REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 624 of 2012

DAVID KABUBII KURIA.....PLAINTIFF

VERSUS

BRYAN ERIC LIMITED.....1ST DEFENDANT

TAFI ENTERPRISES LTD.....2ND DEFENDANT

MELDE VALE HOLDINGS LTD.....3RD DEFENDANT

SIMON KIMUTAI.....4TH DEFENDANT

INVESCO ASSURANCE COMPANY LIMITED.....5TH DEFENDANT

R U L I N G

1. What is before this court is an Application by way of Chamber Summons filed by the advocates for the fifth Defendant on 30 October 2012 but actually dated 24 October 2012. The Application seeks orders that this court be pleased to stay the proceedings in this suit pending arbitration in accordance with the provisions of a Specific Shareholders' Agreement ("the Agreement") entered into between the Plaintiff and the shareholders of the fifth Defendant. The advocates for the fifth Defendant set out the provisions of clauses 24.1 and 24.2 of the Agreement as to settlement of disputes and noted that the suit had been instituted by the Plaintiff in violation of the Agreement. The advocates for the fifth Defendant emphasised, in the grounds in support of the Application, that the parties had agreed and were bound to proceed to arbitration on all matters in dispute and it was in their best interests so to do. The Applicant also referred to section 10 of the Arbitration Act which restricts the intervention of the courts were parties have agreed to go to arbitration.

2. The Application was supported by the Affidavit sworn by **Clifford Otieno** dated 24 October 2012, who described himself therein as the Chief Executive Officer of the fifth Defendant. The deponent referred in his said Affidavit, to a copy of the Agreement which had been included in the Plaintiff's bundle of documents as "DKK 1" the same being dated 14 December 2011. He noted that the Plaintiff was fully aware of the dispute resolution provisions of the Agreement and stated that the Plaintiff had deliberately chosen to side step such provisions. Finally, he confirmed that the said Defendant had not taken any other step in the proceedings save to enter Appearance and file this Application.

3. The Application was opposed and the Plaintiff filed Grounds of Opposition on 30 November 2012. Apart from detailing that the Application had no merit and was an abuse of the court process, the Plaintiff drew the attention of the court to clause 24.1 of the Agreement. That clause specifically stipulated that the whole dispute resolution procedure shall not affect a party's right, where appropriate, to seek an interim

remedy by way of injunction, specific performance or similar. Finally, the Plaintiff maintained that the Application had been filed by the fifth Defendant merely to delay the course of justice and frustrate the Plaintiff.

4. Before court on 7 December 2012, the parties agreed, by consent, to deal with the Application by way of written submissions. Submissions in that regard on behalf of the fifth Defendant were filed on the 11 December 2012 and the Plaintiff's submissions were filed on the 19 December 2012. In support of its contention that Grounds of Opposition, alongside Preliminary Objections, are ways in which a respondent can raise objections to any application, the fifth Defendant referred this court to the finding in **Oraro v Mbaja (2005) 1 KLR 141** as well as a **Warsame J's** ruling in **Avtar Singh Bhamra & anor v Oriental Commercial Bank Kisumu HCCC No. 53 of 2004**. Both of these authorities concentrated on the principles upon which a preliminary objection could be raised in terms of a point of law. In my opinion, the right of the Plaintiff to raise a Preliminary Objection herein was not disputed. Thereafter, the fifth Defendant further referred this court to the principle as regards Grounds of Opposition and referred to the fact that the same was now well defined by the Court of Appeal in **Niazsons (K) Ltd versus China Road and Bridge Corporation (K) Ltd (2001) 2's EA 502 (CAK)**. The court had clarified therein that a "Ground of Opposition" is declared to be a point of law which must not be blurred with factual details which are liable to be contested and to be proved through the process of leading evidence. In the fifth Defendant's opinion, the interpretation of clause 24.1 of the Agreement was a point of fact not of law. In its opinion the reading and interpretation of clause 24.1 was contested by the parties, constituting a breach of established procedure with the unfortunate effect of confusing the issues. Thereafter, the fifth Defendant referred the court to the case of **Quick Enterprises Ltd v Kenya Railways Corporation Kisumu HCCC No. 22 of 199?** Unfortunately, the fifth Defendant failed to supply the court with a copy of this unreported authority.

5. As regards the agreement to arbitrate, the fifth Defendant referred the court to the well-known authority of **Pollock House v Nairobi Wholesalers (1974) EA 152**. That case endorsed the principle that where an agreement between parties refers matters to arbitration, the same is binding and enforceable by the courts. The fifth Defendant maintained that this principle had also been endorsed in the case of **Mara Conservancy versus County Council of Transmara HCCC No. 110 of 2009** as well as in the case of **Oyugi versus Laws Society of Kenya & Anor (2005) 1 KLR 463**. Finally under this heading, the fifth Defendant spelt out in full the provisions of **section 6** of the Arbitration Act, as regards the time appropriate for parties to an arbitration agreement making applications for stay of proceedings pending arbitration. The fifth Defendant maintained that arbitration agreements are contracts just like any other contract and that an arbitration clause in an agreement captures the mutual consent of the parties and is set out in mandatory rather than permissive terms. The fifth Defendant then quoted from **Mustill and Boyd's Companion Volume** on **Commercial Arbitration 2001**:

"…… the heart of the provision…is the mandatory duty imposed upon the court to stay an action brought in breach of the agreement to arbitrate…."

