

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 561 OF 2015

SET AND SIT CONTRACTORS LIMITED.....PLAINTIFF

-VERSUS-

PAOLO BARBERIS CANONICO.....DEFENDANT

RULING

1. By a Notice of Motion dated 28th March 2017, **Paolo Barberis Canonico**, the Defendant, seeks an order for this court to stay further proceedings in this case pending the determination of Arbitration between **Set and Sit Contractors Limited**, the Plaintiff, and the company known as **Mare Nostrum Limited** (MNL). The Application is brought under section 6 of the Civil Procedure Act Cap 21.

2. The Plaintiff's claim in this suit is for judgment for **USD 216,500** against the Defendant. The Plaintiff pleaded for what he called a refund and repayment of a loan of **USD 216,500** which was allegedly loaned to the Defendant by the Plaintiff.

3. The Defendant in his Supporting Affidavit, which was in support of the Notice of Motion dated **28th March 2017**, deponed that the Plaintiff and **MNL** entered into a contract where the Plaintiff was engaged as an independent contractor to construct a world class tourist resort. The Plaintiff, it is not denied, is one of the directors of **MNL**. The Defendant further stated in this affidavit that, he had no direct relationship with the Plaintiff and that, he only dealt with the Plaintiff in respect to the obligations that were set out in the agreement between the Plaintiff and **MNL**.

4. Further that, the Plaintiff having failed to complete the construction as agreed with **MNL**, the agreement was terminated. That agreement had an Arbitration clause. **MNL** proceeded to declare a dispute and referred that dispute to the Sole Arbitrator **Mr. Malonza Simon Sali**.

5. It is not denied that the Plaintiff has filed its defence and counter claim before the said Arbitrator. In the counter claim the Defendant deponed that contained the same amount which is now claimed by the Plaintiff in this matter against the Defendant. It is on that ground that, the defendant seeks stay of this suit pending the determination of the Arbitration between the Plaintiff and **MNL**.

6. The Application is opposed by the Plaintiff. The Plaintiff through a Replying Affidavit of **George Aruru Momanyi**, the Plaintiff's director, deponed that its claim against the Defendant related to money lent to the Defendant between the years **2013 and 2014**. He further deponed that the Defendant is not a party in the agreement between the Plaintiff and **MNL** and there is no nexus between the money lent to the Defendant and that agreement. The deponent stated that as a consequence the Plaintiff's claim against the Defendant cannot fall for determination before the Arbitrator. Strangely after those depositions the Plaintiff under **paragraph 11** of its replying Affidavit stated as follows;

"It is true as alleged by the Defendant that the monies claimed under paragraph 74 of its counterclaim against Mare Nostrum Limited are the same amounts being claimed in this suit. The amounts claimed against Mare Nostrum Limited are supported by evidence of direct wire transfers made by the Plaintiff to the said Mare Nostrum Limited. (Now produced and shown to me are copies of evidence of transfers made by the plaintiff directly to Mare Nostrum Limited)."

ANALYSIS AND DETERMINATION

7. I have considered the affidavit evidence and the submissions of the parties in this suit. The Defendant seeks to stay this suit on the basis that the amount claimed in this suit is also the subject of the proceedings pending before the Arbitrator. The stay is sought with a view to section 6 of the Civil Procedure Act Cap 21. That section provides as follows;

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under who they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed".

8. What I need to determine is whether the matter in issue in this suit is also directly and substantially in issue in the Arbitration matter.

9. The breakdown of the plaintiff's claim in this action is as follows;

DATE	REFERENCE	DESCRIPTION	AMOUNT
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05/11/2013	100005	<p>Loan to Paolo Barberis Canonico on 5th November 2013 by RTGS to;</p> <p>Account No 2024660780</p> <p>Reference No. 100RT3091300010</p> <p>Barclays Bank of Kenya to cover legal fees</p>	\$25,000
11/11/2013	100007	<p>Loan to Paolo Barberis Canonico on 12th November 2013 by RTGS to; Account No. 2024660780</p> <p>Reference No. 1000RT3161300003</p> <p>Barclays Bank of Kenya</p>	\$ 5,000
11/12/2013		<p>Loan to Paolo Barberis Canonico on 11th December 2013 by RTGS to;</p> <p>Reference No. 1000RT3501300013</p>	\$2,500
16/12/2013	100110/100111	<p>Loan to Paolo Barberis Canonico on 18th December 2013 by RTGS to;</p> <p>Account No. 2024660780</p> <p>Refernce No.1000RT3521300007</p> <p>Barclays Bank of Kenya</p>	\$ 5,000
27/01/2014	100134	<p>Loan to Paolo Barberis Canonico on 27th January 2014</p> <p>Cheque No. 100134</p>	\$2,500
31/01/2014	T.T/100135	<p>Loan to Paolo Barberis Canonico on 31st January 2014 by RTGS to;</p> <p>Account No. 2024660780</p> <p>Reference No. 1000RT0311400008</p> <p>Barclays Bank of Kenya</p>	\$100,000
13/02/2014	100149	<p>Loan to Paolo Barberis Canonico on 17th February 2014</p> <p>Reference No. 1000RT0481400010</p>	\$2,250
01/03/2014	100158	<p>Loan to Paolo Barberis Canonico on 5th March 2014</p> <p>Reference No. 1000RT0641400001</p>	\$ 2,250
18/03/2014	100178	<p>Loan to Paolo Barberis Canonico on 18th march 2014</p> <p>Reference No. 1000RTO771400020</p>	\$ 3,000
24/04/2014	101	<p>Loan to Paolo Barberis Canonico on 23rd April 2014</p> <p>Cheque No. 101</p>	\$ 4,000
22/05/2014	18	<p>Loan to Paolo Barberis Canonico on 22nd May 2014</p>	\$ 2,250

