



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 4 OF 2018

EVANSON MASHETI ESHITEMI.....PLAINTIFF

VERSUS

JOKALI HANDLING SERVICES.....1ST DEFENDANT

JOKALI HANDLING SERVICES LIMITED....2ND DEFENDANT

ALPHONCE AKATSA LUKOYE.....3RD DEFENDANT

ERNEST KATAKA LIPESA.....4TH DEFENDANT

CHARLES WAKA LUKOYE.....5TH DEFENDANT

RULING

1. Although the Plaintiff presented these proceedings as a substantive Claim for the Court to determine, there is now a realization that this matter is for Arbitration.
2. The concession by the Plaintiff is found in his submissions in response to a Preliminary Objection taken up by the Defendants. The Plaintiff submits,

“12. It is admitted that there was an Arbitration clause but that it’s mere existence did not negate the Plaintiff’s Right of to (sic) move this Court for appropriate Protective Orders in view of the fraud, forgery of bank documents, tax evasion and further it did not create a dispute that then had to be referred to Arbitration”.

3. The Arbitration Clause referred to is Article 31 of The Articles of Association by Jokali Handling Services Limited which reads;-

“Whenever any differences arises between the Company on the one hand and of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or any claim on account of any such breach or alleged breach, otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator, to be appointed by the Association of Arbitrators Kenya Chapter, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference”.

4. When these proceedings were presented, the Plaintiff also filed a Notice of Motion dated 5th April, 2018 for injunction. The Defendants entered appearance by way of a Notice of Appointment of Advocate by the firm of J.N Muema & Co. Advocates and alongside it filed a Notice of Preliminary Objection in the following terms:-

“That the Honorable Court is not clothed with the requisite original jurisdiction to hear and determine this matter in light of the provisions of the Memorandum and Articles of Association of JOKALI HANDLING SERVICES LIMITED to which the Plaintiff is a Director and Shareholder together with 3rd, 4th and 5th Defendant’s respectively”.

It would seem that no summons had been extracted herein and hence the Appearance by way of a Notice of Appointment.

5. The Defendants do not accept that this is the proper forum for resolution of this dispute and would have been entitled to seek Stay of proceedings under Section 6 of The Arbitration Act (The Act) which provides:-

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.

6. Whilst the Defendants have moved Court for striking out, this Court, in its inherent power, stays the proceedings to enable the parties to submit themselves to Arbitration. This seems the fair and sensible way to go as both parties acknowledge the effect and object of the Arbitral clause. In addition by referring this matter to Arbitration, the Court will be acting consistent with the directive found in Article 159(1)(c) of The Constitution which obligates the Courts to promote alternative forms of Dispute Resolution including Arbitration.

7. As to the Notice of Motion dated 8th April, 2018, the same was brought not as an application for Interim relief as contemplated by Section 7 of Arbitration Act but as an application for Injunction premised on the existence of a substantive suit presented by way of Plaintiff. Section 7 of the Act reads:-

(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.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

8. If the Plaintiff's intention was to invoke the provisions of Section 7, then he should have moved Court for Prayers of Interim Protection but on the express acknowledgement that the matter was for Arbitration and the filing of the proceedings was only for purposes of seeking Interim Protection. The Plaintiff does not pretend to do so here and that makes the Notice of Motion of 8th April 2018 defective. It is hereby struck out with costs.

9. The Plaintiff is not without recourse because he can move the Arbitral Tribunal for an Interim relief or move this Court under Section 7 of The Act and ask the Court to temporarily lift the Stay Orders now imposed for purposes of hearing and determining such Application.

10. For now the orders I grant are as follows:-

(i) The Notice of Motion dated 5th April 2018 is hereby struck out with costs to the Defendant.

(ii) These proceedings are stayed pending the referral to and determination of this dispute by Arbitration.

Dated, delivered and signed in open Court at Nairobi this 21st day of June 2018.

F. TUIYOTT

JUDGE

In the presence of;

Nduku for Defendant

N/A for Respondent

Nixon-Court Assistant