



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 269 OF 2014

KUDAKWASHE NHIWATIWA.....PLAINTIFF

VERSUS

BRENDA ELIZABETH SAPANI WAKA.....DEFENDANT

RULING

INTRODUCTION

1. This is a consolidated Ruling in respect of the Plaintiff's and Defendant's applications.

2. The Plaintiff's Notice of Motion application dated 27th June 2014 and filed on even date was brought under the provisions of Section 7 (1) of the Arbitration Act and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 (Laws of Kenya). It sought for the following orders:-

1) THAT the Defendant be ordered to immediately deposit the sum of United States Dollars One Hundred and Fifty Nine Thousand, Four Hundred and Sixty Two (USD 159,462) in an interest earning bank account in the joint names of counsel for the parties herein pending the full hearing and determination of this suit.

2)The costs of and incidental to this Application be provided for.

(3 Such other, further, alternative and/or incidental orders as the Honourable Court may deem just and expedient.

3. The application was supported by the affidavit of the Plaintiff herein. It was sworn on 28th May 2014. His submissions dated 20th April 2015 were filed on even date.

4. The Defendant filed Grounds of Opposition dated 21st August 2014 on 22nd August 2014 in opposition to the same application. The same were as follows:-

1) That the application herein was fatally defective and was not available in a suit filed before this court.

2) That the suit and application were premature and an abuse of the process of the

court and should be stayed under Section 6(1) of the Arbitration Act 1995 pending arbitration.

3) That the application and pleadings herein offended the mandatory provisions of Order 2 Rule 2 (2) of the Civil Procedure Rules, 2010.

5 The Defendant's Chamber Summons application dated 21st August 2014 and filed on 22nd August 2014 was taken out under the provisions of Rule 2 of the Arbitration Rules 1997, Section 6 (1) of Arbitration Act 1995 and Sections 1A & 1B of the Civil Procedure Act. It sought the following orders:-

1) THAT this Honourable Court be pleased to issue a stay of proceedings in this matter and do order that the matter be referred to Arbitration.

2) THAT costs of the application be provided for.

6. The said application was supported by the Defendant's affidavit sworn on 21st August 2014. Her written submissions were dated 11th May 2015 and filed on even date.

7. The Plaintiff opposed the Defendant's application through Grounds of Opposition that were dated 16th September 2014 and filed on 17th February 2014. The only ground stipulated therein was:-

1) THAT the application was an abuse of the court process, vexatious, lacked merit, bad in law and did not lie.

THE PLAINTIFF'S CASE

8. The Plaintiff averred that by a Transfer Deed dated 30th September 2013, he entered into an agreement with the Defendant to purchase her shares in Sapani Group Limited. Pursuant to the said Transfer Deed, he transferred USD 159,462 being the purchase price of the shares.

9. Subsequently, on 1st November 2013, he entered into an Agreement for Cancellation of Transfer of Shares (hereinafter referred to as "the Agreement for Cancellation") wherein the Defendant agreed to repay the amount of USD 153,329 together with interest at the rate of twelve (12%) per cent per annum by 31st December 2013 and to pay a further interest on one point five (1.5%) per cent per month until payment in full.

10. It was, however, the Plaintiff's contention that the Defendant had failed to pay the outstanding sum and that the withholding of the funds had greatly hindered his operations and business as an investor. He therefore urged the Court that it was in the interest of justice to allow his application.

THE DEFENDANT'S CASE

11. The Defendant did not dispute the fact that she transferred to the Plaintiff the aforementioned shares in Sapani Group Limited (hereinafter referred to as "the Company") pursuant to a Shareholders (sic) Agreement (hereinafter referred to as "the Shareholders Agreement") dated 10th September 2013.

12. She pointed out that after the transfer of the said shares, the Company had leased premises and that she largely financed the expenses. It was her contention that despite being bound by the terms of the said Shareholders Agreement, the Plaintiff failed to pay her the full consideration of the shares that she had transferred to him.

13. It was her case that the proceedings herein ought to be stayed as there was an agreement

between her and the Plaintiff to refer disputes to arbitration. She therefore urged the court to dismiss the Plaintiff's said application with costs.

LEGAL ANALYSIS

14. The court noted the Defendant's ground of opposition that the Plaintiff's application offended the provisions of Order 2 Rule 2 (2) of the Civil Procedure Rules. However, she did not submit on this issue making it difficult for the court to know what her argument was. The court did not therefore find it necessary to delve into the merits or otherwise of the same.

15. Although the two (2) applications were intertwined, the court dealt with the same under the heads shown hereinbelow.

INTERIM MEASURES OF PROTECTION

16. The Plaintiff relied on the Agreement for Cancellation in which the Defendant had agreed to repay him USD 153,329. It was therefore the Plaintiff's case that according to that agreement, there was no dispute to be referred to arbitration.

17. However, the Defendant has denied being party to the said Agreement for Cancellation. It was her submission that she was a stranger to the said Agreement for Cancellation and that the same was a fabrication by the Plaintiff. Unfortunately, there were no sufficient facts before the court to ascertain the authenticity of the said Agreement for Cancellation or the circumstances under which it was subsequently entered into.

18. Be that as it may, Section 7(1) of the Arbitration Act stipulates that:-

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

19. Under the aforesaid provision, the court can issue interim measures of protection or injunction to preserve the subject matter of a dispute that is to be referred to arbitration. This remedy for interim measures is available to parties even before the arbitration proceedings commence as was upheld by Ojwang' J as he then was in the case of **HCCC No 104 of 2004 Don-Wood Co Ltd vs Kenya Pipeline Ltd** (unreported).

20. In its application, the Plaintiff's main prayer was that the Defendant be ordered to immediately deposit the sum of USD 159,462 pending the hearing and determination of the suit. As the Defendant correctly submitted, the interim orders the Plaintiff had sought could only be granted before or during arbitration proceedings and not in the cause of proceedings in a case in court. On this ground alone, the Plaintiff's application would fail in its entirety.

21. However, assuming that the word “suit” in prayer (1) of the Plaintiff's application was a typographical error, the prayer sought is still not one the court can grant for the reason that Section 10 of the Arbitration Act states that the court shall not intervene in matters governed by the Arbitration Act except as otherwise provided by the said Act.

22. It did appear to the court that the Plaintiff was seeking a mandatory injunction, being a deposit of the sum in issue in an interest earning account. It was, however, abundantly clear that the order was not for preservation of the subject matter as envisaged in Section 7 (1) and (2) of the Arbitration Act. Rather, the Plaintiff's prayer appeared to be one that could be adequately dealt with under the provisions of Section 18 (2) of the Arbitration Act that provides as follows:-

Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party-

a. ...

b. **order any party to provide security in respect of any claim or any amount in dispute; or...**

23. For the foregoing reasons, the Plaintiff's application would not succeed as the prayer sought was not one that the court could grant.

STAY OF PROCEEDINGS AND REFERRAL TO ARBITRATION

24. The Agreement for Cancellation that the Defendant disowned had an arbitration clause. Clause 12 therein provides as follows:-

“Any dispute difference or question arising hereafter between the Vendor and the Purchaser on account of any breach or alleged breach or any or incidental to the covenants (emphasis court) herein contained shall be referred to the arbitration of a single arbitrator appointed under the provisions of the Arbitration Act.”

25. Clause 28 of the Shareholders Agreement stipulates as follows:-

“Any dispute, controversy or claim arising out of or in connection with this agreement, including any question regarding its interpretation, existence, validity or termination (emphasis court) shall be referred to and finally resolved by arbitration under the provisions of the Arbitration Act, 1995...”

26. Irrespective of whichever agreement one would look at, it was evident that the Plaintiff and Defendant had chosen arbitration as their preferred mode of settlement of disputes on account of any breach or alleged breach or any or incidental to the covenants, or interpretation, existence, validity or termination of the agreement between them. In this regard, the court was in agreement with the holdings **of Savings and Loans Kenya Limited vs Mayfair Holdings Limited [2015] eKLR** and **National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited [2011] eKLR** that were relied upon by the Defendant. Bearing in mind the existence of the arbitration clauses, the Court was enjoined to be very cautious before bestowing upon itself jurisdiction to deal with the dispute between the parties herein.

27. However, the above notwithstanding, it is imperative that the conditions set out in Section 6 of the Arbitration Act must have been met before the court can confidently state that it has jurisdiction. The said Section stipulates as follows:-

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a 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, stay the 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 matter agreed to be referred to arbitration.

(2) The operative and key words are **“not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.....”**

(3) The essence of Section 6(1) of the Act is that the Defendant ought to have filed an

application for stay of proceedings at the time it filed its Memorandum of Appearance on 22nd August 2014 and before taking any other step in the proceedings herein. From the facts of this case, it was evident that the Defendant had fully complied with the provisions of Section 6 (1)(a) of the Arbitration Act, to the effect that the Defendant's application had been filed on time and that the arbitration agreement was not null and void, inoperative or incapable of being performed.

28. Going further, the Defendant submitted that the Plaintiff purported to cancel the transfer of shares and failed to pay her the balance of the money due on the transfer of shares. It was her argument that the Plaintiff breached the agreement for sale of shares without apparent reason by purporting to cancel the same and seeking a refund of the part payment.

29. Without saying more, this court was of the view that this was evidence of a dispute between the parties as contemplated under the arbitration clause in the Shareholders agreement. The case of **Civil Case No 26 of 2007 UAP Provincial Insurance Company Limited vs Michael John Beckett KLR 2015** and the cases cited therein were therefore distinguishable from the facts of this case and were not of any assistance to the Plaintiff.

30. Having considered the pleadings, the affidavit evidence, the Grounds of Opposition, the Written Submissions and case law that was relied upon by the parties herein, the court found that having established that there was a valid arbitration agreement that was capable of being performed and that there was a dispute between the parties, it was satisfied that the proceedings herein should be stayed in order to refer the suit to arbitration in accordance with Section 6 of the Arbitration Act.

DISPOSITION

31. In the circumstances foregoing, the upshot of this court's ruling was that the Plaintiff's Notice of Motion dated 27th June 2014 and filed on even date was not merited and the same is hereby dismissed with costs to the Defendant. On the other hand, the Defendant's Chamber Summons Application dated 21st August 2014 and filed on 22nd August 2014 was merited in terms of Prayer No (1) therein. The costs of the Defendant's application shall be in the cause.

32. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of June, 2015

J. KAMAU

JUDGE