		<i>Cheque No. 18</i>	
09/07/2014		<i>Loan to Paolo Barberis Canonico on 14th July 2014</i> <i>Cheque No. 20</i>	\$ 2,250
05/09/2014	26	<i>Loan to Paolo Barberis Canonico on 5th September 2014</i> <i>Cheque No. 26</i>	\$ 2,250
17/12/2014	215	<i>Loan to Paolo Barberis Canonico on 17th December 2014 by RTGS</i> <i>Rereference No. FT14351GZTMG</i>	\$ 12,000
17/12/2014	205	<i>Loan to Paolo Barberis Canonico on 17th December 2014 by RTGS</i> <i>Reference No. FT14359YPHO</i>	\$ 20,000
17/12/2014	206	<i>Loan to Paolo Barberis Canonico on 17th December 2014 by RTGS</i> <i>Reference No. FT143518QG9B</i>	\$ 20,000
	TOTAL		\$216,500

10. The Plaintiff in order to prove that that amount, in the suit, bears no relation to the Arbitration, filed the bank money transfers that it had made. I have gone through them and I will proceed to analyse them.

11. The bank transfer of **5th November 2013**, for **USD 25,000** is shown to have been made by the Plaintiff to the Defendant. The remittance information given to the bank by the Plaintiff at the time of the transfer of those funds was that the amount was in respect to reimbursement of legal fees.

12. There is no bank transfer for **11th November 2013**, as claimed in the Plaint. There is however a bank transfer of **12th November 2013** made by the Plaintiff to the Defendant for **USD 5,000** and the reason the Plaintiff gave to the bank for making that transfer was that it was a refund.

13. There is no bank transfer to the Defendant which relates to the Plaintiff's claim of **USD 2,500** of **11th December 2013**.

14. There is also no transfer to the Defendant for **16th December 2013**, for **USD 5,000**. There is however a bank transfer in favour of the Defendant of **USD 5,000** dated **18th December 2013**.

15. There is a transfer to the Defendant dated **31st January 2014**, for **USD 100,000** which is reflected as being architectural and and engineering services.

16. There are no bank transfers to the Defendant of **USD 2,500** dated **27th January 2014**; of **13th February 2014** for **USD 2,250**; of **1st March 2014** for **USD 2,250** of **18th March 2014** for **USD 3,000**; of **24th April 2014** for **USD 4,000**; of **22nd May 2014** for **USD 2,250**; of **9th July 2014** for **USD 2,250**; of **5th September 2014** for **USD 2,250**; of **5th September 2014** for **USD 6,000**; of **17th December 2014** for **USD 12,000**; of **17th December 2014** of **USD 20,000**; and **17th December 2014** for **USD 20,000**.

17. The above transfers are missing from the bundle the Plaintiff annexed to the Replying Affidavit where it was deponed that the bundle contained the transfers made to the Defendant by the Plaintiff.

18. The above transfers should be understood in the backdrop of this courts finding by the **Justice F. Ochieng** by his ruling dated **12th March 2018** where he stated;

“From the documents annexed to the plaint, it does appear that there is a clear nexus between the money allegedly loaned to the defendant, and the construction of Msambweni Saruni luxury Resort. In particular there is a document dated 20th January 2014 which cites the sum of USD 100,000, which was said to be in respect to architectural drawings and structural drawings of Msambwani Saruni Luxury Resort”

19. That Msambweni Saruni Luxury Resort is the structure the Plaintiff was contracted by **MNL** to construct before the dispute arose and the same was referred to Arbitration.

20. That finding by **Justice F. Ochieng** has not been appealed against. It therefore follows that because **Justice F. Ochieng** is a Judge of the High Court, as I am, I cannot violate the rule of coordinate jurisdiction and cannot therefore go against the finding by **Justice F. Ochieng**.

21. Having considered the evidence presented before me and bearing in mind the finding of **Justice F. Ochieng**, I am of the view that the matter before this Court is also before the Arbitrator and consequently in keeping with section 6 of Cap 21 this suit shall be stayed.

22. Accordingly the orders of the Court are:-

a) This suit is hereby stayed pending the final determination of the arbitration between the Plaintiff and the Mare Nostrum Limited;

b) There shall be liberty for each party to apply;

c) The cost of the Notice of Motion dated 28th March 2017 shall be in cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

MARY KASANGO

JUDGE