REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 695 of 2010

KENYA PIPELINE COMPANY LIMITED………..………………………..PLAINITFF

VERSUS

KENOLKOBIL LIMITED……………..………..…………………………..DEFENDANT

RULING

1. The Defendant's Notice of Motion application dated 20th December 2012 was brought under the provisions of Sections 1A & 1B of the Civil Procedure Act Cap 21 Laws of Kenya and Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010. It sought the following orders :-

a. THAT the Ruling and Order of this Honourable Court made on 7th November 2012 be reviewed and reversed.

b. THAT upon review of this Honourable Court's Order made on 7th November 2012, the Defendant's application dated 26 (sic) June 2012 be granted as prayed.

c. **The costs of this application be provided for.**

1. The grounds on which the Plaintiff relied on in support of the application were as follows:-

a. THAT there were several mistakes and errors apparent on the face of the record that justified the review of the said Order and Ruling including inter alia, the following:-

i. Ruling and Order of 7th November 2012 defeated the purpose and object of law relating to amendment of pleadings and the order to amend the arbitral claim in June 2009.

ii. The order of 7th November 2012 defeated what the Legislator had forbidden in Section 10 of the Arbitration Act.

iii. It was an error and mistake of law and fact for the Court to have accepted and acted on the Plaintiff's contention that the Plaintiff would have to keep amending its counter-claim over and over again pursuant to the said Order for amendment.

b. THAT there were other sufficient reasons that justified or merited the review of Order and Ruling.

c. THAT the review was necessary for the fair determination of the proceedings, the efficient use of available judicial resources and disposal of the proceedings.

1. The said application was supported by the Affidavit of Jacob Israel Segman, the Defendant's Executive Chairman sworn on 20th December 2012. He stated that the Defendant's application to have the Plaintiff's claim for additional sums in the amended Plaint dismissed was itself dismissed by Musinga J (as he then was) after he found that the Plaintiff's amended claims which formed the subject matter of the suit were not *res judicata*. The Defendant was aggrieved by the said finding and therefore sought to have the orders made therein reviewed.
2. A dispute between the Plaintiff and the Defendant had been referred to the Arbitral Tribunal and the same was concluded in December 2009. The deponent deposed that there was an error on the part of the court to purport to adjudicate the additional claim as the same issues of controversy formed the subject matter of the adjudication and determination in the Arbitral proceedings. He added that this would defeat the very purpose and object of the order for amendment of the Statement of Claim that had been made by the Arbitral Tribunal.
3. The deponent further stated that the learned judge was persuaded by the Plaintiff's contention that it was practically impossible to introduce in the said arbitration proceedings claims that arose for the period of June 2009 to December 2009 because to do so would have required the Plaintiff to continue amending its counter claim before the Arbitral Tribunal over and over again. The Arbitral Tribunal had granted the Plaintiff leave to amend its claims for its determination.
4. It was the Defendant's contention that it was the Plaintiff's duty to produce and tender evidence for the aforesaid period, for consideration, by the Arbitral Tribunal. He argued that the originals of the documents emanated from the Plaintiff and it would therefore not have had difficulties in obtaining the same. It was the Defendant's case that the non-disclosure of this information misled the learned judge to believe that there were some justifiable grounds which prevented the Plaintiff from tendering the said evidence and which created special circumstances that did not render the Plaintiff's claim in these proceedings, *res judicata*.
5. In response thereto, the Plaintiff filed its Grounds of Opposition dated 9th January 2013 on the same date. The grounds were as follows:-

i. The grounds upon which the application was based were fallacious;

ii. The Defendant had not demonstrated any of the conditions for the grant of an order for review;

iii. There was in fact no mistake or error apparent on the face of the record;

iv. There was otherwise no sufficient reason to merit a review;

v. The application was in fact an appeal disguised as an application for review; and

vi. The application invited the Judge now seized with the matter to substitute his or her own decision for that of the Learned Mr Justice D Musinga rendered on 7th December 2012 knowing full well that the Learned Judge had now been elevated to the Court of Appeal.

1. The Defendant relied on its written submissions filed on 20th January 2013 and 22nd February 2013, The Plaintiff filed its submisions on 22nd February 2013. When the said application came up for hearing on 14th March 2013, advocates for both the Plaintiff and the Defendant informed this court that they did not intend to highlight their respective written submissions. They requested the court could to give its ruling based on the said filed written submissions. This ruling is therefore on the basis of the said submissions.
2. In their written submissions of 20th January 2013, the Defendant argued that there were other

sufficient reasons that justified or merited the review of the Order and Ruling of the learned judge. It relied on the case of **Kimita & Anor vs Wakibiru [1986] KLR 578** in which the Court of Appeal held that **"…"any other sufficient reason" is not necessarily confined… to error and discovery of new evidence… Section 80 of the Civil Procedure Act Cap 21 confers an unfettered right to apply for review and so the words "for any sufficient reason" need not be analogous with the other grounds specified in the order."**

