



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 8 OF 2014**

**BETWEEN**

**KENYA PLANTERS' COOPERATIVE UNION .... PETITIONER**

**AND**

**KENYA COMMERCIAL BANK LIMITED ... 1<sup>ST</sup> RESPONDENT**

**DELOITTE CONSULTING LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**HARVEEN GADHOKE ..... 3<sup>RD</sup> RESPONDENT**

**SAMUEL OKECH ONYANGO ..... 4<sup>TH</sup> RESPONDENT**

**RULING NO. 2**

**Introduction**

1. The issue for consideration in this ruling is whether the petition filed herein should be stayed or dismissed on account of a Deed of Settlement dated 19<sup>th</sup> November 2013 between Kenya Commercial Bank (“KCB”) and the petitioner, Kenya Planters’ Co-operative Union (“KPCU”) (“the Deed of Settlement”).
2. The Deed of Settlement provides for a dispute resolution mechanism. Clause 15.1 on the Dispute Resolution calls for the parties to amicably resolve and mediate any dispute and failing which the parties must refer the matter to arbitration. The relevant part of Clause 15.3 provides as follows;

*15.3.1 If the dispute has not been settled pursuant to the mediation as contemplated in clause 15.2 (Mediation) within 25 days from the Dispute Date, or, if attempts to refer the dispute to mediation have failed altogether in the circumstances referred to in sub-clause 15.2 above (Mediation), such dispute shall be referred to and finally resolved by arbitration in accordance with the provisions of the sub-clauses below:*

**The Petition**

3. Before I proceed to deal with the issue, it is necessary to summarise the petitioner’s case as outlined in the petition and the affidavit of William Gatei, Chairman of the KPCU Board of

Directors, sworn on 9<sup>th</sup> January 2014.

4. The brief history of the matter is set out in the recital of the Deed of Settlement as follows;
  - A. *In the year 2009, the Bank appointed Receivers over the Company following the Company's failure to service various loans and facilities advances to it by the Bank, which at the year 2009 amounted to the sum of Kshs. 643,978,558,00 ("the Debt") as set out in the First Schedule.*
  - B. *The parties are currently engaged in, or otherwise affected by, litigation pending in the High Court Civil Case No. 779 of 2009 (Kenya Planters Co-operative Union Limited v Kenya Commercial Bank Limited, Harveen Gadhoke, Daniel Mutisya Ndonge and Robert Mungai Kahonoki t/a Kahonoki Estate) which is currently pending in the High Court of Kenya ("the Legal Proceedings").*
  - C. *In order to avoid the expense, inconvenience and distraction of litigation, the parties have agreed on a good faith and reasonable basis to settle, compromise and resolve all disputes and liabilities pursuant to the Legal Proceedings and any other outstanding or potential disputes in connection with the Debt on the terms set out in this Deed.*
5. It is on the basis of the history of disputes between the parties that the parties entered into the Deed of Settlement. KPCU contends that its petition is related to events occurring after the Deed of Settlement had been executed and the receivers discharged from their duties upon KPCU fulfilling the conditions under it.
6. KPCU, in the petition dated 9<sup>th</sup> January 2014, claims that after its directors took over the running of the company, they discovered that the respondents had lost, destroyed and or hidden KPCU's title deeds to its unencumbered properties, that some of the properties including LR No. KARATINA/BLOCK 1/18 and LR No. KARATINA/BLOCK 1/21 had been secretly sold to a third party, that they had stolen or caused to be stolen, the KPCU milling machine at Wakulima House valued at Kshs. 800 million and that some properties had been sold without the proceeds of sale being accounted for.
7. As a result of the aforesaid acts KPCU alleges that it's right to property and fair administrative action protected by **Articles 40** and **47** of the Constitution respectively have been violated. To support its case further it calls in aid the provisions of **Article 48**, which protects the right of access to justice and **Article 50**, which guarantees the right to a fair hearing.
8. KPCU seeks several reliefs in the petition including the return of the original titles in respect of LR No. KARATINA/BLOCK 1/18 and KARATINA/BLOCK 1/21, full accounts and documents supporting KCB's claim against it, a permanent injunction restraining KCB from appointing receivers, a permanent injunction restraining the KCB from interfering with its property, return of the milling machine removed from Wakulima Warehouse or restitution of the value of the machine, return of original vehicle logbooks, an order for KCB to produce all records and documents confirming that KPCU owes Kshs. 643 million and an injunction restraining KCB from selling LR No. 209/8658 located in Nairobi.

