REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 160 OF 2014

SHABBIR NASSIR JAMAL

ZAINAB SALIM NASSOR T/A

SILVERSPOON RESTAURANT LIMITED………………..………………. … APPELLANTS

V E R S U S

VRAJKUNVER MANILAL GOHIL

RAJNIKANY MANILA GOHIL

KAMAL MANILAL GOHIL……………………. ....…………..…RESPONDENTS

RULING

1. The respondents filed a case before Mombasa Chief Magistrate's Court being CMCC No. 1106 of 2013 against the appellants. Respondents claim before that court is for vacant possession by appellants of MOMBASA/BLOCK XX/178 (the suit property); and for mesne profit.
2. Appellant before the Chief magistrate's Court filed a memorandum of appearance under protest and thereafter filed a Notice of Motion dated 25th July 2013. That application was for stay of the proceedings of the Chief Magistrate's case and for an order for reference of the dispute to an arbitrator.
3. The Chief Magistrates court after hearing parties submissions on that application, by its Ruling of 9th December 2014 struck out appellant application. It is that striking out that provoked this appeal.
4. Appellant has by Notice of Motion dated 18th December 2014, before this court, sought stay of the Chief Magistrate Court case pending the hearing and determination of this appeal.

BACKGROUND

5. It is admitted by all parties that the respondent and appellants entered into a lease on 17th July 2007 for 5 years and three months. That lease therefore expired on 31st March 2013. When the appellant did not surrender the property respondents filed the case before the Chief Magistrate Court seeking vacant possession on and mesne and profit.

6. The lease agreement provided under clause 4 that the lessee (appellants) if they desired to obtain renewal of the lease they were to signify the same by way of notice in writing given to the lessors (respondents) three months before the expiry of the lease term. That clause further provided that if a dispute arose under that clause between parties the same would be referred to arbitration in accordance with Arbitration Act in force in Kenya.
7. Appellant's struck out Notice of Motion dated 25th July 2013 before the Chief Magistrate's Court and this Notice of Motion, being considered in this Ruling, dated 18th December 2014 are both supported by affidavits sworn by SALEH MOHAMED and CHOHAN SUNIL RUDOLF. This is how the two describe themselves:

> **"That we are adults of soundmind and both Directors of SILVERSPOON Restaurant Limited…"**

ANALYSIS AND DETERMINATION OF NOTICE OF MOTION DATED 18TH DECEMBER 2014

8. I have considered the parties affidavit evidence, written and oral submissions and the cited authorities. Appellants seek to stay proceedings before the Chief Magistrate's Court.
9. There is no doubt that this court has power to stay those proceedings. For the appellants to however succeed before this court they must satisfy the court that they have an arguable appeal and that if stay as sought is not granted this appeal will be defeated.

10. As stated before the lease over the suit property was between the appellants and respondents. Appellants in that lease are described as trading as Silverspoon restaurant.

11. Although appellants filed their Memorandum of appearance before the Chief Magistrate Court "under protest," it is clear they filed it in the title under which they were sued and not as a Limited Liability Company.

12. The parties who sought stay of proceedings and referral of the dispute to an arbitrator and the same parties who now are before this court in this appeal seeking stay of the proceeding before the Chief Magistrate's Court are not the plaintiffs in the Magistrates Court case because they describe themselves as directors of Silverspoon Restaurant Limited.

13. The ramifications of those parties who moved the Chief Magistrate's Court and now have moved this court is two fold. Firstly it shows that there is no arguable appeal and secondly that that there was no dispute that was capable of being referred to an arbitrator.

14. There is no arguable appeal because as correctly stated by the Magistrate who struck out appellant's application, they are strangers to the lease agreement. The lease was between appellants trading as Silverspoon Restaurant and respondents. Silverspoon Restaurant Limited was not a party in the lease. There is therefore no privity of contract between the respondents and Silverspoon Restaurant Limited.

15. The appeal by Silverspoon Restaurant Limited is not arguable.

16. Section 6 (I) of the Arbitration Act Cap 49 is the section that empowers the court to stay proceedings and to refer disputes for arbitration.

