



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 26 OF 2015
DAVID MUTUTO MUMO.....PLAINTIFF/APPLICANT
VERSUS
SOUTH EASTERN KENYA UNIVERSITY (formerly known as
SOUTH EASTERN UNIVERSITY COLLEGE.....DEFENDANT/RESPONDENT

RULING OF THE COURT

1. The Notice of Motion application before the court is dated **27th January, 2016** filed pursuant to **Order 10 Rule 11** of the **Civil Procedure Rules, Section 1A, 1B and 3A** of the **Civil Procedure Act** and **Section 6** of the **Arbitration Act**. The application filed by the defendant herein seeks the following orders;

- a. That the interlocutory judgment entered for the Plaintiff against the Defendant and all other consequential orders be set aside.*
- b. That the matter be referred to an arbitral tribunal and or arbitration.*
- c. That there be stay of further proceedings in this suit to abide by the arbitral award.*
- d. That cost of this application be costs in the cause.*

2. The application is premised on the grounds set out therein and is supported by affidavit of **Erick K. Mutua** sworn on **26th January, 2016**.

3. The Applicant's case is that pursuant to instructions from the defendant, on **16th June, 2015** the applicant entered appearance in this matter. Upon perusal of the Plaintiff and the list of document by the Plaintiff it became apparent to the applicant that they could not file a defence in the matter in view of an arbitration clause in the lease document. Before the applicant could file the requisite application to refer the matter to arbitration, on **22nd September, 2015** the court entered interlocutory judgment against the Defendant. The applicant's case is that it is just and fair that the interlocutory judgment herein be set aside and further proceedings be stayed pending the determination of the dispute by the arbitral tribunal. The applicant states that the delay in filing an application for reference to an arbitrator was occasioned by the fact that the defendant was in the process of locating certain crucial documents relating to the subject matter of the dispute, which documents are now available, and the defendant will suffer no prejudice if the orders sought are granted.

4. The application is opposed by the respondent through his replying affidavit sworn on **26th April, 2016**.

5. The Respondent's case is that he filed the suit herein on **26th May, 2015** seeking a sum of Shs. 9,257,447.20 and general damages for breach of contract. The suit was served upon the defendant who duly entered appearance on **16th June, 2015**, but did not file a defence causing the plaintiff to apply for interlocutory judgment which was duly entered on **22nd September, 2015**. The respondent's case is that the two lease agreements herein upon which the cause of action is founded contained an Arbitration Clause which required that any disputes be referred to arbitration. The Respondents' case is that they invited the applicant to appoint an arbitrator pursuant to Clause 6 of the two (2) agreements. The applicant annexed as DMM-5 which are copies of letters addressed to the respondent inviting them to appoint arbitrators, but which the respondent states were not heeded. Because the applicant did not cooperate in the appointment of arbitrator, the plaintiff/applicant proceeded to file the suit, and when no defence was put in place they accordingly requested for interlocutory judgment which was entered. The Respondent's case is that the applicant cannot now seek to go to arbitration when it had previously refused to cooperate.

6. In their supporting affidavit the applicant does not state whether or not they were invited to take steps towards referring the matter to arbitration. All they state is that they failed to file a defence in time due to the fact that some relevant documents were misplaced causing the delay.

7. I have considered the application. In my view the only issue for determination is

- *Whether there was an Arbitration Clause, and if so, whether any or both parties complied with the same.*

8. The Arbitration clause is contained at clause 6 of both agreements. It partly reads as follows:

“All difference arising out of this lease shall be referred to the decision of an Arbitrator to be appointed in writing by the parties or if they cannot agree upon a single Arbitrator to appoint two arbitrators to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties...”

9. So clearly, there was an arbitration clause. The issue is whether any of parties tried to comply with the same when they had a disagreement. Either party was required to appoint an arbitrator if they failed to agree upon a single arbitrator, to appoint two arbitrators in writing within one month of the dispute arising.

10. There is no evidence that the defendant/applicant made any attempt to appoint an arbitrator as per that clause. As for the plaintiff/applicant, there is inconclusive evidence that he attempted to put in process a system to appoint arbitrator.

11. There are three (3) letters by the plaintiff towards this end. The first letter is dated **8th December, 2014**, the second one dated **20th January, 2015** while the 3rd one, which contained five names of possible arbitrators, is dated **21st January, 2015**. What is common about these letters is that all of them are addressed *“without prejudice”*. The other element common to all of them is that there is no evidence that they were posted, or served upon the defendant or that indeed the defendant received them. In my view, a party purporting to comply with clause 6 of the Lease on arbitration must engage in effective communication, which is not under *“without prejudice”* and which is actually proved to have been served upon the other party, so that it can be said that the other party has refused to comply. As the matter stands now, it is clear that none of the parties has complied with clause 6 of the lease. None of the parties has sought to effect the arbitration clause. Indeed, it is the finding of the court that the plaintiff prematurely moved to the court without effecting clause 6 on arbitration. There is no document the plaintiff can place before the court to show that it complied with clause 6. There is also no charge that the plaintiff can lay upon the defendant for failure to comply. The truth is that both parties have failed to comply with that clause, and the current application by the defendant is the nearest action taken to actualize clause 6 of the

lease.

12. In the upshot, the application herein is allowed in the following terms;

- a. The interlocutory judgment entered for the plaintiff herein is hereby set aside.*
- b. The matter is herewith referred to arbitration with the result that all proceedings herein are stayed depending the said arbitrator.*
- c. Costs of this application shall be in the cause.*

DATED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

A.K. Mutua holding brief for Ndenda for respondent

Mr. Musyoki holding brief for E.K. Mutua for applicant

Court Assistant – Mr. Munyao