### **Interlocutory Proceedings**

9. In the meantime, KPCU defaulted on its obligations under the Deed of Settlement and KCB appointed the 3<sup>rd</sup> and 4<sup>th</sup> respondents as receivers on 9<sup>th</sup> January 2014. The appointment of receivers precipitated these proceedings.
10. Together with the petition, KPCU filed a Notice of Motion dated 9<sup>th</sup> January 2014 in which it sought several orders including restraining the KCB from appointing the receivers and consequential injunctive reliefs related to its properties and business undertaking. On 10<sup>th</sup> January 2014, Korir J., heard the matter *ex-parte* and made following order, *"THAT pending the hearing and determination of the Application inter partes, a conservatory order do issue maintaining the*

*status quo as at 31<sup>st</sup> of December, 2013, prior to the purported appointment of the receiver/manager on the 9<sup>th</sup> January 2014, by the 1<sup>st</sup> respondent.”*

11. On 16<sup>th</sup> January 2014, KCB moved the court by Notice of Motion dated 16<sup>th</sup> January 2014 in which it sought to set aside the *ex-parte* orders issued by Korir J., on 10<sup>th</sup> January 2014 on the grounds that there had been non-disclosure of material facts and that the orders so issued were mandatory in nature and resulted in the removal of the receivers appointed by KCB on 9<sup>th</sup> January 2014 pursuant to the Deed of Settlement without giving KCB a chance to be heard.
12. Mumbi Ngugi J., heard part of the Notice of Motion dated 16<sup>th</sup> January 2014 on the question of whether or not the *ex-parte* orders issued by Korir J., should be discharged. She discharged the orders in her ruling dated 21<sup>st</sup> January 2014.

### **The Submissions**

13. The respondents now seek the court be pleased to dismiss or stay the proceedings herein in the Notice of Motion dated 16<sup>th</sup> January 2014. In support of the Motion, Mr Karori assisted by Ms Odari, for the respondents, submits that KCB was entitled to appoint receivers under the Deed of Settlement without recourse to the court and once they were so appointed any dispute between the parties would have to be resolved in the manner contemplated under Clause 15. Counsel submitted that the Deed of Settlement is, in tenor and effect, conclusive in that respect and as a result the court lacked jurisdiction to intervene in matters reserved for arbitration by reason of **section 10** of the **Arbitration Act, 1995** which permits the court to intervene only in matters governed by the said Act.
14. The respondents also submit that the matters in issue are contractual in nature and do not raise any constitutional claim. Counsel referred to ***Kenya Planters' Co-operative Union Limited v Attorney General and Others Nairobi Petition No. 700 of 2009 (Unreported)*** where the court has held as much. Mr Karori submits that the contractual rights of the parties cannot be defeated by the kind of claims made by the petitioner as was held in ***Kenya Commercial Bank Limited v Registrar of Titles and Others Milimani HCCC No. 19 of 2012 (OS) (Unreported)***.
15. Finally, the respondents urged the Court to allow the application as the debt was conceded and that there was no right to refer the matter to arbitration on that basis. Mr Karori pointed to specific findings of fact in the decision by Mumbi Ngugi J., in her ruling of 21<sup>st</sup> January 2014 and the decision in ***Safaricom Limited v Kenya Data Networks Milimani HCCC No. 41 of 2012 (Unreported)*** to support the proposition that once the debt is admitted there is no dispute to refer to arbitration.
16. On the part of the KPCU, Mr Omwanza appearing with Mr Ngatia, submits that the petitioner's case is not one that is contemplated by the Deed of Settlement hence the arbitration clause is inapplicable in the circumstances. Counsel submits that the KPCU directors discovered acts of misfeasance and malfeasance on the part of KCB and the receivers. Counsel submits that these acts, which are outlined in the petition, form the basis of the cause of action against the respondents. He further submits that the acts complained of were outside the scope of the arbitration clause as they were discovered after the Deed of Settlement was executed. The court is therefore called upon to address the matters that arose post settlement.
17. Mr Omwanza further submits that ***Kenya Planters' Co-operative Union Limited v Attorney General and Others (Supra)*** is distinguishable from the matter at hand as the issue pleaded in that case was one of compulsory acquisition under **section 75** of the former Constitution while the present one concerns the protection of property under **Article 40** of the Constitution. Counsel argued that the matters pleaded in the petition are not envisaged in the Deed of Settlement as they concern the enforcement of fundamental rights and freedoms.

18. Counsel urged the court to exercise restraint in granting the prayers as it is in the interests of justice that the matters raised by the petitioners be ventilated in court.

### **Determination**

19. The first issue for consideration is whether the arbitration clause is applicable to the proceedings at hand. This matter was triggered by the appointment of the receivers under the Deed of Settlement. It is evident from the petitioner's prayers that it challenges the very basis of the settlement including the indebtedness and the basis thereof. In my view, it does not matter how the pleadings or cause of action is couched, what matters is the substance of the claim and the claim as whole emanates from the dealings between KCB and KCPU which are captured in the Deed of Settlement. The fact that it is a petition framed under **Article 22** of the Constitution does not remove the whole dispute outside the purview of the Deed of Settlement. In the circumstances, I find and hold that that subject matter is one that is covered by the arbitration clause in the Deed of Settlement.

