



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 241OF 2012

HANIF SHEIKH.....PLAINITFF

VERSUS

ALLIANCE NOMINEES LIMITED.....1ST DEFENDANT

SUSAN MATIBA MWAMTO

(as the duly appointed Attorney of

Kenneth Stanley Njindo Matiba).....2ND DEFENDANT

STEPHEN G SMITH.....3RD DEFENDANT

RAYMOND MATIBA.....4TH DEFENDANT

ANDREW SMITH.....5TH DEFENDANT

RITZENA LIMITED.....6TH DEFENDANT

HAIES LIMITED.....7TH DEFENDANT

FARLO LIMITED.....8TH DEFENDANT

HILLCREST SCHOOL LIMITED.....9TH DEFENDANT

HILLCREST SECONDARY SCHOOL LIMITED.....10TH DEFENDANT

NARU MORU RIVER LODGE LIMITED (In Receivership).....11TH DEFENDANT

COMPUTRON LIMITED.....12TH DEFENDANT

ALLIANCE DEVELOPMENTS LIMITED.....13TH DEFENDANT

ALLIANCE HOTELS LIMITED (In Receivership).....14TH DEFENDANT

MARLBOROUGH HOUSE KINDERGARTEN LIMITED.....15TH DEFENDANT

THE PEOPLE LIMITED.....16TH DEFENDANT

WESTLANDS (K) LIMITED.....17TH DEFENDANT

ALLIANCE INVESTMENTS LIMITED.....18TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 6th May 2013 and filed on 7th May 2013 was brought under the provisions of Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, 2010, Order 46 Rule 20 of the Civil Procedure Rules, 2010, the inherent powers of the court and all other enabling provisions of the law. It sought the following orders:-

1. THAT the single dispute which had arisen amongst the parties herein under the Gulf Cap Agreement dated 18th January 2010, the Overarching Agreement dated 11th November 2010, the Shareholders Agreement dated 11th November 2010 and the six Trust Deeds dated 11th November 2010 be referred to a single Arbitral Tribunal composed of such Arbitrator or Arbitrators as shall be agreed upon by the parties or as shall be appointed by the court.

2. Pursuant to Order No (1) above, and taking into account all relevant considerations, the parties do agree or in default of such agreement, this Honourable Court do determine, whether the seat of Arbitration shall be in Nairobi, or in London, and whether the governing law shall be the Law of Kenya or the Law of England.

3. THAT this Honourable Court be pleased to make such orders and to issue such directions as shall be necessary to facilitate:-

a. The harmonised expeditious, efficient, proportionate and economical disposal of the dispute amongst the parties hereto.

b. The attainment of the overriding objective envisaged under Sections 1A and 1B of the Civil Procedure Act, 2010.

4. THAT the costs of this Application be provided for.

THE PLAINTIFFS' CASE

2. The Plaintiffs' application was supported by the Affidavit of Hanif Sheikh that was sworn on 6th May 2013. It set out the background of how and from when the parties entered into agreements until the time the Defendants breached the terms of the said agreements. The Plaintiffs were of the view that their claim cut across the said three (3) agreements namely, Gulf Cap Agreement dated 18th January 2010 (hereinafter referred to as "the Gulf Cap Agreement"), the Overarching Agreement dated 11th November 2010 (hereinafter referred to as "the Overarching Agreement") and the Shareholders Agreement dated 11th November 2010 (hereinafter referred to as "the Shareholders Agreement") and the six (6) Trust Deeds.

3. The Plaintiffs case was that they were making a single claim which was based on the common express provision that they were entitled to twenty seven (27%) per share of the residual net value of the assets and cash after payment in full of the outstanding loan to Barclays Bank of Kenya Limited, payment to minority shareholders and other third party creditors.

4. However, referral of the dispute to arbitration had not been easy due to the narrow and technical interpretations that had been adopted by the Defendants necessitating harmonisation of the apparent conflict by referring the same to a single Arbitrator.

