



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 178 of 2010**

**WADALDI LIMITED ::: PLAINTIFF**

**- VERSUS -**

**CORN PRODUCTS KENYA LTD. ::: DEFENDANT**

**R U L I N G**

1. The **Notice of Motion** application before the court is a dated **14<sup>th</sup> January 2013**. the application seeks the following orders namely:

- 1) That this application be certified urgent and be heard *ex-parte* in the first instance and service of the same be dispensed with in view of its urgent nature.
- 2) That pending the *inter-partes* hearing and determination of this application, the Defendant, whether by itself, its servants, directors, assigns, employees and/or agents or otherwise howsoever, be and is hereby restrained from alienating, disposing, selling or transferring any of its assets to any third party and/or otherwise removing any to its assets out of the jurisdiction of this honourable court and/or winding up the operations of the Defendant.
- 3) That pending the hearing and determination of this suit, the Defendant, its servants, directors, assigns, employees and/or agents or otherwise howsoever, be and is hereby restrained from alienating, disposing, selling or transferring any of its assets to any third party and/or otherwise removing any to its assets out of the jurisdiction of this honourable court and/or winding up the operations of the Defendant.
- 4) That this Honourable Court do issue warrants of attachment before judgement in this suit over the Defendant's movable and immovable property and in particular vehicles, machines, computers, hardware, furniture and all goods of trade and in the stock in the Defendant sufficient to satisfy the said sum claimed in the Plaintiff.
- 5) That the Honourable Court do order the Defendant, within a period fixed by the Honourable Court to furnish security or to show cause why security should not be furnished for the sum of kshs.39,380,619.73 as claimed in the Plaintiff.
- 6) That the Honourable Court do issue any other relief it may deem just to grant for the interest of justice.

2. The application is supported by the affidavit of **ERROL F. KING** dated **14<sup>th</sup> January 2013** and a supplementary affidavit dated **11<sup>th</sup> March 2013** and is premised on the grounds stated therein.

3. The application is opposed through the grounds of opposition filed in court by the Defendant on **21<sup>st</sup>**

February 2013 and a Replying Affidavit of **MARTIN NDUNG’U KARIUKI** filed in court on **21<sup>st</sup> February 2013**.

4. On 7<sup>th</sup> March 2013 the Interested Party – **EQUIP AGENCIES LIMTIED** successfully applied to join the proceedings as such. The Interested Party is also opposed to the application and filed a Notice of Preliminary Objection in court on 7<sup>th</sup> March 2013. In their Notice of the said Preliminary Objection the Interested Party states:-

**“In light of the orders made on 25<sup>th</sup> day of March 2011 staying ALL proceedings pending the determination of the arbitral proceedings, this Honourable Court lacks jurisdiction to grant the orders sought.”**

5. The Defendant has also raised a similar objection stating that there is an order of this court made on 25<sup>th</sup> March 2011 staying all proceedings in this matter and referring the dispute to arbitration.

6. It is therefore necessary to consider the preliminary objection before we may go into the merits of the application if need be.

7. The brief history of the application before the court is that the Plaintiff filed a suit against the Defendant for alleged breach of contract and sought, among other reliefs:-

a) **An injunction to restrain the Defendant from breaching the contract.**

b) **A mandatory injunction to compel the Defendant to accept a professional undertaking issued on behalf of the Plaintiff and pay over to the Plaintiff a sum of USD174,000.**

c) **An order referring the dispute between the parties to arbitration as provided under Clause 1 (i) (a) of the Agreement dated the 1<sup>st</sup> April 2009 (“the Agreement”).**

d) **Specific performance of the Agreement.**

e) **Kshs.39,389,619/73 with interest at commercial rates.**

8. A default judgement was entered for the Plaintiff on or about 17<sup>th</sup> June 2010 in the sum of Kshs.39,389,619/73. The Defendant in November 2010 successfully applied to have the same set aside on the grounds that:-

a. **The suit arises out of a contract which contains an arbitration clause.**

b. **The Defendant did not file a Defence because it was expected that this case would be referred to arbitration as prayed in the Plaint.**

c. **The Defendant has a good defence to the Plaintiff’s claim.**

9. The court in granting the Defendant’s application stated thus at paragraph 12 of the Ruling:-

**“The ex-parte judgement and all consequential orders including execution process is hereby set aside and all proceedings are stayed pending reference of the dispute to arbitration by the parties in accordance with the relevant clause in the agreement . . . The Defendant is hereby given unconditional leave to enter and defend. The Defendant to file its defence and counter-claim within the next fourteen (14) days from the date of this Ruling . . .”**

10. Both the Defendant and the Interested Party now appear to hang on this aspect of the Ruling which appear to have stayed all the proceedings. Counsel for the Defendant M/s Kirimi submitted that since there is an order staying all proceedings in this matter, the current application cannot proceed, and that the right forum for this application should be found with the arbitral process to which the dispute had been referred by the court in that Ruling. This view was also adopted by M/s Migiro for the Interested Party.

