



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 149 OF 2013

FAST TRACK

KENGAS LINK LIMITED.....PLAINTIFF

VERSUS

TIME LINE CONSTRUCTION CO LIMITED.....1ST DEFENDANT

GRACE MUTINDA MAINGI.....2ND DEFENDANT

STANDARD CHARTERED BANK.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

INTRODUCTION

1. The 1st and 2nd Defendant's Notice of Motion application dated 3rd June 2013 and filed on 4th June 2013 was brought under the provisions of Section 6 of the Arbitration Act Cap 49 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-
 - a. **THAT suit be stayed and Plaintiff be ordered to refer its claim to arbitration.**
 - b. **THAT costs of this application be provided.**
 - c. **THAT further or any other relief that this Honourable Court might deem fit to grant.**

1ST DEFENDANT'S CASE

2. The application was premised on the grounds that there was a dispute that was capable of being referred to arbitration as had been agreed upon by the Plaintiff and the 1st and 2nd Defendants in accordance with Clause 12 of their Agreement dated 6th May 2010. The 1st and 2nd Defendants contended that the court had no jurisdiction to hear and determine this matter. The application was supported by the Affidavit of Muinde Maingi that was sworn on 3rd June 2013.
3. In their written submissions dated 25th June 2013 and filed on 31st July 2013, the 1st and 2nd Defendants reiterated the grounds that had been set out in the face of their application and the averments in the aforementioned Supporting Affidavit.
4. They were categorical that they were not just invoking provisions of Article 159 (2) (c) of the Constitution of Kenya, 2010 as a blanket relief to cover up for shortcomings as most legal practitioners have been doing but rather that the court, as an agency of the process of justice, was

called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course of action. They placed reliance on the cases of **Election Petition No 5 Raila Odinga vs IEBC & 3 others** and **Diocese of Marsabit Registered Trustees vs Technotrade Pavillion Limited [2014] eKLR** in this regard. They contended that the Plaintiff would suffer no prejudice or loss if the matter proceeded for arbitration.

PLAINTIFF'S CASE

5. In response thereto, Hassan Kassim Farah swore a Replying Affidavit on 22nd October 2013 on behalf of the Plaintiff herein. It was filed on 23rd October 2013. It was the Plaintiff's contention that Clause 12 of the Agreement for Sale intended to refer claims or disputes arising between the parties but the 2nd -4th Defendants who were integral parties to the suit herein were not parties to the said Agreement.
6. It stated that it had written several letters to the 1st and 2nd Defendants to fulfill their obligations but they had never shown their willingness to refer the matter to arbitration. It averred that it was only after it filed suit that the 1st and 2nd Defendants had now sought a stay of the proceedings herein.
7. The Plaintiff filed its written submissions and List of Authorities both dated 2nd July 2013 and filed on 23rd July 2013. It was its submission that only a dispute between the parties to the arbitration could be referred to arbitration. The 3rd and 4th Defendants as they were not party to the aforesaid Agreement, they could therefore not be bound by Clause 12 therein. It referred the court to the case of **Mehta Electrical Limited & 4 Others vs N.K. Brothers Limited & Another [2005] eKLR** where Kasango J held that the arbitration clause, if any, was not operative as the Plaintiffs therein were not privy to the agreement that was in question.
8. It also averred that there was no dispute that was capable of being referred to arbitration as the 1st and 2nd Defendant's refusal to pay the outstanding amounts could not be said to amount to a dispute. It relied on the case of **C.A. No 26 of 2007 UAP Provincial Insurance Company Limited vs Michael John Beckett** and **Russell on the Law of Arbitration** in this regard.
9. The other contention by the Plaintiff was that the 1st and 2nd Defendants did not file their application as was envisaged by Section 6 of the Arbitration Act. It referred the court to the case of **Charles Njogu Lofty vs Bedouin Enterprises Limited [2005] eKLR** and pointed out that the 1st and 2nd Defendants filed their present application about fourteen (14) days after they entered appearance in this matter.
10. Additionally, the Plaintiff argued that an arbitration clause could not oust the jurisdiction of the court. It referred the court to the cases of **Safaricom Limited vs Flashcom Limited [2012] eKLR** and **Indigo EPZ Limited vs Eastern Southern African Trade & Development Bank 1 KLR 2002** to buttress its submission that the 1st and 2nd Defendants had not demonstrated that the court should stay the proceedings herein and refer the dispute to arbitration.

3RD DEFENDANT'S CASE

11. The 3rd Defendant filed its Grounds of Opposition dated 18th March 2013 on even date. The grounds were generally as follows:-
 - i. **This court was properly seized of this matter as parties having filed their respective appearances and defences, the dispute had now been removed from the realm of the arbitration process.**
 - ii. **The 3rd Defendant was not party to and did not authorise/ approve the Agreement of Sale dated 6th May 2010.**
 - iii. **The subject matter of the suit was charged in favour of the 3rd Defendant.**
12. In its written submissions dated 14th October 2013 and filed on 15th October 2013, the 3rd Defendant reiterated the grounds in its Grounds of Opposition and relied on the provisions of

Section 6 (1) of the Arbitration Act and the case of Millicent W. Mugih vs Speedway Investment & Another [2009] eKLR in support its case.

LEGAL ANALYSIS

13. Section 6 of the said Arbitration Act stipulates as follows:-

1. **A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a 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 unless it finds –**
 - a. **that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
 - b. **that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration.**

14. The operative and key words are “**not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.....**”

15. The essence of Section 6(1) of the Act is that the 1st and 2nd Defendants ought to have filed an application for stay of proceedings at the time they filed their Memorandum of Appearance on 20th May 2013 and before taking any other step in the proceedings herein.

16. In the case of Niazsons (K) Ltd vs China Road & Bridge Corp (2001) KLR 12, the court held that before staying proceedings, it had to consider whether the applicant had taken any steps in the proceedings other than the steps allowed by Section 6 (1) of the Arbitration Act.

17. The court is aware of its obligation under Article 159(2)(c) of the Constitution of Kenya, 2010 to promote resolution of disputes through Alternative Dispute Resolution. However, statutory provisions must be strictly adhered to. Parties cannot always invoke the aforesaid provisions to circumvent what had specifically been legislated.

18. Evidently, the 1st and 2nd Defendants did not file the application under Section 6(1) of the Arbitration Act on 20th May 2013 and only did so on 4th June 2013. As was rightly pointed out by the Plaintiff, the 1st and 2nd Defendant could therefore not purport to stay the proceedings herein so that the matter could be referred to arbitration as they had waived their right to have the dispute resolved as had been envisaged in the arbitration clause.

19. The court therefore agrees entirely with the submissions by the Plaintiff that the 1st and 2nd Defendants’ present application was thus misconceived as it did not institute proceedings in this court strictly in accordance with the provisions of Section 6 (1) of the Arbitration Act. Their argument that it would be more expedient to have this matter disposed through arbitration finds no favour with this court. The choice of the mode of settlement of disputes should not be at the whims of a party to suit its circumstances more so where there is an arbitration clause.

20. The court was also persuaded by the 3rd Defendants’ submissions that the dispute was outside the realm of arbitral proceedings. This was not so much because it had filed its Statement of Defence but rather it was because it was not privy to the Agreement of Sale dated 6th May 2010 between the Plaintiff and the 1st and 2nd Defendants herein.

21. As is stipulated in Section 6 (1) of the Arbitration Act and rightly stated by the Plaintiff and the 3rd Defendant, there was in fact no dispute between the 1st and 2nd Defendant and the 3rd Defendant that had been agreed to be referred to arbitration.

22. While the dispute between the parties herein can still be referred to arbitration under Order 46 Rule 20(1) of Civil Procedure Rules, 2010, the court can only refer a matter to arbitration where all parties who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration if they apply to the court for an order of reference.

23. In this case the dispute between the Plaintiff and the 1st and 2nd Defendants can be referred to arbitration. However, in the absence of the consent by the Plaintiff, 1st, 2nd, 3rd and 4th Defendants to proceed to arbitration, the courts hands remain tied. The court finds that it does not have any

jurisdiction to refer the dispute herein for determination through arbitration.

24. Although this was not an issue for determination, the court nonetheless wishes to disabuse the notion by the Plaintiff that the jurisdiction of the court cannot at any given be ousted due to an existing arbitration clause. Notably, the court assumes jurisdiction in arbitral proceedings and intervenes only as provided by the law. This is borne by Section 10 of the Arbitration Act that provides as follows:-

“Except as provided in the Act, no court shall intervene in matters governed by the Act.”

25. Accordingly, having considered the pleadings, affidavit evidence, grounds of opposition and written submissions by the parties, the court has come to the conclusion that the court became seized of this matter when the 1st and 2nd Defendants failed to file their application to stay the proceedings herein on 20th May 2013 and due to the absence of an arbitration agreement between all the parties or their consent to refer the matter to arbitration.

DISPOSITION

20. For the foregoing reasons, the court finds that the 1st and 2nd Defendants' Notice of Motion application dated 3rd June 2013 and filed on 4th June 2013 was not merited and the same is hereby dismissed with costs to the Plaintiff and the 3rd Defendant.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October 2014

J. KAMAU

JUDGE