5. It was their averment that no prejudice would be occasioned to the Defendants if the application was allowed as prayed and that the court was enjoined to enhance the substantive application of the law and substantive interpretation and enforcement of contractual arrangements between parties without undue regard to technicalities.

THE DEFENDANTS' CASE

6. Susan Matiba Mwamto swore a Replying Affidavit on 13th March 2013 on behalf of the Defendants herein. Their written submissions were dated and filed on 17th April 2014. They referred the court to several cases which were attached to their List of Authorities dated and filed on 17th April 2014.

7. The bottom line of their case was that the court did not have jurisdiction to consolidate the arbitrations between the parties herein. It relied on seventeen (17) grounds in opposition to the Plaintiffs' application. In general terms, the said grounds could be summarised as follows:-

a. The 1st Plaintiff lacked *locus standi* to bring the present application for the reason that he was not a party to any of the aforesaid Agreements and that the 3rd Defendant was only a party to the Shareholders Agreement which was governed by the Laws of England and subject to the Rules of the London Court of International Arbitrations in which consolidation could only be undertaken with the consent of all the parties.

b. None of the Plaintiffs were party to the Trust Deed.

c. There was no privity of contract between the Plaintiffs and the Defendants.

d. There was no commonality of parties, subject matter, disputes, claims, governing laws, seat and venue of arbitrations between the parties who were privy to the aforesaid said Agreements.

e. The application was *res judicata* as Musinga J (as he then was) delivered his ruling on 17th July 2012 in which he dealt with the same matters that had been raised in the Plaintiff's application.

f. The suit by the 1st and 3rd Defendants against the Defendants was dismissed with costs on 17th July 2012.

g. The application was frivolous and an abuse of the court process and the laid principles of law and jurisprudence could not be sacrificed at the altar of convenience of the 1st Plaintiff.

LEGAL ANALYSIS

8. While there were no written submissions by the Plaintiff in the court file, both parties orally submitted in great detail what was entailed in the aforesaid Agreements. Whilst the court noted the oral and written submissions and the case law in respect of the Plaintiff's claims against the Defendants herein, the same were not relevant in its determination of the Plaintiff's application herein.

9. The court would run the risk of delving into the realm of arbitration in the event it was to consider or analyse the merits of the dispute as was set out by the Plaintiffs. It will therefore disregard the same and only focus on whether or not it has jurisdiction and power to grant the prayers that had been sought in the Plaintiffs' application.

10. Clause 15 of the Gulfcap Agreement provided as follows:-

“All disputes and differences arising between the parties, including any dispute or difference in regard to the interpretation of any provision or term or remaining thereof, or in regard to any claim of any one party against the other or in regard to the rights and obligations of any other party under this Agreement or otherwise, howsoever, shall be referred to Arbitration under the Laws of Kenya.”

11. The parties to the said Agreement were The Alliance Group of Companies represented by Alliance Nominees Limited, the 1st Defendant herein and Gulfcap Africa Limited, which did not appear to be a party to the proceedings herein.

12. Clause 8.3.1 of the Overarching Agreement provided that:-

“Any dispute, claim, controversy or disagreement between the parties as to matters under, touching upon or pursuant to this Agreement as aforesaid which cannot be settled amicably within fifteen days after receipt of one party of another’s party request for such amicable settlement may be submitted by a party to Arbitration in accordance with the provisions of Clause 8.3. The venue and seat of Arbitration shall be in Nairobi, Kenya.”

13. The parties to the said Agreement were Alliance Nominees Limited, Kenneth S.N. Matiba, Stephen G. Smith, Ritzenna Limited Alliance Investments Limited, and who were the 1st, 2nd, 3rd, 6th and 18th Defendants respectively.

