



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 217 OF 2014

ERIC KIBAARA KIRAITHE.....PLAINTIFF

VERSUS

GIRTH CONSTRUCTION LIMITED.....1ST DEFENDANT

JARED OCHUNGO.....2ND DEFENDANT

RULING

INTRODUCTION

1. This is a consolidated ruling in respect of the Plaintiff's Notice of Motion application dated 15th May 2014 and filed on 23rd May 2014, the Defendants' Notice of Motion application dated and filed on 17th July 2014 and the Defendants' Preliminary Objection dated 29th September 2014 and filed on 29th October 2014. The court deemed it prudent to deal with the said applications under different heads although the issues were intertwined as will be seen later on in the Ruling herein.

I. PLAINTIFF'S NOTICE OF MOTION APPLICATION DATED 15TH MAY

2014 AND FILED ON 23RD MAY 2014

2. The Plaintiff's Notice of Motion dated 15th May 2014 and filed on 23rd May 2014 was brought under the provisions of Order 40 Rule 2(1) and (2), Rule 4 and Order 51 of the Civil Procedure Rules. Prayer Nos (1) and (ii) were spent. It sought for the following remaining orders:-

- i. Spent.
- ii. Spent.
- iii. **THAT this honourable court do order and issue an order of injunction restraining the defendants, their agents or anyone working on their behalf from receiving any money, payment or dues from the Ministry of Youth and sports affairs or The Government of Republic of Kenya in respect to:-**

- a. **Construction of 80 Bed Hostel, Workshop and Ablution Block at Keveye Youth Polytechnic Tender No. Moyas/009/2011-2012.**
- b. **Construction of workshop and ablution block at Siwot Youth Polytechnic Tender Number....**

Pending hearing and determination of this suit.

- iv. **THAT the Honourable Court does and hereby orders that the 1st Defendant immediately resumes executing the following projects:-**
 - a. **Construction of 80 Bed Hostel, Workshop and Ablution Block at Keveye Youth Polytechnic Tender No. Moyas/009/2011-2012.**
 - b. **Construction of Workshop and Ablution Block at Siwot Youth Polytechnic Tender No....**
- v. **THAT the Defendants be ordered to give and deposit in court such security as the court may deem fit under the circumstances.**
- vi. **The costs of this application be provided for.**

THE PLAINTIFF'S CASE

3. The application was supported by the Plaintiff's Affidavit that was sworn on 15th May 2014. His Written Submissions were dated 28th July 2014 and filed on 31st July 2014.
4. The Plaintiff stated that he had entered into a Joint Venture Agreement dated 7th December 2011 (hereinafter referred as "the Joint Venture Agreement") with the 1st Defendant where he was to finance construction projects that the 1st Defendant won in tenders as it did not have financial ability to finance the same.
5. He averred that the 1st Defendant was paid eighty (80%) of the costs in respect of constructions of BAT (K) Limited sheds but refused to remit to him his share of the monies. He agreed to finance the projects at Keveye Youth Polytechnic and Siwot Youth Polytechnic so as to recoup his investment in respect of the BAT (K) Limited sheds but the 1st Defendant abandoned the said projects after receiving part payment.
6. His case was that the 1st Defendant had received 80% payment for the Keveye Youth Polytechnic and Siwot Youth Polytechnic but, similarly, the 1st Defendant had refused to account for the same to him or reimburse him his capital.
7. He therefore urged the court to grant him the orders he had sought in his application.

THE DEFENDANTS' CASE

8. In response to the said application, the 2nd Defendants swore a Replying affidavit on his own behalf and that of the 1st Defendant on 25th August 2014. The same was filed on 29th October 2014. The Defendants also filed a Notice of Preliminary Objection dated 29th September 2014 and filed on even date. The Defendant's written submissions were dated 21st January 2015 and filed on the same date.
9. In the Notice of Preliminary objection, the Defendants argued that the dispute before the court was subject of an arbitration clause in the said Joint Venture Agreement. With regard to the construction projects, it was their case that they had discharged their contractual obligations with the Plaintiff and paid him his dues and therefore prayed for the dismissal of his application with costs to them.
10. The Grounds of the said Notice of Preliminary Objection could be summarised as follows:-
 1. **THAT the dispute before the court was subject of an arbitration clause in the agreement dated 7th December 2014 entered into by the parties herein.**
 2. **THAT the court lacked jurisdiction to determine the matter pursuant to Article 159 (2) (c) of the Constitution of Kenya as read with Sections 4, 6 and 7 of the Arbitration Act Cap 49**

