



REPUBLIC OF KENYA AT NAIROBI
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NUMBER 233 OF 2013

SOPHIA WANJIKU KIMANI.1ST PLAINTIFF
PHYLISS MWIHAKI GICHUHI.2ND PLAINTIFF
SOLOMON MUREITHI KIMANI.3RD PLAINTIFF

VERSUS

MRARADIA GATUYA RUMWE.1ST DEFEDDANT
HOUSING UNIT LIMITED. 2ND DEFENDANT
STANLEY GITUKU KARUAH.3RD DEFENDANT
STEPHEN MWANGI KARANJA.4TH DEFENDANT
MARGARET NYAKIAGO WANDERI.5TH DEFENDANT

RULING

The Application before the court is a Notice of Motion dated 24th June, 2013. The relevant prayer at this stage is the one seeking an injunction to restrain the 2nd to 4th Defendants and other directors, from further dealing or transacting on behalf of the 1st Defendant's business, including approvals of members, occurring at any type of general meetings, pending the hearing and final determination of this suit.

The relevant facts show that on 27th February, 2013 the 1st, 2nd and 3rd Plaintiffs who also are the Applicants herein, delivered a Deed of Transfer to the Defendants for the transfer of the shares now registered in the name of the 1st Plaintiff to the 2nd and 3rd Plaintiffs. The defendants refused or neglected or ignored to register the said intended Deed of share transfer. These 100 shares originally belonged to the late Antony Njoroge Kimani, husband of the 1st Plaintiff and father to the 2nd and 3rd Plaintiffs herein who apparently provided in his Will that the shares be transferred to the two Plaintiffs.

The problem arose when the Defendants took the position that the company rules or regulations provided that a member's share could only be transferred to his spouse. The Defendants appear to have

transferred and registered the shares in the 1st Plaintiff's name contrary to the wishes of the deceased and contrary to the Transfer Deed submitted to the Defendants by the Plaintiffs.

The Plaintiff in the plaint accordingly, inter alia, had claimed that the Defendants acted contrary to Sections 79 and 80 of the Companies Act (Cap 486). They also claimed losing dividend during the delay to transfer the 100 shares. They finally claimed that they lost opportunity to make positive contribution as shareholders of the company during the period they are kept out of the company during the failure to register the shares.

The Defendants on the other hand, filed a Notice of Preliminary Objection dated 3rd July, 2013 alleging that the Applicants/Plaintiffs, are bound by the operation of the Arbitration provisions found in the 1st Defendant Company's clause 31 of Articles of Association. That the same provision also denied jurisdiction to this court to entertain this suit and application both of which should be heard by a tribunal or arbitrator. That accordingly, this court should cease further proceedings and refer the suit back to the company for arbitration process as provided therein.

The main issues for determination at this stage, accordingly, is first whether this court has jurisdiction to hear the application and the suit in view of the alleged arbitration jurisdiction of the company. Secondly, there is the issue is whether in the circumstances of this case and if this court has no jurisdiction, the applicants have proved a case for issuing the order of injunction sought.

I have carefully considered the material placed before the court. There is no dispute that the 1st Defendant Company in its Articles of Association Clause 31, has an arbitration provision. It provides inter alia: -

“Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or as signs on the other hand, touching the true intent or construction, or the incidents or consequences of these articles, or of the statutes, or touching anything then or thereafter done, executed, omitted or suffered in pursuance of these articles, or any claim on account of any such breach or alleged breach, every such difference shall be to the decision of the arbitrator, to be appointed by the parties in deference.....”

I have no doubt in any mind and it is my finding, that failure by the company and other defendants herein to register the Deed of Transfer of the 100 shares presented by the 1st Defendant and 2nd and 3rd Defendants, constituted **“a difference”** between the Company (1st defendant) and the Plaintiffs who would be nominees or executors or administrators or assignees of the deceased share holder. This position prima facie, would appear to lend credibility to the Defendant's argument that this court may not originally have jurisdiction to hear the suit which both should refer back to the 1st Defendant Company for arbitration.

The above conclusion is, however, not the end of the story. There are invocational provisions in the Arbitration Act of 1995 whose Section 6 (1) provides: -

“ 1. if a party to the arbitration agreement or a person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or against a person claiming through or under him in respect of a matter agreed to be referred: -

- a. ***Any party to those proceeding may at any stage after appearance and before delivering any pleadings or taking any steps in the proceeding apply to the court to stay proceedings.***
- b. ***That the court if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement and that the Applicant was, at the time when proceedings were commenced, and still remains willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.***

2. Notwithstanding anything in this Part, if a party..... or person claiming through or under him. commences any legal proceedings, In respect of any matter agreed to be referred:

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- a. **Any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings apply to the court to stay the proceedings; and**
- b. **that court, unless satisfied that the Agreement or arbitration has become inoperative or cannot proceed or there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.**

It is clear to me, therefore, that a party to the arbitration agreement can apply to the court in which an arbitration suit has been filed, to stay the proceedings. The court will however, make a stay order only if the following terms and conditions have been fulfilled. That is to say: -

- i. *The matter before the court is the subject of an arbitration agreement or clause between the parties in the suit by the applicant*
- ii. *The application for stay must be made by a party in the proceedings and arbitration agreement or clause, not later than the time of entering appearance or acknowledging the claim against which the stay of proceedings is sought,*
- iii. *The court must be convinced that the arbitration agreement in reference, is still valid, operative and effective;*
- iv. *There is still a valid dispute in the terms of the arbitration agreement or clause between the parties in the suit.*
- v. *The party applying for stay must not have delivered any pleading or taken any other steps in the proceedings sought to be stayed.*

Considering the aspects of Section 6(1) and 6(2) of the Arbitration Act in respect to the points referred to above, the Court of Appeal in **UAP PROVINCIAL INSURANCE COMPANY VS MICHAEL JOHN BECKET [2013] EKLR** stated as follows: -

“... if as a result of that inquiry 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.”

It is however, clear as well that it will be a party in the suit and also in the arbitration dispute who will move the court for stay and that the court cannot, suo moto, do so. That was so stated by this court in **AGIP(K) LTD VS KIBUTU IN CIVIL APPEAL NO. 43 OF 1981** where Madan, J, (as he then was) stated:

“... the only way in which an application for stay to enforce an arbitration clause can be made, is by way of Notice of Motion supported by an affidavit; it cannot be disguised as a point of law contained in a pleading. As the application must be made before any step is taken in the suit, it cannot be incorporated in a pleading, delivery of which constitutes a step in the proceedings.”

In this case before me as earlier stated, most conditions for stay are met. There is an arbitration clause in the Articles of Association of the 1st Defendant Company. A dispute between a shareholder or a party claiming through him and the company and/or directors, does exist as to whether or not the Plaintiffs are entitled or not, to register a share Transfer Deed in their favour. A suit in which the dispute over the

arbitration clause is the issue between the shareholders and company or directors clearly also, exists. Furthermore, the suit file record, shows that the Defendants are seeking the stay of the suit before filing any defence or any other pleadings.

The Defendants, however, are raising the issue of stay of proceedings through a Notice of Preliminary Objection instead of a Notice of Motion as earlier pointed out in the **Agip (K) Ltd** case aforesaid. As stated therein, the application to the court seeking stay, must be through a Notice of Motion, supported by an affidavit and not by a point of law in a Preliminary Objection as done in this case.

For the above reason alone, this court hereby dismisses the Notice of Preliminary Objection as a means of seeking stay of proceedings in this suit. That releases the court to move ahead to consider whether the Applicants/Plaintiffs, have made up a case for the granting of an injunction.

The Applicant's suit seeks an injunction to restrain the Defendants from selling, transferring, alienating, issuing dividends or transacting any business on the 100 shares held in the share certificate No. 0036 originally issued by the 1st Defendant, until their suit to have the shares registered in their favour, is heard and determined. It is their further case that they will lose the shares and the dividends if the shares are sold or in any way alienated by the Defendants before the suit is determined.

I have carefully considered the application. There is evidence that Defendants have or have indicated an intention to transfer the shares to the 1st Plaintiff alone to the detriment of the 2nd and 3rd Plaintiff which will be contrary to their wishes or the wishes of the original share holder.

In the view of the court, the Plaintiffs have shown that the suit hold a prima facie case in their favour. They also have shown that they will incur substantial loss and damage if the shares are sold out or are in any other way alienated in a manner they do not accept or have not sought. Thirdly, it makes sense that the subject matter of the suit needs protection and preservation until the suit is determined. Finally, an injunction would, in the view of the court would be a more convenient way to go at the moment. In the circumstances, the court finds that the application for an injunction only, has merit and the injunction in terms of prayer one (1) is hereby granted until the suit is heard and finally determined. Costs are to the applicant. Orders accordingly.

Dated and delivered at Nairobi this 18th day of June, 2014.

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JUDGE