



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
ELC CIVIL SUIT NO.47 OF 2013

SBI INTERNATIONAL HOLDINGS AG (KENYA)APPLICANT

=VERSUS=

REUBEN KIPKORIR J.T. BORE.....RESPONDENT

RULING

1. By a notice of motion brought under **Order 40 Rules 1 and 2; Section 1A, 1B and 63** of the **Civil Procedure Rules and Act** respectively the applicant, among other orders, seeks;
 - a) A temporary injunction to restrain the respondent by himself, his agents, servants, employees or in any other manner whatsoever from evicting, alienating or in any other manner interfering with its occupation and use of Land reference No. KIPKELION/CHEPSEON BLOCK 2 (KISABO)/88 or in any way varying the terms of the Lease agreement dated 18th August, 2012 pending the hearing and determination of the suit.
 - b) A mandatory injunction to compel the respondent to comply with the terms of the Lease Agreement dated 18th August, 2012 in respect of the suit property; and allow the applicant peaceful occupation and use of the suit property for the remainder of the lease period, provided that the applicant continues to pay the agreed rent.
 - c) Costs.
2. The application is supported by the affidavit of the financial controller of the applicant, Shay Skeif, sworn on 19th July, 2013 and is premised on 24 grounds that can be summarised as follows:-
 - i. that there exist a lease agreement between the respondent and the applicant over the suit property;
 - ii. that owing to the lease agreement the applicant has invested heavily on the suit property;
 - iii. that the investments and activities of the applicant on the suit property are of great public interest;
 - iv. that in breach of his part of the bargain, the respondent without any lawful cause, has issued the applicant with a termination notice of the lease agreement;

- v. that unless restrained by way of the orders sought, the respondent intends to proceed with his threatened illegal termination of the lease agreement, which action unless restrained will greatly prejudice the applicant and the public at large;
- vi. that the respondent has no ability to compensate the applicant for the losses it will suffer if the lease herein is terminated; and
- vii. that in the interest of fairness, justice and public good the orders sought should be granted.

3. The application is opposed through the grounds of opposition filed on 28th August 2013. In those grounds, it is contended:-

- (a) that the transaction required the consent of the land control board, which consent was not obtained;
- (b) that the documents the applicant seeks to rely on in support of its case are inadmissible in evidence for its failure to pay stamp duty in respect thereof;
- (c) that the lease which is the subject matter of this suit has not been registered as by law required;
- (d) that some of the documents the applicant relies on in support of its case offend the provisions of **Section 35 of the Advocates Act**;
- (e) that the deponent of the supporting affidavit, Shay Skeif, was not competent to make and swear the affidavit since he had not been given authority to do so;
- (f) that the orders sought cannot issue since there is neither a prayer for permanent injunction nor is there a prayer for mandatory injunction in the plaint.
- (g) that the applicant is asking the court to re-write the contract for the parties, which act the court cannot do; and
- (h) that owing to an arbitration clause in the "*lease agreement*," the court has no jurisdiction to hear and determine the matter.

Jurisdiction

4. Ground (h) of the respondent's grounds of opposition raises the issue of this court's jurisdiction to hear and determine the suit. Bearing in mind the observation of Nyarangi J in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** thus:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction;"

I will determine that question first.

5. The respondent contends that clause 7(d) of the "*lease agreement*" ousts this court's jurisdiction to preside over this dispute. That clause provides as follows:-

"save as may be specifically provided all questions hereinafter in dispute between the parties hereto and any claim for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration by a single arbitrator mutually agreed upon by the parties herein assisted by such assessor or professional advisors as the arbitrator shall deem necessary to appoint to sit with him to be appointed in default of agreement by the Chairman for the time being of the institution

of Surveyors of Kenya and every award made under this clause shall be expressed to be made under the Arbitration Act or Acts for time being in force in Kenya in relation to the Arbitration.”

