



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 31 OF 2014

BLUE SKY STUDIOS & MEDIA CENTRE..... PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF.....DEFENDANT

THE AGRICULTURAL SOCIETY OF KENYA

T/A THE NAIROBI INTERNATIONAL TRADE FAIR

RULING

The plaintiff by an application dated 25th May 2012 seeks the following substantive prayers against the Defendant.

1. That an injunction do issue to restrain the Defendants/Respondents their officers, employees, principles, agent, Auctioneers or court Brokers appointed by it or any person whatsoever for it or on its behalf from evicting or procuring the eviction of the Plaintiff/Applicant, its directors, officers, employees, servants or agents or any of the plaintiffs visitors from all that property known as plot number E8a on Land Reference **Number 9141, Nairobi (“the suit premises”)** pending the hearing and determination of this application and suit.
2. That an injunction do issue to restrain the Defendants/Respondents their officers, servants, employees, principals. Agents, Auctioneers or court Brokers appointed by it or any person whatsoever for it or on its behalf from threatening harassing and/or in any way intimidating or procuring the threatening, harassment and intimidation of the plaintiff/Applicant, its directors officers, employees, servants or any visitor of the plaintiffs to the suit premises pending the hearing and determination of this application and suit,.
3. That an injunction do issue to restrain the Defendants/Respondents, officers, employees, principals, agents, Auctioneers or court brokers appointed by them or any person whatsoever for it or on its behalf from breaching, obstructing inhibiting and/or interfering or procuring the breach, obstruction inhibition or interference in any way with the plaintiff/Applicant’s lease of the suit premises or its quiet and peaceful enjoyment thereof pending the hearing and determination of this application and suit.

The application interalia is grounded on the following grounds that appear on the body of the application.

- a. That the plaintiff/Applicant is a lessee of the suit premises under a duly stamped and registered lease from the Defendants /Respondents dated 8th December 2011 of two (2) terms of ten (10)

- years each commencing 1st January 2012 and expiring on 31st December 2031.
- b. That the Defendants/Respondents are purporting to unlawfully terminate the plaintiff/Applicant's said lease and demand vacant possession with immediate effect through its Advocate's letter to the Plaintiff/Applicant dated 16th May 2012.
 - c. That the plaintiff/Applicant paying the rent and performing the covenants contained in the said lease which it has at all times duly done is entitled to peacefully hold and enjoy the premises during the said term.
 - d. That there is a real apprehension on the part of the plaintiff/Applicant and imminent risk that the Defendants shall unlawfully evict it from the suit premises if not restrained from doing so by this Honourable court.

The application is further supported on the grounds and facts set out in the affidavit sworn by **Assad ("JIM") Shamoona** a director of the plaintiff/Applicant on 25th May 2012.

The Defendant/Respondent upon being served with the plaintiff's application filed a Notice of preliminary objection dated 4th June 2012 and set out the following grounds:-

1. THAT the plaintiff's said application and the entire suit herein are fatally and incurably defective for failure to comply with the mandatory provisions of the law.
2. That this Honourable court has no jurisdiction to entertain the applicant's application and the entire suit therein.
3. That the pendency of the suit as canvassed in the plaint dated 25th May 2012 is an abuse to the due process of the law and the application filed on even date to the suit herein cannot be sustained as presented.

Parties filed written submissions to canvass the Defendant's preliminary objection and appeared before me on 12th February 2014 when counsel for the respective parties highlighted the submissions.

Mr. Kithi Advocate on behalf of the Defendant submitted that Article 159(2) (c) of the constitution mandates the courts to use Alternative Disputes Resolution (**ADR**) mechanisms such as arbitration for resolving disputes and argued in instances as in the present matter where the parties had chosen the forum of arbitration to resolve any disputes that may arise between them the court cannot in the face of the constitution provisions under Article 159(2) (c) which requires the courts to promote ADR have any jurisdiction to entertain such a matter as the present one. **Mr. Kithi** argued that the constitution 2010 elevated the position of **ADR** and contended that where an arbitration agreement exists as in the matter between the plaintiff and the Defendant herein the jurisdiction of the court is ousted. **Mr. Kithi** further argued that an arbitration forum is in the nature of a court or tribunal and would therefore be amenable to the supervisory powers of the High Court and thus the High Court cannot exercise both original jurisdiction and supervisory powers over such a tribunal. The High court ought only to exercise supervisory powers over such tribunals to prevent miscarriage of justice.

Mr. Kithi submits that the effect Article 159 (2) (c) of the constitution read together with the transitional provisions schedule 6 was to amend section 6(1) of the Arbitration Act such that the High Court is wholly divested of jurisdiction in all matters where the parties have chosen arbitration as the forum to have their disputes resolved.

Mr. Amin Advocate in reply to the submissions by **Mr. Kithi Advocate** adopted his submissions filed on 18th January 2013. **Mr. Amin** submitted that Article 159 (2) (c) merely enjoins the court to promote alternative dispute resolution (**ADR**) and does not mandatorily require the court to impose arbitration in cases where it would not be proper to refer the matters to arbitration. The plaintiff avers that there is no dispute with the Defendant and all the plaintiff is seeking to do is to have the Defendant restrained from committing an unlawful act which is to unlawfully and illegally evict the plaintiff from the suit premises. The plaintiff contends that they have a valid lease and the Defendant cannot have a ground and/or justification to evict the plaintiff and there is therefore no basis to have the matter referred to arbitration.

Mr. Amin submitted that if the Defendant was of the view that the matter ought to be referred to arbitration, the Defendant ought to have in terms of the provisions of the Arbitration Act 1995 section 6 (1) applied to have the suit stayed and the matter referred to arbitration in the terms thereof. The plaintiff further submitted that the constitution cannot ipso facto be taken to have amended the Arbitration Act 1995 as contended by the Defendant and further contended/submitted that the submissions by the Defendant were flawed and that the preliminary objection lacks merit and does not satisfy the test as to what constitutes a preliminary objection as elucidated in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 969** where Law Judge in his judgment observed thus:-

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit”.