And further the fifth Defendant quoting from the same volume detailed:

"…. An application for a stay is not, however, a challenge to the jurisdiction, but an application to the court to decline to exercise such jurisdiction as it may possess…"

Finally, the fifth Defendant in its submissions made two further points. Firstly, it maintained that this Application had been made without delay and secondly, that the relationship between the parties is contractual. From the Agreement, it was obvious that the same had been entered into voluntarily.

6. The Plaintiff opened its submissions by summarising the Application before court. It took the fifth Defendant to task in the latter's submission that a preliminary objection and grounds of opposition are one and the same. In the Plaintiff's is view they were not. Quoting the **Niazsons** case (supra) the Plaintiff submitted:

"……A preliminary objection is a pure point of law which is resolved without considering the

merits of the application before the court…"

The Plaintiff emphasised that in its grounds of opposition to the fifth Defendant's Application, clause 24.1 of the Agreement had a proviso that clearly stipulated that the clause, as such, shall not affect a party's right, where appropriate, to seek an immediate remedy for an injunction. The Plaintiff maintained that his Application dated 26th of September 2012 sought orders restraining the Defendants from locking him out of the company premises and interfering with the performance of his duties as a director of the fifth Defendant. It also sought to restrain the Defendants from purporting to remove the Plaintiff as a director of the Board of Directors of the fifth Defendant. To this end, the Plaintiff again referred to the **Niazsons** case (supra) in quoting the Court of Appeal as follows:

"…..Under section 6 of the Arbitration Act, a court considering an application for stay must decide whether the party applying has taken a step in the proceedings, whether there are any impediments on the validity, operation or performance of the arbitration agreement, and whether the suit concerns a matter agreed to be referred."

It was the Plaintiff's submission that the Agreement expressly granted to the parties the right to file a suit seeking immediate injunctive relief, hence this suit filed by the Plaintiff. The parties to the Agreement expressly gave to each other the right to file a suit in court if orders sought are injunctive orders.

The Plaintiff concluded that it was abundantly clear that the Arbitration clause in the Agreement does not include instances where a party to the same seeks an immediate remedy for an injunction, specific performance or similar court order to enforce the obligations of the other party.

7. I have had an opportunity of perusing the Agreement but not the copy attached to the Affidavit of the Plaintiff in support of his said application dated 26 September 2012 which seems to be incomplete. However a complete copy of the Agreement document does seem to have been included in the Plaintiff's bundle of documents in relation to this suit. The first thing to note is that the Plaintiff is not one of the parties to the Agreement. The parties are Public Transport Investment Company Ltd, Obadiah Kioko Kavivya, Merceda House Ltd and Kaimosi House Ltd. However, the Agreement at clause 3.1.1 (xi) seems to indicate that the Plaintiff is to be allotted 500 fully paid-up shares to be beneficially owned by him. As the Plaintiff is not a party to the Agreement, it seems to me that he is unaffected by the Settlement of Disputes clause – clause 24.1. However, as he confirms in his Affidavit in support of his said Application dated 26 September 2012 at paragraph 2 that he owns 500 shares in the fifth Defendant, he would be bound by the provisions of the Memorandum and Articles of Association of the fifth Defendant Company. Article 31 of the Articles of Association of the fifth Defendant, a copy of which has been provided to court in the Plaintiff's bundle of documents filed in this suit, provides that all differences arising between the Company on the one hand and any of its members etc. on the other should be referred to arbitration. It seems therefore that, one way or another, the Plaintiff can expect his disputes with the Defendants, including the fifth Defendant, to be referred to arbitration.

8. Leaving aside the provision for settlement of disputes as per the Agreement for a moment, the provisions of **section 7 (1)** of the *Arbitration Act Cap 49* seem quite clear to me. It provides:

"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."

To my mind, that is exactly what the Plaintiff is seeking to achieve in these proceedings before court. From his said Application and the Affidavit in support, it is clear that he feels he has been wronged by being "sacked" as a director of the fifth Defendant Company, bearing in mind that he is also a shareholder thereof. In this regard, the Agreement provides at clause 6.2 that the membership of its Board of directors shall include the Plaintiff. Further at clause 5.6 (c) it provides that:

"David Kabubii Kuria and Obadiah Kioko Kavivya shall remain directors the Company for the period which the Company holds the titles to the three Properties."

It seems therefore that he has some justification in bringing his said Application. In my opinion, the Plaintiff should be entitled to pursue the same and **section 7 (1)** of the Arbitration Act (supra) allows him so to do. Accordingly, I dismiss the fifth Defendant's Chamber Summons dated 24 October 2012 with costs to the Plaintiff.

DATED and delivered at Nairobi this 24th day of January 2013.

J. B. HAVELOCK
JUDGE