6. Even though the respondent did not submit on this ground, the applicant has submitted that by failing to apply for stay of proceedings as contemplated under **Section 6(1) of the Arbitration Act**, the respondent acceded to the court's jurisdiction and is estopped from alleging otherwise. In this regard, counsel for the applicant has referred to the Court of Appeal decision in **Corporate Insurance Co. Ltd v. Wachira (1995-1998) 1 E.A 20 (CAK)** where it was held:-

“The arbitration clause was in the nature of a Scott v. Avery clause which provides that disputes shall be referred to arbitration and that the award of arbitration to be a condition precedent to the enforcement of any rights under the contract. A Scott v. Avery clause can provide a defence to a claim but the party relying on it cannot circumvent the statutory requirement to apply for stay of proceedings. If the appellant had wished to invoke the clause, it ought to have applied for stay of proceedings after entering appearance and before delivering any pleadings. By filing a defence, the appellant had lost its right to rely on the clause (Kenindia Assurance v. Mutuli (1993) LLR 2833 (CAK) applied.”

7. Having read and considered the provisions of **Section 6(1) of the Arbitration Act, Cap 49 Laws of Kenya**, and the authorities cited by counsel for the applicant, I have no reason to deviate from the holding in **Corporate Insurance Co. Ltd v. Wachira**.(supra). I say this because in the instant application, the respondent lost his right to challenge the jurisdiction of this court when he filed a statement of defence rather than applying for a stay as contemplated under **Section 6(1) of the Arbitration Act**.

8. Under **Section 6(2) of the Arbitration Act**, the court is prohibited from continuing with proceedings before it, only and only if an application for stay was made under **Section 6(1)**. No such application was made in the instant suit to warrant acceding to the respondent's contention.

Whether the transaction is void for want of Land Control Board's Consent?

9. The respondent contends that the transaction he entered into with the applicant violates the provisions of **Section 6(1) of the Land Control Act, Chapter 302 Laws of Kenya**. Further, no consent for change of user from agricultural to quarrying/commercial activities was obtained.

10. In reply the applicant has submitted that there is no proof that the suit land is agricultural land; and that, in any event, **Section 6(3) of the Land Control Act** does not apply to a transaction to which the Government is a party.

11. Terming itself an agent of the Government for the purpose of rehabilitation and upgrading of the road hereto (*Mau-Summit Kericho Road*), the applicant has submitted that the works it is engaged in are a Government function for which a consent is not required under **Section 6(3) of the Act**.

12. The applicant contends that the function it is engaged in mandates performance by Government as it attracts a lot of public interest.

13. Referring to the definition of Government functions in the Ninth Edition of the Black's Law Dictionary, the applicant has reiterated that the works it is engaged in are Government functions. To drive that point home, the applicant explained that it was the Government's decision to rehabilitate and upgrade the road in question. He pointed out that Government officials were at all times responsible for the project. It argues that Government officials were the ones applying their discretion and making value judgments throughout the process.

Is the suit property agricultural land under cap 302?

14. Section 2 of Cap 302, defines “agricultural land” as:-

“agricultural land” means -

(a) land that is not within -

(i) a municipality or a township; or

(ii) an area which was, on or at any time after the 1st July, 1952, a township under the Townships Ordinance (now repealed); or

(iii) an area which was, on or at any time after the 1st July, 1952, a trading centre under the Trading Centres Ordinance (now repealed); or

(iv) a market;

(b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;”

15. Although the applicant contends that there is no evidence that the suit property is agricultural land, having considered the definition of agricultural land above and given the circumstances of this case, I have no doubt that the suit property herein is agricultural land under **Section 2 of the Land Control Act** (*supra*). The suit property herein is neither within a Municipality, township nor is it within a market as contemplated under section 2 above.

16. The suit property being agricultural land under **Section 2 of the Land Control Act**, it is subject to Section 6 thereof which provides:-

“6. (1) Each of the following transactions -

- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land area;
- b.
- c.

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

(2)

(3) This section does not apply to -

(a)or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”

17. In constructing the obligations imposed on parties under **Section 6(1)** aforementioned courts have observed:-

“If the consent of the Land Control Board is not obtained where necessary the transaction is void and a party cannot be guilty of fraud if he relies on the same since the duty to obtain consent is on both parties. if the consent of the Land Control Board is not obtained the parties are restored to *status quo ante* while in between there is merely a *de facto* agreement which has no legal effect but if the consent is obtained the transaction binds the parties which proceeds to completion.” (See Jacob Michuki Minjire vs. Agricultural Finance Corporation Civil Appeal No. 61 of 1982, a Court of Appeal decision).

18. Similarly, in Omuse Onyapu vs. Lawrence Opuko Kaala Civil Appeal No. 21 of 1992, the Court of Appeal held:-

“If the transaction for the sale of land is a controlled transaction involving the sale of an agricultural land within the meaning of Section 6 of the *Land Control Act*- Cap. 302 Laws of Kenya, it is null and void for all purposes for lack of consent of the appropriate land control board in respect of that transaction. It follows therefore that the money or other valuable consideration paid under that void controlled transaction but, not the cost of the improvement on the land whether claimed as general damages or special damages, is recoverable as a civil debt without prejudice to penal consequences imposed by Section 22 of the Act.”

19. In Wamukota v. Donati (1987) KLR 280, while reiterating that an agreement to be a party to a controlled transaction becomes void for all purposes if consent of the Land Control Board was not obtained, the Court of Appeal held:-

“The respondent has no legal or equitable claim, and the only redress available is to recover the money or valuable consideration paid in the course of the void transaction as per the Land Control Act (Cap 302) Section 7.”

20. In view of the foregoing, unless the applicant can demonstrated that it falls under the exemptions provided under **Section 6(3) of the Land Control Act**, it must suffer the harsh reality of the law as espoused in the authorities quoted hereinabove.

Is the applicant covered under the exemption clause in section 6(3)(b) above?

21. As pointed out earlier, the applicant has submitted that by virtue of the works it is engaged in, it is merely a disclosed agent of the Government.

22. To appreciate the meaning of Government as used in **Section 6(3)(b)**, regard must be had to the Interpretations and **General Provisions Act, Chapter 2 Laws of Kenya** (*An Act of Parliament enacted to make provision in regard to the construction, application and interpretation of written law and to make provisions with regard to such law and for other like purposes*).

23. **Section 3 of Cap 2** defines Government as:

“The Government means the Government of Kenya.”

Black's Law Dictionary, 8th Edition, defines the term “government” as:-

- “1) The structure of principles and rules determining how a State or Organization is regulated.***
- 2) The sovereign power in a Nation or State.***
- 3) An Organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.”***

24. The *Constitution of Kenya 2010*, on the other hand, defines “State” at Article 260 as:-

“State, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic of Kenya under this Constitution”.

Further, the same article of the Constitution defines a “State organ” thus:-

“State Organ,” means a commission, office, agency or other body established by this Constitution” and “state office” includes “holder of an independent office or commission.”

25. Whereas the applicant has submitted that its dealings are by their very nature dealings of the government, from the foregoing definitions of government, I find and hold that the applicant is neither a government organ nor its agency.

26. Whilst it is not in dispute that the work the applicant is engaged in attracts a lot of public interest, I am not persuaded that, that fact alone warrants elevation of the applicant to an “an agent of the Government of Kenya. If this court were to agree with the applicant's submissions, that would mean, for instance, that the applicant can call upon the Attorney General of the Republic of Kenya to defend it in this suit or even get the government to pay any order for costs issued against it in this case.

27. I am sure that by calling itself an agent of the government, the applicant does not mean it can call upon the government to do the above acts on its behalf. That being the case, its claim that it's merely a disclosed agent of the government fails.

28. Although the respondent has challenged the application herein on many other questions of law, having found the agreement hereto to have been void, it would be superfluous to consider the other issues raised in the application.

29. The upshot of the foregoing is that the applicant's application has no merit and is dismissed with costs to the respondent.

Dated and Signed at Kericho this 28th day of May 2014.

L N WAITHAKA

JUDGE