14. Clause 21.2 of the Shareholders Agreement stipulated as follows:-

“Should any dispute or claim that arises out of or in connection with the Agreement and which has not been amicably resolved as aforesaid by Arbitration under the rules of the London Court of International Arbitration, which rules are deemed to be incorporated by reference into this clause. The number of Arbitrators shall be one. The seat of Arbitration shall be London, England and the language shall be English.”

15. The parties to the said Agreement were Southcote Limited, Ritzenna Limited, Haies Limited, Farlo Limited, the 3rd Plaintiff and 6th, 7th and 8th Defendants respectively. The Plaintiffs submitted that Farlo Limited, Haies Limited and Southcote Limited were the alter egos of the Smiths, the Matibas and Hanif Sheikh, the 1st Plaintiff respectively.

16. It is clear who the parties to the aforesaid Agreements and what the governing laws, seat and venues of the different Arbitral proceedings were. It would be outside the scope of this court to purport to add other parties who were not parties to the said Agreements and order that their disputes be resolved by way of amicable settlement of disputes or referral to Arbitration. If the court were to do so, this would amount to it re-writing the said Agreements, something it did not have power or jurisdiction to do as was rightly submitted by the Defendants.

17. Having said so, the court entirely agrees with the Plaintiffs’ submissions that the supreme law and enacted legislation clearly empowers it to refer disputes to alternative methods of dispute resolution. Indeed, Article 159 (2)(c) of the Constitution of Kenya, 2010 provides as follows:-

“In exercising judicial authority, the courts shall be guided by the following principles:-

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).”

18. Under Section 59 C of the Civil Procedure Rules , it is also provided that:-

“1. Any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral (emphasis court).

2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order. ..”

19. Order 46 Rule 20 of the Civil Procedure Rules under which the Plaintiff’s application was predicated upon stipulates as follows:-

“1. Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion(emphasis court)or at the request of the parties, any other appropriate means of dispute resolution (including mediation)(emphasis court) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act.

(2) The court may adopt an alternative dispute resolution(emphasis court)and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution...”

20. Section 3A of the Civil Procedure Act also stipulates that nothing in the said Act shall otherwise limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court. In addition, Section 1A of the said Act also mandates this court, while exercising power, to bear in mind the overriding objectives, which is, to facilitate the just, expeditious and affordable resolution of disputes. This is aimed at attaining the efficient disposal of the business of the court.

21. Whereas the court is mandated under Article 159(2)(c) of the Constitution of Kenya, 2010 to promote resolution of disputes through Alternative Dispute Resolution, statutory provisions must be strictly adhered to. Parties cannot always invoke provisions to circumvent what had specifically been legislated. The oxygen principle is thus not intended to override statutory provisions which must be strictly adhered to.

22. A referral of the dispute herein by the court would have been feasible if the same had been brought pursuant to Order 46 Rule (1) and (2) of the Civil Procedure Rules. The same provide as follows:-

“1. Where in any suit all the parties interested(emphasis court) **who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration they may, at any time before judgment is pronounced apply to the court for an order of reference.**

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.”

23. Under this order, parties must have presented a dispute to the court for determination but somewhere along the way, they opted for the same to be determined through an arbitral process. In such a case, unless parties agreed to have a matter referred to arbitration, the court would have no jurisdiction or power to do so.

24. The circumstances of this case are, however, distinguishable as the Plaintiffs’ suit was not for the determination of the dispute between them but rather, it had sought orders of interim measures of protection pending the hearing and determination of the dispute through arbitration. The provisions of Order 46 Rule 1 of the Civil Procedure Rules would thus not applicable herein.

25. It is clear that there is a distinction between referral of a dispute for determination through the process of arbitration or other methods of alternative dispute resolution. Whilst the court can on its own motion refer matters for determination to other alternative dispute resolution mechanisms pursuant to the provisions of Order 46 Rule 20 of the Civil Procedure Rules, it cannot purport to refer the dispute

between the parties to arbitration due to the consensual nature of arbitral proceedings.

