REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. 39 OF 2013

NEW KENYA CO-OPERATIVE CREAMERIES LTD.....APPLICANT

-VERSUS-

SAVE THE GENSET INTERNATIONAL LTD.....RESPONDENT

RULING

1. This ruling is in relation to a Notice of Motion Application dated the 25th day of October 2016, filed by the Plaintiff, (herein "the Applicant"), under the provisions of Order 51 Rule 1; Order 22 Rule 35; Order 5 Rule 17 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act, Section 504(2) of the insolvency Act No. 18 of 2015 Laws of Kenya and all other enabling provisions of the law. It is based on the grounds thereto and supported by an Affidavit dated 25th October 2016, sworn by Jane M. Mubangi.

2. The Applicant's is seeking for orders that:

> *a) That the Directors of the Respondent's Company namely, Jude Lwanga Kang'ethe Njomo, John Maina Githaiga, Catherine Wanjiru Kamotho, be orally examined on oath as to the properties of the Defendant's Company or other means of satisfying the Decree and all books of account be produced in the court;*
>
> *b) That in default the Directors be held personally liable for the Decretal amount; and*
>
> *c) The costs of the Application be provided for*

3. The background facts of the case are that, the Plaintiff filed the case herein; vide a Plaint dated 4th February 2013, seeking for the various prayers as stated therein. The Defendant was served with summons, whereupon it filed a memorandum of appearance. However it did not file any statement of defense. As a result, the Applicant sought for and was granted Judgment in default for a sum of Kshs. 3,300,000 with costs and interest at 24% from 14th August, 2009 until payment in full on 13th June 2013.

4. Subsequently, a decree was issued on 19th June, 2014 and Certificate of costs for Kshs. 143, 340.00 dated 18th August, 2014 was also issued. Thereafter the Applicant instructed Auctioneers to proceed with execution against the Respondent. But, the Auctioneers could not trace any of the Respondent's attachable assets. The Applicant the instructed Isight Corporate Solutions to conduct investigations as to the whereabouts of the Defendant/Respondent, its assets for purposes of attachment and sale.

5. However, the said Firm and the Auctioneers could not trace any of the Respondent's assets. Therefore Applicant alleges that it has been unable to execute its decree and enjoy its fruits to date, and it is only fair and just that the application be allowed, as that is the only avenue to ensure that it realizes the fruits of its Judgment.

6. However, the Application was opposed by the Respondent vide a Preliminary objection dated the 18th May, 2017, the Respondent argues that:

> *a) The suit filed and canvassed in the Plaintiff's Plaint and in the Application dated 26th October 2016, is fatally and incurably defective in law and cannot stand or be ventilated before this Honourable Court;*
>
> *b) The Honourable Court is not clothed in the requisite jurisdiction to entertain and/ or determine this suit; and*
>
> *c) The agreement sought to be enforced by way of this suit expressly provides for Arbitration as the means to resolve any dispute between the Parties thereto.*

7. The Respondent also relied on a Replying Affidavit sworn by John Maina Githaiga the Managing Director of the Respondent. He reiterated the grounds in the Preliminary objection and argued that Application has been brought prematurely. That it is an abuse of the Court process, and the Judgment decree is a nullity as it was entered, when the Court had no jurisdiction.

8. The Respondent argued that, it has filed an Application dated 19th April, 2014, to set aside the said judgment and it is imperative that the same be heard first for the Court to establish if the judgment is regular and valid.

9. Finally the Respondent argued that, the Court cannot re-write the agreement for the parties. That as the Application lacks merit it should be dismissed with costs.

10. The Application was disposed of through the filing of submissions which I have considered herein, alongside the arguments for and against the Application. In that regard I find that the issues that have arisen for determination are:

a) Whether the Court has jurisdiction to entertain this matter;

b) Whether there is a valid and/or regular judgment and/or decree herein; and

c) Whether the orders sought for can be granted.

11. The Applicant addressed these issues and submitted that, the issues raised by the Respondent were not raised in the Application and that Respondent has not addressed the issue of examination of the directors as prayed for.

12. Further that the judgment entered herein is regular and has not been challenged, that the Respondent abandoned the attempt to challenge it ten (10) months after delivery thereof. Even then the Respondent can not purport to challenge a judgment entered into four (4) years ago. That period of four (4) years is inordinate and unexplained delay. Therefore the application to challenge the Judgment is a delaying tactic, as the Respondent only woke up when served with this Application. The Respondent relied on the case of; *Justin Nyambu vs Jaspa Logistics (2017), eKLR*, where it was stated that the only issue the Court has to determine is that the Applicant has a money decree.