11. On his part Mr. Odongo for the Applicant submitted that the court has the jurisdiction under Section 7 of the Arbitration Act to provide measures of relief as the matter is being referred to arbitration. The

counsel further submitted that in the said Ruling of 25<sup>th</sup> March 2011 the court allowed the Defendant to enter appearance and file its defence and counter-claim meaning that indeed the proceedings were not at all stayed. Mr. Odongo further submitted that both the Plaintiff and the Defendant by their conduct have waived the direction to refer the matter to arbitration. The counsel referred the court to several correspondences between the Plaintiff and the Defendant in which they invited each other for fixing the matter for hearing. These correspondences ended up fixing a hearing date for 11<sup>th</sup> October 2012 almost one and half years after the order referring the matter to arbitration was given by the court.

12. Clearly, the parties by their own conduct waived the order staying all proceedings and referring the matter to arbitration. That, however, is not the end of the matter. The issue is, to what extent can parties to a suit amend, waive or defy a court direction or order? More importantly, can a 3<sup>rd</sup> party suffer a detriment occasioned by an illegal act of the parties?

13. To address the first issue, it is possible that the parties are still in the process of transferring the matter to arbitration. It is now two years since the order was issued. If that is so, then the Applicant has a right to be heard under Section 7 of the Arbitration Act. However, in my view two years is too long to have the view that the parties are in the process of transferring the matter to arbitration. Even if two years is not too long, there must be indications on record that the parties are moving in that direction. Such indication could be proposals for appointment of arbitrators, seat of arbitration, and generally several correspondences showing that the parties are moving to that end. In the current situation there is no evidence of movement towards arbitration. Indeed what is clear is that the parties are preparing for hearing the dispute in this court. If that is so, how would a court, such as mine, react when they were to come and ask to be heard? Naturally, I would refer to the court order of 25<sup>th</sup> March 2011 which divested this court of jurisdiction and require them to comply thereto. In other words, although the parties in this matter appear by their conduct not to be interested in pursuing the dispute through arbitration, there is a clear court order and direction compelling them to do that, and this court cannot but enforce that order.

14. Secondly, and more importantly, a suit does not just impact the parties before it alone. It affects parties hitherto unknown from all parts of the world. The Interested Party was never a party to the suit on 25<sup>th</sup> March 2011. However, the court order made on that day applied to the Interested Party the moment it became a party. This means that even though the Plaintiff and the Defendant may by their conduct appear to ignore the impact of the court order dated 25<sup>th</sup> March 2012 the *status quo* cannot apply to other parties including the Interested Party.

15. The Interested Party in this matter is alleged to have entered into contract to purchase some of the properties belonging to the Defendant and which the Plaintiff seeks an order of security over. The Interested Party's plea that there is a stay of all proceedings in this matter pending the referral of the dispute to arbitration is, in my view, a perfect plea which cannot be tainted by the action or inaction of the Plaintiff and the Defendant.

16. In my view, the Defendant by its own conduct cannot lay claim to the plea of lack of jurisdiction on account of the excising stay order. Neither can the Plaintiff were the roles to reverse. However, the order of stay of proceedings is on the face of the record. It has not been varied, appealed or replaced. This court can refer to it as a matter of cause, and the Interested Party can point it out as a matter of right.

17. Arising from the foregoing I uphold the Preliminary Objection raised by the Interested Party. That being so, the Notice of Motion application dated 14<sup>th</sup> January 2013 cannot see the light of day and must fail in its entirety with costs to the Interested Party. For avoidance of doubt, any further proceedings in this matter will only be entertained in the arbitral proceedings envisaged by this court's Ruling dated 25<sup>th</sup> March 2013. It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 20<sup>TH</sup> DAY OF MARCH 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Odongo for the Plaintiff*  
*Kirimi for the Defendant*  
*Teresia – Court Clerk*