition to the Preliminary Objection as follows:

“1. That this honourable court has jurisdiction to hear and determine the Application dated 12th April 2017 as the 1st 2nd and 5th Defendants are not parties to the leases dated 23rd April,

2015 and 3rd February 2015 and therefore Arbitration Agreement of the leases are inapplicable as not all parties herein are bound by it.

2. That the arbitration agreement is incapable of being performed as stipulated in section 6(1) (a) of the Arbitration Act of 1995 Laws of Kenya.

3. The notice is frivolous, vexatious and an abuse of court process.

4. The said notice is an afterthought only meant to delay this matter.”

4. During the hearing of the Preliminary Objection, the Defendants counsel referred the court to the arbitration clause in the lease Agreements and submitted that the 3rd and 4th Defendants are parties to the lease agreement while the 1st Defendant is their agent. It was further stated that the 2nd and 5th Defendants are not mentioned anywhere in the documentation herein and that there is therefore no cause of action against them.

5. The counsel for the Plaintiffs argued that not all the parties in the suit are bound by the two lease agreements and that the arbitration clauses are accordingly not applicable.

6. I have considered the Preliminary Objection, the response to the same and the argument made by the respective counsels for the parties herein.

7. The essence of a Preliminary Objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700, Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The documentation herein includes a lease agreement dated 3rd February, 2014 and another lease agreement dated 23rd April, 2015. It is abundantly clear from the aforesaid two lease agreements that the 2nd and 5th Defendants are not parties to the same.

9. I have perused the plaint dated 12th April, 2017. The plaint does not mention how the 2nd and 5th Defendants are connected to the dispute herein. The plaint has only described the 2nd and 5th Defendants as limited liabilities companies and has not mentioned the 2nd and 5th Defendants in any other capacity.

10. With the foregoing, I hold that the 2nd and 5th Defendants are not bound by the arbitration clauses herein. Consequently, this court has the requisite jurisdiction to hear this suit. I hereby dismiss the Preliminary Objection with costs to the Plaintiffs.

Date, signed and delivered at Nairobi this 29th day of Jan., 2018

B. THURANIRA JADEN

JUDGE