13. However the Respondent in response submitted that Clause 10 of the agreement executed by the parties, provides for the settlement of disputes between them through Arbitration, and that the Court's jurisdiction is only limited to enforcement of the Arbitral Award. It was submitted that jurisdiction is everything as stated in the cases of; *Owners of Motor Vessel Lillian 'S' v Caltex Oil (Kenya) limited [1989] KLR 1* that:-

> *"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence…"*

14. The Respondent reiterated that the judgment herein is not regular due to lack of jurisdiction. Further the fact that, even in the Demand letter dated 22nd June, 2011, it is acknowledged that the dispute resolution mechanism is Arbitration, the Court has no jurisdiction. Similarly there is no justification for the "interest" claimed and awarded herein.

15. Finally, the Respondent submitted that the Application herein is devoid of merit, as the Applicant has not attached proof of how they selected the people identified to be the as directors of the company. The evidence Form CR12 has not been provided. Further the averment by the Applicant that the Investigators were engaged to trace the Respondent's assets is "Hearsay" as no investigation Reports have been filed. Hence the only conclusion is that, no efforts have been made to trace the assets of the Respondent.

16. As aforesaid, I have considered the Application in total but before I embark on analyzing the orders sought for herein, it suffices to note that, most of the argument advanced by the Respondent; in particular as to; (a) whether the Court had the jurisdiction to enter the default judgment or has jurisdiction to entertain this application, and; (b)whether the judgment herein is regular and/or valid, are matter to be dealt with, in the Respondent's alleged Application seeking to set aside the said Judgment herein, which Application has not been heard. In the given circumstances I shall not delve into the same.

17. Be that as it were, in the same vein the Applicant has decided to remain silent on some of the critical issues raised by the Respondent being: (a) whether the Court has jurisdiction or (b) whether the dispute should have been referred to Arbitration. These issues go to the core of the matter herein, in that jurisdiction is everything.

18. However, as regard the current Application, I find that, the relevant provisions of the law applicable is inter alia, Order 22 Rule 35 of the Civil Procedure Rules 2010, which provides that:

> *"35. Where a decree is for the payment of money, the decree-holder may apply to the court for an order that—*
>
> *(a) the judgment-debtor;*
>
> *(b) in the case of a corporation, any officer thereof; or*
>
> *(c) any other person,*
>
> *be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any*

and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents".

19. The Applicant argues that all that has to be proved is that the decree is a money decree. I agree with the Applicant that indeed the decree should be a decree for payment of money. In that regard the Applicant has annexed to the Affidavit in support of the Applicationis a decree and a certificate for costs.

20. However the Applicant seeks for the presence of several persons to be examined on oaths who are alleged to be Directors of the Respondent's Company. However as stated there is no evidence to support the same. If the said persons were to deny that indeed they are such Directors, there will be no evidence to rebut it. In the same vein although the Applicant alleges that it instructed the the Auctioneer and an Investigator to trace the Respondent's assets and none was found, these allegations are not evident. No documents were produced to back it up. The Applicant was rather too presumptuous in relation to these issues.

21. Be that as it were the fact remains that there is a judgment on record and unless and until it is set aside, it is on record and is presumed to be valid. Even then, it suffices to note Application herein was filed on 20th February 2017 though dated 25th October 2016. The Application to set aside the judgment is dated 10th April 2014 and was filed on 14th April, 2014. Thus the latter has been pending in Court, for the last four (4) years. Yet the Respondent argues that this Application is premature and should await the hearing and determination of their four (4) year old Application.

22. As already stated the issue of jurisdiction is well canvassed in the Application that is pending. I am aware though jurisdiction is everything but the Court ought to be properly moved. Be that as it were, in fact the Respondent did not even deem it appropriate to provide a copy (if any), of the said Agreement which contains Clause 10 that deals with the Arbitration as a dispute settlement mechanism. At this point the Court cannot be able to confirm that such a clause exists.

23. In conclusion I find that although the Applicant has not proved that the persons listed under prayer 2 of the Application are Directors of the Respondent save for one John Maina Githaiga who has sworn a Replying Affidavit and described himself as the Managing Director of the Defendant's Company. In view of the aforesaid, I allow the Application in terms of prayer 2 in relation to the said Managing Director alone. Prayer 3 was sought for in default to prayer 2. Thus it falls where it is. The costs of the Application shall await the examination of the said Director. Therefore the prayer for the costs may be renewed thereafter.

24. It is so ordered

Dated, delivered and signed on this 30th day of August 2018 at Nairobi

GRACE L NZIOKA

JUDGE

<u>In the presence of:</u>

Ms Mwaura holding brief for Ms Mubangi for the Applicant

Mrs Nderitu holding brief for Mr Gichuki for the Respondent

Dennis ----------Court Assistant