3. The Defendant submitted that the evidence in its Supporting Affidavit established beyond reasonable doubt that the learned judge was misled when he found that the Plaintiff had faced some justifiable difficulties which prevented it from tendering evidence for consideration by the Arbitral Tribunal. It argued that this was evidence of fraud or deceit on the part of the Plaintiff, a question of fact that was to be proved or established by facts.
4. In respect of the second ground, the Defendant contended that where a court reached a decision when it clearly did not have jurisdiction to hear and determine the matter, then that amounted to an error or mistake on the face of the court record to justify the review of the said Order and Ruling. The Defendant submitted that the learned judge had no jurisdiction to determine this matter as intervention of the court in a matter the parties had opted to take to arbitration was prohibited by Section 10 of the Arbitration Act, 1995. It contended that this case fell squarely under Section 10 of the Arbitration Act and not Section 6 of the said Act as alluded to by the Plaintiff. The Defendant correctly stated that the section applies in a situation where a legal action is commenced for first time thereby requiring the staying of court proceedings to allow the parties to proceed for arbitration.
5. It was the Defendant's case that the controversy between the parties was a matter that was determined by an Arbitral Tribunal. It contended that the learned judge conferred upon himself jurisdiction to hear and determine matters that were already the subject matter of ongoing or previous proceedings. As a result, the said learned judge gave an order that defeated what the Legislature had forbidden in the Arbitration Act which amounted to a glaring error and mistake on the face of record of this court.
6. The Defendant relied on the **Civil Appeal No 1 Benson Ngugi & Francis Kabui Kinyanjui & 3 others** where it was held that:-

"There is no way of going round what the Legislature had forbidden."

1. It also relied on the case of **Civil Appeal No 59 of 1993 Omega Enterprises (Kenya) Limited vs KTDC & Others** in which Tunoi J (a he then was) cited the case of **Macfoy vs United Africa C. Ltd [1961] 3All E.R. 1169** where Lord Denning stated that **" If an act is void, then it is in law a nullity…"**
2. The Defendant also argued that allowing the Plaintiff's amendment to bring in claims which arose between June 2009 and December 2009 in the present court proceedings was tantamount to reopening a dispute that was previously before the arbitrator which was a glaring error and mistake. It submitted that the essence of amending pleadings was "**for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the proceedings…"** as has been provided by Order VI A Rule 5 of the Civil Procedure Rules. Notably, there is no longer Order VI A Rule 5 as the same was replaced by Order 8 in the Civil Procedure Rules, 2010. However, for purposes of the just determination of this matter, the court will assume that the argument related to the new Order as drafted in the rules.
3. In respect of the third ground, the Defendant submitted that the review was necessary for the fair determination of the proceedings, the efficient use of the available resources and disposal of the proceedings as envisaged in Sections 1A & 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010 which states that:-

" (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(b) justice shall not be delayed;

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

17. It was argued that since the learned judge had no jurisdiction to hear this matter *ab initio*, the error or omission regarding the lack of jurisdiction ought to be corrected expeditiously so as not to cause any delay in justice and defeat the principles enshrined in Article 159 of the Constitution. The Defendant was emphatic that jurisdiction went into the foundation of the case and consequently, any subsequent proceedings such as the present application were null and void.

18. In response thereto, the Plaintiff argued that Sections 1A & 1B of the Civil Procedure Act had no place in the proceedings herein. It argued that the Defendant was not relying on the ground relating to discovery of new and important matter and that in fact the present application was a disguised appeal as it was attempting to hear the same arguments that were placed before the learned judge.

19. It was its contention that the Defendant's rightful place ought to have been in the appellate court and that the issue of jurisdiction of the court ought to have been ventilated before the learned judge. It averred that the amendments to the Plaint were made by the consent of the parties on 5th June 2012 and the Defendant filed its Amended Defence and Counter-claim on 26th June 2012.

20. The Plaintiff relied on the case of **National Bank of Kenya vs Ndung'u Njau [1995-1998] 2 EA 249** where the Court of Appeal held that " **The error or omission must be self-evident and should not require an elaborate argument t be established. It will not be a sufficient ground of review that another judge could have taken a different view…"** The same principle is to be found in **Mulla on the Code of Civil Procedure, 15th Edition Vol. III para 10** and **Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1 EA** also relied upon by the Plaintiff.

21. It was the Plaintiff's case that the Defendant was calling upon the court to look at the matter through a different prism and substitute its own decision for that of the learned judge, which was clearly not the function of an application for review.

22. I have carefully considered the affidavits and the written submissions by both the Plaintiff and the Defendant and do not find any error or mistake apparent on the face of the record. A court need not struggle to establish whether or not there was such an error or mistake because such an error or mistake must be one which should be apparent or manifest on the face of the court record.