26. Indeed, court cannot therefore clothe itself with jurisdiction and power to refer the dispute between the Plaintiffs and the defendants to a single Arbitral Tribunal composed of such Arbitrator or Arbitrators as shall be agreed by the parties or shall be appointed by the court purportedly under Order 46 Rule 20 (1) of the Civil Procedure Rules as had been argued by the Plaintiffs.

27. The court would still have had no jurisdiction to grant the orders that had been sought by the Plaintiffs herein due to the limitations that are imposed upon it by Section 10 of the Arbitration Act Cap 49 (Laws of Kenya). The said Section stipulates as follows:-

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

28. Notably, both the GulfCap Agreement and the Overarching Agreement were governed by the laws of Kenya. There is no provision anywhere in the said Act that would give this court the jurisdiction or power to support the Plaintiffs’ argument that granting the orders they had sought would enhance the substantive application of the law and substantive interpretation and enforcement of contractual agreements between them without undue regard to technicalities.

29. As was rightly submitted by the Defendants, the court cannot intervene and order consolidation of the disputes herein for determination by a single Arbitral Tribunal by virtue of Section 10 of the Arbitration Act. Referral of disputes to a single tribunal for expediency purposes cannot be deemed to be a technicality. The bottom line is that the court cannot intervene in arbitral matters except as has been provided in the Arbitration Act.

30. The Plaintiffs’ submission in respect of the facilitative role of the court as was observed in **Intoil Limited & Another vs Total Kenya Limited & 3 Others [2013] eKLR**, though correct, cannot be extended to mean that the court has powers to facilitate what is not provided for in the Arbitration Act.

31. Again as was rightly submitted by the Defendants, the court cannot intervene and order consolidation of the disputes herein for determination by a single Arbitral Tribunal due to the limitations that have been set out in Section 35 of the English Arbitration Act, 1996 that provides as follows:-

“1. The parties are free to agree-

a. that the arbitral proceedings shall be consolidated with other arbitral proceedings;

b. that concurrent hearings shall be held,

on such terms as may be agreed.

2. Unless the parties agree to confer such power on the tribunal, the

tribunal has no power to order consolidation or concurrent hearings.”

32. This section is relevant in view of the fact that the Shareholders Agreement, which the Plaintiffs would want heard by a single Arbitral Tribunal, was governed by the law of England. Although the Plaintiffs argued that their application was not one seeking consolidation of the arbitral proceedings but rather it was seeking directions for the harmonised, expeditious, efficient, proportionate and economical disposal of the dispute amongst the parties herein, it is evident that that is exactly what was intended to be achieved as can be seen in the prayers that were set out in Paragraph (1) hereinabove.

33. If an arbitral tribunal can only consolidate arbitral proceedings with the consent of the parties, a court cannot have power to order such consolidation as was submitted by the Plaintiffs. Their prayer to have the dispute referred to a single arbitrator can only be made to the arbitral tribunal parties will have submitted themselves to. The role of the courts is only complementary and must only be exercised within the

parameters that have been set out in the Kenya and English Arbitration Acts.

34. Accordingly, having considered the pleadings, affidavit evidence, oral and written submissions and the case law in support of the respective parties' cases, the court has come to the conclusion that it did not have any jurisdiction or power to grant the prayers that had been sought by the Plaintiffs.

35. The court agrees with the Defendants' submissions in their entirety to the effect that the parties to the said Agreements were bound by the provisions therein and that the jurisdiction of this court to intervene in any manner was ousted except as was provided under Section 10 of the Arbitration Act. The Plaintiffs' application was not one of those cases that are envisaged under the said Section 10 of the Arbitration Act.

DISPOSITION

36. For the foregoing reasons, the court finds that the Plaintiffs' Notice of Motion application dated 6th May 2013 and filed on 7th June 2013 was not merited and the same is hereby dismissed with costs to the Defendants.

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of December 2014

J. KAMAU

JUDGE