20. Under **section 6** of the **Arbitration Act, 1995**, the Court on application of the respondent, would be entitled to stay the proceedings pending reference to arbitration in accordance with the Deed of Settlement. Even if I found that the matter is one involving fundamental rights and freedoms, it would still be within the courts power, under **Article 159(2)(c)** to refer the matter to arbitration as the court is obligated to promote alternative dispute resolution where circumstances permit.

21. This though, is not the end of the matter. In the ruling of 21<sup>st</sup> January 2014, Mumbi Ngugi J., noted that the petitioner conceded that the receivers were appointed under the Deed of Settlement and that it owed KCB certain sums of money. In the circumstances, KCB was entitled to appoint the receivers under the Deed of Settlement. Under Clause 15.4 of the Deed of Settlement, default in payment of the agreed instalments does not constitute a dispute capable of being resolved by arbitration hence the matter cannot be referred to arbitration only on that account. These issues though will be dealt with should the petitioner file an ordinary case. At this point it would be appropriate to segue into the second issue.

22. The second issue concerns whether the matter is one for the enforcement of fundamental rights and freedoms under the Bill of Rights. This issue has been subject of the judgment in **Kenya Planters' Co-operative Union Limited v Attorney General and Others (Supra)** where the parties were litigating, inter alia, over the appointment of receivers. Mumbi Ngugi J., stated, “[40] *In the present case, KCB appointed receivers pursuant to debentures executed in its favour by the petitioner. The entire dispute between the petitioner and KCB arises out of a contractual relationship between a bank and its customers. There has not been any allegation by the petitioner that the 1<sup>st</sup> Cited Third Party has compulsorily taken its property in the sense contemplated under Section 75 of the former constitution. By no stretch of the imagination can the acts of the 1<sup>st</sup> Cited Third Party in appointing receivers in an attempt to recover its debt be deemed a violation of either section 75 or 76 of the former constitution.*” I agree with this reasoning and its application to **Article 40** of the Constitution.

23. I am not convinced that the petition discloses a violation of **Article 40** or **47** of the Constitution. In the recent case of **Bishop Absalom Ndungo and Others v Attorney General and Others Nairobi Petition No. 444 of 2012 (Unreported)** I stated, “[T]he responsibility of the State in such circumstances is to provide a framework for resolution of such disputes as a means of protecting the property. Various statutory enactments like the Land Act, Act No. 6 of 2012 and the Land Registration Act, Act No. 3 of 2012 which repealed previous statutory enactments like the Registration of Titles Act fulfil the protection guaranteed by the Constitution by providing an orderly manner of acquisition, holding and disposal of property. Where disputes arise between parties, the ordinary procedures for dispute settlement provided by the State are to be invoked. This is evidenced by the fact that our courts, on a day-to-day basis, deal with land cases within the framework established by the Constitution and law enacted pursuant to Constitutional provisions to protect property rights. (See *Tony Munene v Commissioner of Lands and Others*

*Nairobi Petition 322 of 2012 [2012]eKLR). It is therefore unnecessary to have recourse to constitutional provisions to resolve what is in fact an ordinary civil dispute respecting claims to property.”*

- 24.KPCU has not contended that the State has compulsorily taken its property or that it has arbitrarily interfered with its enjoyment or use. It has not asserted that the State has failed in its obligation to protect the property. The dispute between the parties is a commercial and contractual dispute and as a matter of fact, the parties have agreed on arbitration as a means of resolving their disputes under the Deed of Settlement. The State, on its part, has discharged its constitutional obligation by underpinning the efficacy of the process through the courts by enacting the **Arbitration Act, 1995**.
- 25.I therefore find and hold that the petition does not raise any constitutional issue or a matter of enforcement of fundamental rights and freedoms. Not every disagreement or claim raises a constitutional question and where there are alternative modes of dispute settlement then such channels ought to be encouraged.

### **Disposition**

- 26.The issue remains whether I should strike out or stay the proceedings. This matter was commenced by way of a petition under **Article 22** of the Constitution. **Article 22** provides a special procedure for the court to enforce fundamental rights and freedoms. As I have held, this case does not raise any issue of violation of fundamental rights and freedoms. The petition is therefore incompetent and an abuse of the court process.
- 27.The Court has inherent power to prevent an abuse of its process and the fact that the matter is presented as a petition under **Article 22** of the Constitution does not take away this power (see **Kenya Bus Services Ltd and Others v Attorney General and Others [2005]eKLR, Githunguri v Republic [1985] KLR 95, John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 [2012]eKLR**). I have warned myself that striking out a petition for the enforcement of fundamental rights and freedoms at this early stage is drastic but it is a power I must nevertheless exercise to prevent sullyng of the court rolls with a matter that is an abuse of the process.
- 28.The only option available is to strike out the petitioner’s case. It is hereby struck out. The petitioner shall bear the respondents costs.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of January 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Omwanza with him Mr Ngatia instructed by Kariuki Muigua and Company Advocates for the petitioner.

Mr Karori with him Ms Odari instructed by Iseme, Kamau and Maema Advocates for the respondents.