LEGAL ANALYSIS IN REPECT OF THE PLAINTIFF'S APPLICATION

11. The Plaintiff pointed out that the court had given very specific directions as to the filing of affidavits and written submissions but the Defendants failed to file any response. He therefore contended that his application was unopposed and ought to be granted as prayed.
12. The court deemed it prudent to dispose of the Preliminary Objection right at the outset as it went to the root of the jurisdiction of the court. The Defendant's objection was that the dispute before the court was subject of an arbitration clause in the said Joint Venture Agreement. To that end, it submitted that this court lacked jurisdiction to determine the dispute herein.
13. The Plaintiff annexed a copy of Joint Venture Agreement Exhibit marked "EKK 1" in his Supporting Affidavit showing that he entered into an agreement with the 1st Defendant for the Construction of Tobacco Buying Sheds for BAT (K) Limited in Western Kenya. There was, however, no evidence of a joint venture agreement in respect of Construction of 80 Bed Hostel, Workshop and Ablution Block at Keveye Youth Polytechnic Tender No. Moyas/009/2011-2012 and Construction of workshop and ablution block at Siwot Youth Polytechnic between him and the 1st Defendant.
14. Notably, in the present matter, the Plaintiff was seeking relief with regard to the construction projects at Keveye Youth Polytechnic and Siwot Youth Polytechnic. However, there was no written agreement with regard to these construction projects.
15. The Plaintiff had attested as much in Paragraph 7 of his Supporting Affidavit when he stated that he and the 2nd Defendant entered into **oral agreement** (emphasis court) where he accepted, in good faith, to finance projects in which the Defendants won tenders so that he could recoup the investment he had made in the tender for the construction of the BAT (K) Limited sheds. These facts were not contested by the Defendant.
16. Having considered the parties' submissions regarding this issue, the court found that there were two (2) reasons why the Defendant's Notice of Preliminary Objection could not have been sustained. Firstly, for arbitration to ensue, there must be in existence a valid arbitration agreement in writing in accordance with Section 4 of the Arbitration Act Cap 49 (Laws of Kenya). However, in this case there was no written agreement in respect of the projects in question enable them submit the dispute in this matter to arbitration.
17. Secondly, a party to a suit cannot challenge the jurisdiction of the court by way of a Notice of Preliminary Objection where it contends that there is in existence a valid arbitration agreement. The procedure for ousting the jurisdiction of the court is well set out in Section 6 of the Arbitration Act as will be seen later on in the Ruling herein.
18. While the court noted the Defendants' submissions that it is the duty of the court to apply **"the law in a given situation... with a view to doing justice to the parties and adopt an activist goal oriented approach in the interpretation of the fundamental rights embodied in the Bill of Rights or in statutory legislation,"** the court cannot ignore the mandatory provisions of the law that guide parties on how to approach the court to seek remedies or relief.
19. Appreciably, the Defendants clearly erred in failing to file a Replying Affidavit in the mistaken belief that it would be subscribing to the jurisdiction of the court if they filed the said response.
20. For the reasons aforesaid, the preliminary objection that was raised by the Defendant could not be sustained and the same therefore failed.
21. In respect to the Plaintiff's application for injunction, the court noted that the Plaintiff was to finance the 1st Defendant in the construction projects in question. This was on the understanding that he would get his profits on completion of the projects. The Plaintiff was apprehensive that the 1st Defendant would continue receiving payments and not remit his share to him.
22. On the other hand, the Defendant contended that the Plaintiff withdrew from the project at an advanced stage and they could not therefore conclude the projects. As a result, they were served with a notice to complete the projects.
23. It was the Plaintiff's evidence that the 1st Defendant was paid in full for the construction of the BAT (K) Limited and eighty (80%) per cent of the total contract sum in the construction of works

at Keveye Youth Polytechnic, a fact that was evidenced by a letter dated 28th January 2014 by the County Director Youth Training Vihiga County Exhibit marked “EKK 5”. The Defendants did not deny having received the said payments. It was, however, their position that they paid the Plaintiff what was due to him.

24. It did not help much that the agreement under which the Plaintiff sought to obtain reliefs from this court was oral in nature. There was no documentary evidence to show the rights and obligations of the parties emanating therefrom. There was also no documentary evidence to show that the Defendants had refused to reimburse the Plaintiff what was due to him out of the construction projects. It did not get any better when the Defendants maintained that they paid the Plaintiff his dues with no evidence to back their assertion.
25. The court carefully considered the prayers that had been sought by the Plaintiff and noted the hopelessness of the same. He had sought orders to restrain the Defendants from **receiving** (emphasis court) payments from Ministry of Youth and Sports Affairs. How would the court monitor this to ensure that its orders were duly complied with? Indeed, the court could restrain the Defendants from receiving the said payments but there was nothing that would stop the said Ministry from paying him any sums if it found it necessary to do so. Nothing would have been easier than for the Plaintiff to have enjoined the said Ministry as a party to the suit herein so that it could be bound by orders made by this court. Appreciably, courts should never grant or make any orders it cannot enforce.
26. Having said so, the court must ask itself whether indeed the Plaintiff could have proceeded in such manner. Evidently, there was no privity of contract between him and the said Ministry and it could not therefore dictate when and how the said Ministry could pay the 1st Defendant.
27. There was definitely a contract between the 1st Defendant and the said Ministry. In the letter dated 28th January 2014 mentioned hereinabove, the said County Director Youth Training Vihiga had stated as follows:-

“The purpose of this letter is to inform you to complete the outstanding works on or before 15th March 2014, failure which we shall instruct the county works officer to commence termination proceedings.”

28. In the letter dated 13th December 2012 annexed to the Plaintiff’s Supporting Affidavit and marked “EKK 2(b), the County Works Officer had written to the District Youth Training Officer Vihiga District as shown hereinbelow:-

“Please ensure that no payments are released to the contractor without our certification of the works as complete.”

29. It was clear from the contents of the said letters, that the Plaintiff had not been able to demonstrate that he had met the criteria that was set out in the case of **Giella v Cassman Brown (1973) EA 358** in which it was held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

30. Additionally, the Plaintiff had not demonstrated any special circumstances that would have entitled him to be granted an interlocutory mandatory injunction, the effect of which would have been that the Defendants should be compelled to complete the construction of the projects in question as there were clearly mechanisms of how this was to be achieved.

31. In the case of **Locabail International Finance Limited vs Agro-Export & Another [1986] 1 All ER**, the circumstances of when a mandatory injunction can be granted are well set out. The Plaintiff’s case was clearly not one of them. In the said case, it was stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

32. Having considered the pleadings, written and oral submissions and the case law relied upon by the respective parties, the court found that the Plaintiff did not demonstrate that it was entitled to a mandatory injunction. It did not meet the threshold that was set out in the case of **Locabail International Finance Limited vs Agro-Export & Another** (Supra) which still remains good law.
33. From the foregoing, it was clear that the dispute between the parties herein could only be determined at full trial where the parties would give *viva voce* evidence. It became evident that the *status quo* orders the court gave on 16th June 2014 were superfluous as the said Ministry had on its own motion indicated that it would not pay the 1st Defendant until it completed all the projects.
34. As regards the issues of security of costs, it is clear from the provisions of Order 26 Rule 1 of the Civil Procedure Rules, 2010 that it is only a Defendant that can make an application for security for costs. Such security is intended to protect a Defendant from incurring costs in a suit filed by a Plaintiff where the same does not succeed and a Defendant is unable to recover its costs in defending such a suit. Be that as it may, the Plaintiff appeared to have abandoned this prayer as it did not submit on the same.
35. In this regard, the Plaintiff's Notice of Motion application dated 15th May 2014 and filed on 23rd May 2014 would not succeed on the grounds shown hereinabove.

II. DEFENDANT'S NOTICE OF MOTION APPLICATION DATED AND FILED ON 17TH JULY 2014

36. The Defendant's Notice of Motion dated and filed on 17th July 2014 was brought pursuant to the provisions of Order 40, Order 46 of the Civil Procedure Rules and all enabling provisions of the law. Prayer No (1) was spent. It sought for the following remaining orders:-

- i. **Spent.**
- ii. **THAT this Honourable Court grant a stay of the main suit pending the referral of the matter for Arbitration.**
- iii. **THAT this matter be referred to the Chairman, Chartered Institute of Arbitrators (Kenya Chapter) to appoint a single arbitrator for hearing and determination of the suit.**
- iv. **THAT costs be in the cause.**

THE DEFENDANTS' CASE

37. The application was supported by the 2nd Defendant's Affidavit that was sworn on 17th July 2014. The Defendants' Written Submissions were dated 20th January 2015 and filed on 21st January 2015.
38. The Defendants contended that the Plaintiff had alluded to oral and written agreements in which they had agreed that any disputes between them had to be referred to alternative dispute resolution as could be seen in Clause 1 of the aforesaid Joint Venture Agreement. It therefore argued that this court had no jurisdiction to determine this matter herein and urged the court to refer the matter to arbitration.

THE PLAINTIFF'S CASE

39. In response to the said application, the Plaintiff filed Grounds of Opposition dated 11th December 2014 on even date. His Written submissions were dated 11th December 2014 and filed on 15th December 2014.

40. The said grounds could be summarised as follows:-

1. **THAT the application dated 17th July 2014 lacked merit and should be dismissed.**
2. **THAT the application had already been overtaken as the the matter was before a competent court.**
3. **THAT the nature of the dispute could not be addressed by an arbitrator as he had sought interlocutory orders.**
4. **THAT the application was wrongly instituted and the supporting documents irregularly filed.**
5. **THAT the Defendants were guilty of indulgence and had come to court in bad faith.**

LEGAL ANALYSIS IN REPECT OF THE DEFENDANTS' APPLICATION

41. The court noted the parties' submissions in respect of the said application but found them to have been rendered irrelevant for the reason that there was no written agreement between them that would have persuaded this court to stay the proceedings herein and refer the dispute to arbitration.

42. Assuming that there was a written agreement to refer the dispute herein to arbitration under Section 6(1) of the Arbitration Act, the same would also not have been automatic. Indeed, the court can decline to refer the matter to arbitration in the circumstances shown hereinbelow:-

“A court before which proceedings are brought in a matter which is the subject of an arbitration 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, (emphasis court) stay of 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...”**

43. This essentially means that the latest the Defendants ought to have filed an application under Section 6 of the Arbitration Act was 11th June 2014. They did not so and in fact filed their Statement of Defence dated 29th October 2014 on the same date.

44. The court therefore agreed with the Plaintiff's submissions that the said application had been overtaken by events as this court was properly seized of the dispute between him and the Defendants. However, the Plaintiff's arguments that the said Statement of Defence was filed late or that it was a sham, were immaterial for the purposes of determining whether or not the court should stay the proceedings herein pending referral of the dispute to arbitration.

45. Be that as it may, the Defendants' application was incompetent for the reason that it had sought to have the matter referred to arbitration under the provisions of Order 46 of the Civil Procedure Rules which provide as follows:-

“1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration (emphasis court) they may, at any time before judgment is pronounced apply to the court for an order of reference.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.”

46. Evidently, unless parties consent, this court has no jurisdiction to refer the dispute between the parties to have their dispute resolved through arbitration. The Defendants' said application would not succeed and must fail.

DISPOSITION

47. Accordingly, having considered the pleadings by the parties, the affidavit evidence, the written submissions and the case law that was relied upon by the parties, the court came to the following conclusion:

- a. **THAT the Plaintiff's Notice Motion application dated 15th May 2014 and filed on 23rd May 2014 was not merited and the same is hereby dismissed.**
- b. **THAT the Defendants' Notice of Motion application dated and filed on 17th July 2014 was also not merited and the same is hereby dismissed.**
- c. **THAT the Defendants' Notice of Preliminary Objection dated 29th September 2014 and filed on 29th October 2014 was not merited and the same is also hereby dismissed.**
- d. **Parties shall each bear their own costs.**
- e. **The *status quo* orders that had been issued by the court on 16th June 2014 are hereby discharged, set aside and/or vacated.**

48. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of March 2015

J. KAMAU

JUDGE