



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO.227 OF 2013

MAVALO BUILDING & ENGINEERING LTD.....PLAINTIFF/RESPONDENT

AND

SAKAFU LIMITED.....1ST DEFENDANT/APPLICANT

MOHAMED AKTA KAN.....2ND DEFENDANT/APPLICANT

RULING

1. Before the Court is the Notice of Motion of 23rd August 2016 for the following Orders:-

1. That the Plaintiff herein be struck out for being frivolous, vexatious and otherwise an abuse of Court process.
2. That the suit be struck out since this Court lacks jurisdiction to hear it.
3. That the costs of this application be provided for.

2. This suit commenced by way of Plaintiff on 5th June, 2013 is a Claim for US Dollars 47,845.20 against the Defendants. Together with the presentation of the suit the Plaintiff filed a Notice of Motion of even date in which he sought no less than 12 Orders.

3. On 5th June 2013 Hon. Havelock J. made the following Orders:-

“By Court,

By my calculation the value of the Plaintiffs Claim in this suit is just over Khs.4 million, which, even with the interest claimed, is well within the pecuniary jurisdiction of the Chief Magistrate’s Court here at Milimani. Accordingly I hereby order that the suit be transferred to the Chief Magistrate’s Court with immediate effect under the Provisions to the end of Section 18(1) Civil procedure Act”.

4. The file was accordingly transferred to the Subordinate Court which subsequently heard the Motion whereupon handed down a Ruling dated 30th August 2013 with the following ultimate Orders:-

“8. As per the content of paragraph 25 of the submissions, the applicant contends that Interim Orders can be issued either prior or during arbitration. Both parties concede that the dispute should be referred to arbitration and for that reason I will uphold the first point of the Preliminary objection and find that this Court lacks jurisdiction to hear and determine the dispute much less give interim orders. The only Court that can do so is the High Court. I do agree with the Applicant that the other points in the Preliminary Objection are not points of Law and I hereby dismiss them. The applicant can move the High Court for any interim relief”.

With that the file was retransferred to the High Court.

5. The Court Record shows that on 14th September, 2016, Mr. Ogutu appearing for the Plaintiff sought to withdraw the Motion of 5th June

2013. The Court then observed,

‘The Application of 5.6.2013 was actually dealt with in a Ruling delivered on 30th August, 2013. Matter was therefore listed in error. “S.O.G”

6. One of the grounds upon which the current application is founded is that the Plaintiff did not move the Court within the 30 days ordered by the subordinate Court. This would be in respect to paragraph 9 of the Ruling of the learned Magistrate where she said,

“9. I will not make any Orders as to costs as the Applicant had approached the proper Court in the first instance but I will order that the Applicant does move the Court appropriately within the next 30 days”.

7. How is the delay explained? Attached to the affidavit of Counsel Edward Magoma Oonge is a letter dated 18th September 2013 from the firm of Were Oonge (representing the Plaintiff) urging the Executive Officer, Milimani Commercial Court to forward the Court file to the High Court to enable them act further. This letter, it is to be noted, was within the 30 days ordered by the Subordinate Court. There was a follow up letter of 23rd October 2013 and it was not until 28th February 2014 that the file reached the High Court.

8. Through a letter of 26th March 2014, Counsel for the Plaintiff sought a mention date for direction before the Duty Judge. It would appear that no action was taken and so on 17th June 2014, the said Advocates wrote this letter:-

Tuesday 17th June 2014

The Deputy Registrar

High Court of Kenya

Milimani Commercial Division

NAIROBI

ATT: D.W. NYAMBU

Dear Sir,

RE: MILIMANI CMCC CAUSE NO. 3252 OF 2013

MAVOKO BUILDING & CIVIL ENGINEERING LTD VS. SAKAFU LTD

We refer to the above matter.

The Court file was forwarded to your Division on 21st February 2014 and received by you on 28th February 2014 the letter forwarding the file is herein enclosed for reference.

We have been requesting for the aforesaid court file for the last three months but it cannot be traced at the Court registry.

Kindly assist us to locate the Court file as we under pressure from our client to prosecute the matter.

Your early respond will be highly appreciated.

Yours faithfully

E.M. Oonge

For Were & Oonge Advocate

9. Still there was no action and according to Counsel, the Court file could not be traced. There was a follow up letter of 27th March 2015 received by the Court on 1st April, 2015. On 30th June 2016 a representative from the firm of Were Oonge Advocates attended the Registry and fixed the Notice of Motion dated 5th June 2013 for 14th September 2016. It was in the intervening period that the current Motion dated 25th August 2016 was filed.

10. That history (which is not denied) shows that, whilst Counsel for the Plaintiff could have acted with greater agility, there was a substantial portion of inaction on the Court file because it could not be traced. During that period the Plaintiff's Counsel wrote to Court on several occasions seeking intervention in tracing the file. The delay has, in my view, been very substantially explained and it would be far too drastic for this Court to dismiss the matter on account of delay.

11. On another issue the learned Magistrate had noted that the parties herein conceded that the Dispute should be referred to Arbitration. The Defendant has in its current motion reiterated that the Agreement which is Central to the Dispute herein has an Arbitration clause. And in responding to the Application the Plaintiff through Counsel states,

“That as a Result of the above this Honourable Court has jurisdiction to hear this matter and furthermore even gave directions towards the disposal of the same by exercising its discretion by referring parties to Arbitration”.

A stance that the Plaintiff is not opposed to Arbitration.

12. Once the Defendant had formed the view that the matter was subject to an Arbitration Agreement, then the solution was not to seek its dismissal but to seek stay hereof in terms of Section 6 of the Arbitration Act. Section 6 reads:-

“(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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings”.

13. The occasion has since passed but this Court can on its own Motion make that Reference. This would be in reference to Article 159(2)(c) of The Constitution which enjoins this Court to promote alternative forms of Dispute Resolution which includes Arbitration. This is reiterated by Section 59(c)(i) of The Civil Procedure Act on the following words,

“59(c)(1) A suit may be referred to any other method of Dispute Resolution where the parties agree or the Court considers the case suitable for such referral”. *(my emphasis)*

I consider this matter suitable for Arbitration. In view of the fact that both sides acknowledge and accept the existence of an Arbitration Agreement.

14. This Court is aware that the Defendants have taken issue with the merit of the Claim and the joinder of the 2nd Defendant hereto but those are matters for the Arbitrator to deal with.

15. For now I dismiss the Motion of 23rd August 2016 but with no Order on costs. This matter is hereby stayed and referred to Arbitration. The parties shall appoint an Arbitral Tribunal in the terms set out in Clause 11 of The Arbitration Clause Agreement. The same to be done within 14 days thereof and such longer time as this Court may order upon application of parties.

Dated, Signed and Delivered in Court at Nairobi this 29th day of June, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Waweru for Kinga for Defendant

Ogutu for Oonge for Plaintiff

Nixon - Court Assistant