REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC SUIT NO. 560 OF 2012 (O.S)

ANTHONY AKELO OKULO…………………………..…..APPLICANT/RESPONDENT

VERSUS

VENTURE HOLDINGS LIMITED…………....……………RESPONDENT/APPLICANT

RULING

The application before this Court is the Notice of Motion dated 27th March 2014 brought under ***Order 36 Rule 10, Order 45, Order 51 of the Civil Procedure Rules 2010Section 3A and Section 5 of the Civil Procedure Act*** and ***Section 6 of the Arbitration Act*** seeking for orders that there be a stay of execution of the judgment and decree entered on 25th February 2014 pending the hearing and determination of this application and that the court reviews its proceedings, judgment and decree delivered on 25th February 2014 and set aside and nullify the said proceedings and judgment and all consequential orders and decrees including the decree dated 25th February 2014.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of ***Kwame Kariuki,*** a Director of the defendant company who deposed that the parties entered into a sale agreement on 31st December 2009, for the property known as Apartment No C2 situated ***on Ground Floor Block C on LR No 330/356*** with Clause 1.8 of the agreement stating that,

"All disputes and questions whatever which shall arise between the parties hereto touching this agreement or relating to the rights and liabilities of either party hereto shall be referred to the decision of a single Arbitrator who shall be an Advocate of not less than 20 years standing to be appointed by the Chairman for the time being of the laws of Kenya in accordance with the provisions of the Arbitration Act or any amending or replacing the same. The decision of such Arbitrator shall be final conclusive and binding on the parties."

He averred that the Respondent instituted a suit in ELC No 560 of 2012 which were served on the applicant .They instructed a law firm which duly entered appearance. The firm advised the applicants that they did not need to respond to the originating summons and on 25th February 2014 judgment was entered in favour of the Respondent in the terms that :

a. ***Refund of the paid purchase price of Ksh 7,200,000/=***
b. ***Damages of Ksh 4,000,000/=***
c. ***Costs of the suit.***

He further stated that the proceedings and judgment acknowledged that the dispute emanated from the sale agreement between the parties without refereeing to clause 18 and had the court made reference to this clause it would have established that the court had no jurisdiction to hear and determine

the disputes raised. He further averred that it was apparent that the Respondent intended to proceed with execution of the said judgment and they would suffer irreparable loss and damage if the proceedings and judgment are not reviewed and set aside.

This application is opposed by the Respondent Anthony Akelo Okulo who deposed a Replying Affidavit stating that the application raises one ground for seeking review of the judgment which is an error on the face of the record which error is that this court did not have jurisdiction to hear and determine this case because the sale agreement had an Arbitration Clause. He believes that an Arbitration Clause does not oust the jurisdiction of the court. That the applicant was fully aware applicant was fully aware of the case from when it was commenced on 30th September 2012, to when it was concluded in 25th February 2014 but refused to prompt the court to stay the proceedings. That the proceedings have already been determined therefore section 6(2) of the Arbitration Act cannot apply. That the application for review was filed on the same day a letter seeking to withdraw the Appeal was lodged and so technically the appeal was still valid when the application for review was lodged in court therefore the application should be dismissed with costs.

I have considered the affidavits; submissions and the authorities relied on. The applicant is seeking the court to review its decree dated 25th February 2014 in which judgment was entered in favour of the Respondent. It is also seeking to set aside the said judgment.

The relevant law on review is Order 45 rule 1 of the Civil Procedure Rules and is discretionary. In ***Salama Mahmoud Saad –Vs- Kikas Investments Limited & Another (2014) eKLR***, the court held that,

"the jurisdiction of the Court under Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said Order which are:1) there has been the discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made; or 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason". (Our emphasis)

The *applicant herein seeks to have the decree issued by this court emanating from a judgment delivered on* ***25th February 2014****, be set aside for on grounds of sufficient reasons. The applicant relies on Clause 1.8 of the sale agreement that provided for Arbitration should a dispute between the parties arise. That the Respondent did not bring the said clause to the attention of the court. Its contention is that there was an error on the part of the court in hearing a matter that both parties had agreed that their disputes would be dealt with in Arbitration and that the Court ought to have given the parties directions to take the matter for arbitration. In essence the Applicant is saying that this court did not have the jurisdiction to hear this matter.*

I have perused the court record and note that this suit was filed on 30th August 2012and the applicant came on record on 1st October 2012 vide a Notice of Appointment. On 11th March 2013 the Respondent's advocates Okong'o, Wandago& Company invited the applicant to fix a hearing date for the hearing of this suit and subsequently the applicant was served with a hearing notice that this suit would be heard on 28th May 2013.There was a mention notice served in the applicant to confirm that parties had filed their written submissions on 16th July 2013.The Court issued Notices to both advocates for the parties herein notifying them of Judgment on 12th February 2014 and judgment subsequently delivered on 25th February 2013.

As can be noted by the chronology of events in court is that the applicant was duly noted of every step the Respondent took in prosecuting the matter. Further when the applicant entered appearance, it was incumbent upon it to raise the issue it is raising now that the court should not have dealt with the matter. That notwithstanding I will revisit the said clause 1.8 of the sale agreement. The clause states that,

“All disputes and questions whatever which shall arise between the parties hereto touching this agreement or relating to the rights and liabilities of either party hereto shall be referred to the decision of a single Arbitrator who shall be an Advocate of not less than 20 years standing to be appointed by the Chairman for the time being of the laws of Kenya in accordance with the provisions of the Arbitration Act or any amending or replacing the same. The decision of such Arbitrator shall be final conclusive and binding on the parties”

Does this clause oust the jurisdiction of this court? I think not. In the case of ***Indigo EPZ Limited –V-Eastern and Southern African Trade & Development Bank Nairobi [2002] 1KLR 2002*** the court held that,

“In any case…. (there) is a well settled general rule recognized (even) in the English courts which prohibits all agreements purporting to oust the jurisdiction of the court”

Further the court went on to make a holding that ,

“…..where parties have agreed to refer disputes to arbitration the position is that the jurisdiction to deal with substantive disputes and differences is given to the arbitrator and the Kenyan Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes or differences are dealt with in the manner agreed between the parties under the agreement”

My understanding of this decision is that the arbitral clause did oust the jurisdiction of the court but gave an option for the parties to solve their dispute before coming to court. The applicant has not disputed that it came on record and continued receiving correspondences from the respondent’s advocates on the progress of this suit. If they were serious on having this dispute dealt with at the arbitration level, then they would have under section 6 of the Arbitration Act made their application to stay the courts proceedings. The court in Corporate **Insurance Co. –Vs- Wachira (1995-1998) 1EA 20** held that,

“In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”

It is clear that by the minute the applicant came on record it was incumbent of them to file an application in pursuant to section 6 of the Arbitration Act to stop the proceedings but since they acceded to the jurisdiction of the court when they came on record and received correspondences from the Respondent they are precluded from seeking to review the judgment of this court. I am persuaded by the decision of the Court of Appeal in ***National Bank of Kenya Limited vs. Njau (1996) LLR 469 (CAK)***, where it state d that**,**

“A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law”.

Having now considered the pleadings generally and the written submissions, the Court finds that the Applicant Notice of Motion dated 27th March 2014 is not merited.

I therefore decline to grant the orders sought by the applicant herein and the end result is that the application dated 27th March 2014 is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and **delivered** this **20th day** of March **2015.**

L. GACHERU

JUDGE

In the Presence of:-

Mr Otieno holding brief Wandabo for Plaintiff/Respondent

M/s Oserwa for Defendant/Applicant

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling Read in open Court in the presence of the above counsels.

L. GACHERU

JUDGE