23. It was incumbent upon the Defendant to raise the issue of lack of jurisdiction of

the court after it entered appearance and before it took any other step in the proceedings herein as stipulated in Section 6 (1) of the Arbitration (Amendment) Act, 2009 which provides as follows:-

"**A court before which proceedings are brought in a matter which is the subject of an arbitration 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 of 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 matters agreed to be referred to arbitration…"

1. In the case of **Eagle Star vs Yuval [1978] 1 Lloyd's Reports 358**, Lord Denning MR stated that a step in the proceedings is **"a step by which the Defendant evinces an election to abide by the Court proceedings and waives his right to ask for arbitration.**" At page 363 in the same case, Geoff LJ said:-

“**The authorities show that a step in the proceeding means something in the nature of an application to the court…some step such as taking out summons or something of that kind which is in technical sense a step in the proceedings.”**

1. The essence of Section 6 (1) of the Arbitration Act is that a dispute over a particular matter cannot be referred to different fora for determination. A party to an arbitration must elect to have its dispute resolved either by the court or through arbitration. If there is an arbitration clause and parties submit themselves to the jurisdiction of the court, they would essentially have waived their right to have the matter determined through arbitration. The ramifications of this election are to ensure that the different fora do not come up with different determinations regarding the same dispute between the same parties which can only create confusion to the disputing parties.
2. This was also the finding in **Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya Ltd [2001] KLR** where the Court of Appeal held as follows:-

“**The policy of the law is that concurrent proceedings before two or more fora is disapproved. Section 6(2) of the Arbitration Act of 1995 did not permit parallel proceedings to be handled simultaneously…”**

27. The Defendant may very well have had a point when it stated that the Plaintiff’s claim ought to have been presented to the Arbitral Tribunal for hearing and determination thereof. However, the moment the Defendant filed its Defence and Counter-claim on 23rd November 2012, it essentially submitted itself to the jurisdiction of this court and waived its right to have any disputes between it and the Plaintiff determined by way of arbitration.

28. It would be a great miscarriage of justice if this court were to find that the claim filed by the Plaintiff herein is not properly before the court. It is for that reason that I find that Section 10 of the said Arbitration Act would not be applicable herein as the Defendant submitted itself to the jurisdiction of this court.

29. This court finds itself in agreement with the Plaintiff’s submissions that if this court were to find the Defendant as having been correct, it would be tantamount to hearing an appeal from a court of same jurisdiction and which this court is not by law allowed or able to do. If the Defendant was aggrieved by the ruling of the learned judge, the proper fora would have been the appellate court.

30. This court finds that it was clothed and continues to be clothed with jurisdiction to determine the controversy between the Plaintiff and the Defendant. It is therefore not correct as the Defendant has argued that allowing the Plaintiff’s amendment to bring in claims that arose between June 2009 and December 2009 in the present court proceedings was tantamount to reopening a dispute which was previously before the arbitrator. The court agrees with the learned judge’s finding that these present proceedings are not *res judicata*.

31. I must point out that a plain reading of Article 159 of the Constitution of Kenya, 2010 requires the court to promote settlement of disputes by way of alternative dispute resolution. That may be so but such referral must be by the consent of the parties because of the very nature of the resolution methods. It is for that reason that the Constitution uses the words “promote” and not “shall refer to” alternative dispute resolution.

32. Under Order 46 Rule 1 of the Civil Procedure Rules, 2010 which deals with arbitration under an order of the court and other alternative dispute resolution, duty is bestowed upon the parties in a suit pending in court for determination to apply to have the matter referred to arbitration. The said Order stipulates as follows:-

“Where is any suit all the parties interested who are not under disability <u>agree</u> 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.”

33. Order 46 Rule 20 (1) of the said Rules provides that:-

"Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, <u>any other appropriate means of dispute resolution (including mediation)</u>…"

34. It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion, refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration *suo moto*, nothing would have been easier than for the drafters of the legislation to have explicitly stated so.

35. For the simple reason that arbitration is a consensual process, it therefore obtains that unless the parties in this matter consent to proceed for arbitration under Order 46 of the Civil Procedure Rules, 2010, they have no option but to submit themselves to the jurisdiction of this court until the very end of the proceedings.

36. Accordingly, in a nutshell, having not been satisfied that the Defendant has made out a good case for the review of the ruling of the learned judge either by providing sufficient proof that there was an error or mistake apparent on the face of the court record or that there was discovery of new evidence or that there was sufficient cause to warrant a review, this court has no hesitation in finding that the Defendant has not succeeded in persuading this court to grant it the orders sought in its Notice of Motion application dated 20th April 2012. The court finds that the said application is not merited. In the circumstances, the same is hereby dismissed with costs to the Plaintiff.

37. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 31st day of May 2013

J. KAMAU

<u>JUDGE</u>