Sir Charles Newbold, P. in the same case while lamenting at the increasing practice of raising points which ought to be argued in the normal manner improperly by way of preliminary objection observed as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should stop”.

The issues that therefore arise to be determined in this preliminary objection is whether there is a dispute between the plaintiff and the Defendant arising from the lease that required to be referred to arbitration in terms of the lease executed between the parties and whether the filing of the instant suit was fatally defective by dint of Article 159 (2) (c) of the constitution which enjoins the courts to promote **ADR** and whether the jurisdiction of the court was ousted by the fact that the parties had agreed to have any disputes arising out of the lease resolved through arbitration.

The plaintiffs' claim in addition to the injunctive orders to restrain their eviction by the Defendants seek a declaration that the Defendants' purported termination of the lease is null and void and a declaration that the intended eviction of the plaintiff from the suit premises in the circumstances is illegal.

The lease between the parties required any disputes to be referred to arbitration for resolution. **What is the dispute between the plaintiff and the defendant?** The plaintiff claims he has no dispute with the Defendant on the lease but that he has come to court to restrain what would otherwise be unlawful eviction by the Defendant. For there to be arbitration a dispute must be in existence and the same has to arise from the instrument/agreement incorporating the arbitration agreement. The Defendant has not in my view demonstrated there is a dispute which would require to be submitted to arbitration. I do not see how the defendant would possibly be able to demonstrate that there is such a dispute without filing an affidavit and/or making reference to other evidence to show that and if that happens, that would remove the matter from the purview of a preliminary objection as it would then cease to be a pure point of law (see *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors*) *Supra*.

I agree with the plaintiff's submission that for a court to determine whether arbitration is appropriate the court would need to look at the arbitration agreement to determine whether there is a dispute capable of being referred to arbitration under the arbitration agreement. Where the arbitration agreement is null and void or inoperative or where there is no dispute falling under the arbitration agreement, the court will not make a reference to arbitration.

I have considered the provisions of Article 159 (2) (c) of the constitution and my view is that the same does not create a mandatory requirement for the court to refer cases to arbitration. All it does is to require the courts to promote alternative dispute resolution including arbitration. Arbitration by its very nature is private and parties have to willingly agree to subscribe to it and the court cannot force arbitration where the parties are unwilling. I therefore do not agree with counsel for defendant that Article 159 (2) (c)

automatically amended section 6 (1) of the Arbitration, Act 1995 such that the jurisdiction of the court to entertain applications for stay of proceedings envisaged under that section was ousted. Thus it is my view that if that Defendant considered that there was a dispute that needed to be determined pursuant to the dispute resolution clause incorporated under the lease the defendant ought to have brought an application for stay of proceedings under section 6 (1) of the Arbitration Act 1995.

Striking out of suits is something that the courts will do very sparingly. This court being a court with the status of the High Court has unlimited jurisdiction while dealing with disputes relating to the environment and the use and occupation of and title to land. I do not therefore agree with the Defendant that an arbitration agreement can oust its jurisdiction to consider whether indeed such an agreement exists, is null and void inoperative and/or incapable of being performed and/or infact whether any dispute between the parties with regard to the matters agreed to be referred to arbitration exists.

The plaintiff in the present matter was under threat of eviction the Defendant having purported to terminate the lease forthwith. I do not suppose the plaintiff had other options other than to approach the court for interim protection given that the process of appointing an arbitrator can often times be a long drawn affair. The opportunity for the parties to resort to arbitration is not at all lost as the parties may if they so desire submit the dispute (if indeed it is) to arbitration in accordance with their agreement. Any party can seek a stay of these proceedings to enable the matter to proceed by way of arbitration and the court would in view of the constitutional provision enjoining it to promote arbitration would use the occasion to implore the parties to use ADR as the constitution requires the court to do.

While the Defendant invokes article 159 (2) (c) of the Constitution to fortify his argument that the jurisdiction of this court is ousted, the plaintiff in turn invokes article 159 (2) (d) of the Constitution to support his submission that the court are enjoined to administer substantive justice without paying too much regard to procedural technicalities being an insinuation that the Defendant is crunching on technicalities to seek the plaintiff's suit to be struck out at the expense of substantive justice. As I have ruled that the court has jurisdiction to entertain the suit and the application I hold that there can be no basis to have the suit and the application struck out. Let the application and the suit proceed to be heard on merits. The overriding objective of the court is to facilitate the just expeditious, proportionate and accessible resolution of disputes (**see section 3 ELC Act and sections 1A, 1B Civil Procedure Act**). Striking out the suit would be an affront to the overriding objective and the need to do substantive justice.

I have considered the submissions by the parties and the authorities referred to me by the parties and while I have not analysed each of the authorities I am not persuaded the authorities have any relevance and/or application to the present preliminary objection save to provide the jurisprudence and the context within which the court has to make its ruling. I am nonetheless grateful to the counsel for their industry and forceful arguments. No doubt it must have become apparent in the course of my ruling that the preliminary objection cannot be sustained and the same is for all the reasons contained in the body of the ruling hereby overruled.

I direct that the costs of the preliminary objection shall be in the cause.

I grant leave of 21 days from the date hereof to the Defendant to file a response to the plaintiff's application with corresponding leave of 7 days to the plaintiff to file a further affidavit if need be from the date of service of the Defendants response. Matter fixed for mention on 22nd July 2014 for further directions. The interim order is extended till then.

Ruling dated signed and delivered this.....18th.....day of ...June.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant