



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 26 OF 2014

TRUE NORTH CONSTRUCTION

COMPANY LIMITED:.....1ST PLAINTIFF

BENSON MURUMBA SIFUMA :.....2ND PLAINTIFF

DAUDI KIPTUGEN:..... 3RD PLAINTIFF

DOROTHY CHEMUTAI YATOR :..... 4TH PLAINTIFF

-VERSUS-

ECO BANK KENYA LIMITED:..... 1ST DEFENDANT

KENYA NATIONAL HIGHWAYS

AUTHORITY:..... 2ND DEFENDANT

RULING

1. There are two applications before the court. The first one is the Chamber Summons dated **19th February 2014** filed by the 2nd Defendant while the second one is a Notice of Motion dated **14th March 2014** filed by the Plaintiffs. I will deal separately with the said applications in the aforesaid order.
2. The first application which is the Chamber Summons dated 19th February 2014 is expressed to be brought under Section 6 (1) of the Arbitration Act, Rule 2 of the Arbitration Rules and section 3A of the Civil Procedure Act. The 2nd Defendant is seeking for the following orders:-
 1. *That the suit filed herein by the 1st Plaintiff/Respondent be stayed pending its determination through arbitration as provided for in the agreement that was entered into between the 1st Plaintiff/Respondent and the 1st Defendant/Applicant in this suit.*
 2. *That the dispute between the 1st Plaintiff/Respondent and the 1st Defendant/Applicant in this suit be referred to arbitration as per the contract.*
 3. *That the 1st Defendant/Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant in the circumstances.*
 4. *That the costs of this application be provided for.*

3. The application is based on the several grounds stated on the face of the application and is supported by the affidavit of **ENG KENNETH INAWEDI MUDULIA** sworn on **19th February 2014**.
4. The application is opposed vide the Replying affidavit of the **2nd Plaintiff** sworn on **16th May 2014**. The **2nd Plaintiff** deponed that he had the authority of the other Plaintiffs to make the said affidavit. The **1st Defendant** also filed Grounds of Opposition dated **26th September 2012** in opposition to this application.
5. The background to the application is that the **1st Plaintiff** and the **2nd Defendant** entered into an agreement by a contract in writing for the emergency/maintenance of NANGILI'S MOI BRIDGE ROAD (B2) Tender Ref: KeNHA/125/2010 on **17th December 2010** (herein referred to as 'the contract'). The Contract was for a consideration of **Kshs. 225,969,425.64/=** whereby the **2nd Defendant** engaged the **1st Plaintiff** to carry out the emergency maintenance of NANGILI'S MOI'S BRIDGE ROAD (B2).
6. It is the **2nd Defendant's** position that according to the general conditions of contract, part 1 provided that the general conditions shall be those forming part 1 of the Conditions of Contract for works of Civil Engineering Construction Fourth Edition 1987, reprinted in 1992 with amendments prepared by Federation *Internationale des Ingenieurs Consiel* (FIDIC) (herein "the FIDIC conditions of Contract"). It is averred for the **2nd Defendant** that the said FIDIC conditions of Contract provides very elaborate provisions for the settlement of disputes between the parties through arbitration under Articles 67.1 to 67.4. The contract itself at sub clause 67.3 and the appendix to form of tender provides for arbitration, the mode of appointment of the arbitrator and the applicable laws namely the Arbitration laws of the Republic of Kenya.
7. It is the **2nd Defendant's** case that 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. It is therefore the **2nd Defendant's** case that the **1st Plaintiff's** move to Court is pre-emptive and premature as they should first exhaust the dispute resolution mechanism afforded by the Contract.
8. In opposition to the application, it is averred for the Plaintiffs that there is pending case before this Court (Civil Case no. 164 of 2013) between the **1st Plaintiff** and the **2nd Defendant**. It is the Plaintiffs' position that in the said case the **2nd Defendant** filed a Defence and voluntarily submitted itself to the jurisdiction of this honorable Court. It is therefore the Plaintiffs' case that it is not open to the applicant to seek to refer the current dispute to arbitration. It is further their case that the current dispute involves third parties, namely the **3rd** and **4th** Defendants, who were not parties to the arbitration agreement between the **1st Plaintiff** and the **2nd Defendant**.
9. According to the Plaintiffs, the cause of action in this suit emanates from a tripartite agreement made between the **2nd Defendant**, the **1st Plaintiff** and the **1st Defendant**, which said agreement has no arbitration clause. (*Attached to the Replying affidavit and marked "BMS 2" is a copy of the said agreement*). The **2nd Plaintiff** avers that the subject matter of the suit, namely land properties, belong to him, the **3rd** and **4th** Plaintiffs and are not subject to any arbitral process. It is therefore his assertion that the current matter is no longer a simple contractual dispute between the **1st Plaintiff** and the **2nd Defendant** as it involves third parties.
10. The **1st defendant** also opposed the application on grounds that the tripartite agreement in respect to which the suit is grounded does not have an arbitration clause. It is also the **1st Defendant's** case that the dispute between the **1st Plaintiff** and the **2nd Defendant** is already before the Court in HCCC 164 of 2013 whereby the **2nd Defendant** has already submitted to the jurisdiction of the Court.
11. The application was prosecuted by way of written submissions. The **2nd Defendant** filed its submissions on **27th May 2014** while the **1st Plaintiff** filed its reply on **11th June 2014**.

ANALYSIS

12. I have considered the application, the affidavits on record and submissions by Counsel as well as the authorities cited. Having done so I take the following view of the matter.
13. It is not in dispute that the Contract between the 1st Plaintiff and the 2nd Defendant provided for arbitration as a form of settlement of disputes. However, it is the 1st Plaintiff's case that the avenue of arbitration is no longer available to the 2nd Defendant. The argument put forward is that the 2nd Defendant already submitted itself to the jurisdiction of the Court in an earlier case (HCCC 164 of 2013) between itself and the 1st Plaintiff by filing a Defence. The 1st Plaintiff further argues that the dispute which is subject of litigation involves third parties who were not subject to the agreement providing for arbitration.
14. I will not delve into the first argument since it is not viable to deny a party the right to arbitration on the basis that they did not explore the same in another suit. To say the least, the earlier suit and the current suit are separate suits with different parties, issues and prayers.
15. With regard to the second argument, I have perused the Amended Plaintiff with respect to the current suit which is dated **28th January 2014** and filed on **29th January 2014**. It is evident that the subject matter of the dispute between the parties therein is the tripartite agreement dated **4th December 2010**. It is averred in the said Amended Plaintiff that in order to finance the project (the tender agreement between the 1st Plaintiff and the 2nd Defendant), the 1st Plaintiff applied for and was granted a loan by the 1st Defendant which said facility was backed and secured by the 2nd Defendant through the tripartite agreement duly executed by the 1st Plaintiff, the 1st Defendant and the 2nd Defendant. The facility was further secured by the first legal charges that were registered over properties belonging to the 2nd, 3rd and 4th Plaintiffs.
16. The crux of the matter is that the 2nd Defendant reneged on the tripartite agreement by failing to pay the 1st Plaintiff the balance of the contract sum of about Kshs. 88 Million. As a result, the 1st Defendant has now advertised the suit properties for sale by public auction.
17. I recognize the fact that the tripartite agreement was in connection with the tender won by the 1st Plaintiff for the emergency rehabilitation of the Nangili-Moi's bridge (B2) road from the 2nd Defendant. However, the contract for the tender and the tripartite agreement are two distinct agreements and should be treated as such. The tripartite agreement did not have a provision for arbitration and therefore the 2nd Defendant should not impose the same on the parties involved. I agree with the 1st Plaintiff's submissions that the tripartite agreement is a commercial loan agreement and does not fall within the scope of the FIDIC conditions of Contract to make arbitration mandatory as stipulated for under clause 67.1. The said FIDIC conditions of contract relate to construction contracts.
18. In light of the foregoing, it is plain that this Court has jurisdiction to determine the current suit. In the circumstances, the 2nd Defendant's application seeking orders to refer this matter to arbitration cannot stand. Therefore, the order that commends itself to this Court is to dismiss the Chamber Summons dated 19th February 2014 with costs to the Respondents.
19. The second application is the Plaintiffs' Notice of Motion dated 14th March 2014 and filed on 17th March 2014. It is expressed to be brought under Order 45 Rule 1 (1) and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following orders:-
 1. ...
 2. ***That this Honourable Court be pleased to set aside, vary or vacate the order made on the 5th day of March 2014 lifting the interim order of injunction***
 3. ***That this Honourable Court be pleased to re-instate the order of temporary injunction in***

- terms of prayer 2 in the Notice of Motion dated the 24th day of January 2014.*
4. *That this Honourable Court be pleased to give further directions as to the early and speedy hearing and disposal of the Notice of Motion dated the 24th day of January 2014.*
 5. *That the Costs of this Application be provided for.*

20. The application is based on the several grounds stated therein and is supported by the affidavit of BENSON MURUMBA SIFUMA, the 2nd Plaintiff herein, sworn on 14th March 2014.

21. The facts leading to the application are that the present suit was filed simultaneously with an application for temporary injunction under Certificate of urgency on the 23rd of January 2014. The Court granted the Plaintiffs an interim injunction on the same day restraining the 1st Respondent from disposing the suit properties by way of a public auction. When the said application first came up for hearing *inter partes* on 30th January 2014, Counsel for the 2nd Respondent did not appear but Counsel for the 1st Respondent appeared and sought an adjournment to enable him seek instructions from his client and file a Replying affidavit. In response, Counsel for the Applicants applied for leave to file a Supplementary affidavit to the Replying affidavit and for the interim orders of injunction to be extended until the next hearing date. The next hearing was scheduled for 5th March 2014.

22. The 1st Respondent filed its Replying affidavit on 26th February 2014 and served the same on the Applicants' Advocates. It is the applicants' case that their former advocates were honestly awaiting the 2nd Respondent to file its Replying affidavit so that they could do one supplementary or Further affidavit in response to both the Respondents. On or about 28th February 2014, the 2nd Respondent instead filed an application dated 19th February 2014 seeking to stay the proceedings herein. The application was served upon the applicants' advocates on 3rd March 2014, two days prior to the hearing set for 5th March 2014. According to the Applicants' advocates they were taken by surprise and had very little time to do a Supplementary affidavit.

23. When the matter came up for hearing, the Advocate who was instructed to hold brief and seek an adjournment on the foregoing grounds, was unable to explain to the Court why the applicants required additional time. As a result, the Court discharged the interim order of injunction and stood over the application generally.

24. It is the Applicants' position that while the 2nd Respondent was not ready to proceed, Counsel for the 1st Respondent was ready but applied for the interim order to be lifted if the Applicants were not ready. It is averred for the Applicants that the lifting of the interim orders herein, exposed the suit properties to the risk of being disposed off by public auction. It is argued for the applicants that they have a good case based on the tripartite agreement dated 4th December 2010 with regard to payment of the mortgage debt. Besides, it is the Applicant's argument that the suit in general shall be defeated and rendered completely useless if the suit properties are sold.

25. It is submitted for the Applicants' that none of them was out to delay the hearing and disposal of the case and that the mistake of Counsel should not be visited upon the Applicants. It is the Applicant's case that they have taken steps to remedy the situation by filing a reply to the 1st Respondent's Replying affidavit. It is also the applicant's case that this application has been brought timeously and without unreasonable delay.

26. In opposition to the application, the 1st Respondent filed a Replying affidavit sworn on 25th March 2014 by the Legal officer, one Mr. Jack Kimathi. It is averred by the deponent that it is absurd for the Applicants to contend that they were waiting for a replying affidavit from the 2nd Respondent yet they had not served them with the order of the Court. It is the deponent's position that the failure to file a replying affidavit by the 2nd Respondent in itself cannot be a ground for seeking adjournment.

27. It is the 1st Respondent's case that to date no further affidavit has been filed and no draft is

annexed to the supporting affidavit. It is also the Respondent's case that there is no new set of facts to warrant the varying or setting aside of the Order. According to the deponent, the explanation given by the Applicants for failure to file a further affidavit was given to Court on the hearing date and the Court deemed it fit to lift the orders of injunction. The deponent further avers that the Applicants only remedy lies on appeal.

28. I have considered the application, the affidavits on record as well as submissions by Counsel. The application is brought under Order 45 Rule 1 and it seeks to review, vary or set aside the orders of this Court of 5th March 2014. By the said orders, the Court lifted the interim orders of injunction granted to the Plaintiffs against the 1st Respondent on 23rd January 2014.

29. The principles upon which a Court can review or vary a ruling are well established. Under Order 45 Rule 1 of the Civil Procedure Rules a court has power to review its own orders. The Section provides:-

“(45) (1) Any person considering himself aggrieved-

- a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
- b. ***by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

30. This legal position flows from Section 80 of the Civil Procedure Act which gives a Court power to review its own order where an appeal has not been preferred against its order for sufficient cause.

31. It is submitted by Counsel for the Applicants that due to inadvertent miss-communication and the inability of Counsel who held brief to ably pronounce himself on the instructions given, the Court lifted the temporary injunction. The argument that was to be put forth by Counsel holding brief on the hearing date was that the Applicants' former advocates were honestly awaiting the 2nd Respondent to file its Replying affidavit so that they could do one supplementary or Further affidavit in response to both the Respondents. This argument does not suffice for the reason that if the Respondents were filing separate Replying affidavits then it was only ideal that the Applicants put in separate Replies to the same.

32. The other argument by the Applicants is that the 2nd Respondent served them with an application on 3rd March 2014 just two days to the hearing of their application dated 23rd January 2014. For that reason, the Applicants' advocates were taken by surprise and had very little time to do a Supplementary affidavit. It is not clear what the Applicants' Advocates meant by saying they had very little time to do a supplementary affidavit yet the 1st Respondent filed its Replying affidavit on 26th February 2014 and served them with the same. It seems to me that so long as the 2nd Respondent had not put in a Replying affidavit to the Plaintiffs' application then the Plaintiffs would never have filed a supplementary affidavit.

33. It has also been observed by this Court that the Plaintiffs or their advocates are not keen on prosecuting this case. In their supporting affidavit, it is averred by the 2nd Plaintiff that they have filed a reply to the 1st Respondent's Replying affidavit. However, there is none on the Court record. The Plaintiffs did not even attach a copy of the same to the supporting affidavit, if indeed they filed one. This is a Court of equity and therefore it is required of the Applicants to come to Court with clean hands.

34. Having made the above observations, it is evident that the Plaintiffs have not given sufficient reasons to warrant the review or setting aside of the Orders of this Court made on 5th March 2014. In the upshot, the Notice of Motion dated 14th March 2014 and filed on 17th March 2014 is hereby dismissed. The costs of the application shall be for the 1st Defendant to be borne by the Applicants.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Keya for the Plaintiffs

Mugambi holding brief for Bundotich for Defendants

Irene – Court Clerk