17. For the court to stay proceedings under that section there must be a dispute. Section 6 provides:

> **6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement 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, 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 maters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continues after an application under subsection (1) has been made and the matter remains undetermined.

17. The court of appeal had occasion to consider the provisions of that section in the case **<u>UAP PROVINCIAL INSURANCE COMPANY LTD –V- MICHAEL JOHN BECKETT [2013] eKLR</u>** as follows:.

> **"It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.**
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> **The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.**
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> **The provisions in Section 6(1) (b) of the Arbitration Act are similar to the provisions of Section 1(1) of the Arbitration Act, 1975 of England before its amendment by the Arbitration Act, 1996…….**
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> **In interpreting that provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no "real dispute". Lord Swinson Thomas LJ, captured the significance of the words *"there is not in fact any dispute between the parties'*"as used in the 1975 English Arbitration Act, and which appear in our section 6(1)(b), in the English case of <u>Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 W l R 726</u> which presents striking similarly with the circumstances in the present appeal. We bear in mind that that case was decided under the 1996 Arbitration Act of England.**
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> **In <u>Halki Sipping Corpn v Sopex Oils Ltd</u>, ship owners applied for summary judgment against charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties and the charterers applied to stay those proceedings pending reference to arbitration. The issue in that case was whether there was a dispute within the meaning of the arbitration clause. Lord Swinton Thomas LJ stated at page 755 that:**

“The words used in clause 9 of the charterparty in relation to a referral to arbitration were “any dispute”. The words in section 1 (10 of the Act of 1975 are: “there is not in fact any dispute between the parties.” To the layman it might appear that there is little if any difference between those words. However the legislature saw fit to draft section 1 using the phrase “not in fact any dispute.” The legislature did not use the words “there is no dispute” and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrases “any dispute” and “not in fact any dispute” is of central importance in understanding what underlined the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words “not in fact any dispute” as opposed to “no dispute” have from time to time been interpreted by the courts as meaning “no genuine dispute,” “no real dispute,” “a case to which there is no defence.” “there is no arguable defence”, and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed “is indisputable due.” The approach of the courts has on occasions been similar to that adopted by them in Order 14 proceedings in cases where there is no arbitration clause.

In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord. 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence.”

18. In my view there is no dispute capable of being referred to an arbitrator because the party alleging there is a dispute is not, and I repeat, not a party to the lease agreement. That holding also goes to fortify my finding that there is no arguable appeal.

IF NO STAY IS APPEALS DEFEATED

19. Having found that there is no arguable appeal because the parties alleging there is a dispute have no privity of contract with respondent it follows that they do not stand to suffer if stay of proceedings is not granted. In other words if stay is not granted the appeal will not be defeated.

OTHER ISSUES

20. I have noted that the respondent’s plaint before the Chief Magistrate in paragraph 2 have pleaded that the appellant trade under the name of Silverspoon restaurant Limited. Following the discussions above it is clear that the lease which is the subject of the claim before Chief Magistrate was between the respondents and appellants trading as Silverspoon Restaurant. I will therefore invoke the provisions of section 1A of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules to order the respondents to amend their plaint in paragraph 2 by deleting the word Limited. Such an amendment will ensure that the real question in controversy between the parties is before court for determination.

CONCLUSION

21. Having made the above determination I grant the following orders:

a. **The Notice of Motion dated 18th December 2014 is dismissed with costs to respondent**
b. **The stay of proceedings of Mombasa CMCC No. 1106 of 2013 previously granted in this matter is vacated.**
c. **The Respondents are granted leave to amend their plaint by deleting the word “Limited” in paragraph 2 in Mombasa CMCC No. 1106 of 2013 within 21 days from todays date.**

d. **The appellant is granted leave to file a defence within 15 days of service of such amended plaint.**

DATED and DELIVERED at MOMBASA this 21ST day of AUGUST, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A …………………..

For Appellant:

For Respondents:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE