REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 146 of 2012

FEBA RADIO (KENYA) LTD..PLAINTIFF

=VERSUS=

LUMBIG VENTURE CAPITAL LTD..............1ST DEFENDANT/ APPLICANT

PINNACLE PROJECTS LIMITED................2ND DEFENDANT/ APPLICANT

RULING:

The Application for consideration is the one dated 19th June 2012 brought by the Defendants herein for Orders that:-

(a) That the Court be pleased to strike out the Plaintiff suit herein.

(b) Cost of the application.

The Application was supported by the grounds on the face of the application and on the ***Supporting Affidavit*** of **David Kabubii Kuria**. The deponent stated that the dispute between the parties herein has already been subjected to Arbitration Proceedings as provided for by their **Share Sale Agreement.** Furthermore, the **Arbitral Award** thereon provided for clear guidelines and timelines for compliance and the same Award has neither been challenged nor set aside and as such, it is still binding to the parties. It is further alleged that the plaintiff did not follow the right recourse as required by Law and thus the suit herein is an abuse of the Court Process. The Deponent averred in his Affidavit that the parties herein had executed a Share Sale Agreement on 5/10/2009 for the purpose of eventually transferring the suit property to the Defendants/Applicants through a Special Purpose Vehicle known as ***Feba Investments Ltd*** (SPV) marked **DKK I** . He further alleged that a dispute arose between the parties as to the interpretation of a clause in the said agreement and the matter was referred to Arbitration in accordance with provisions of the Agreement and both parties wilfully participated in the proceedings of the Arbitration to its conclusion as evidenced by ***DKK 2.***

That the said Arbitration has never been challenged and the same is still binding to the parties and that, whoever is dissatisfied with the same should follow the proper laid down Procedures and mechanisms.It was the applicants contention that the suit filed by the Respondent is without merit, unnecessary and therefore an abuse of the Courts process meant to defeat justice.

The application is opposed. The Respondent through one **Peter Robert Anaminyi** filed an Replying Affidavit and did admit that the parties herein entered into a sale of **Shares Agreement** on 5/10/2009 for the purpose of transferring the property known as **LR No. 209/2299** situated along *Keyahwe Road, Lavington Nairobi* to the 1st Defendant. That the Plaintiff was the registered owner of the property at the time of entering the Agreement. The Respondent further averred that a dispute arose between the parties as to the payment of deposit, exchange of title documents and possession of the property.

Further the dispute was referred to Arbitration and upon considering the legal implications of the Agreement , the Arbitrator delivered his **Arbitral Award** on 13/5/2011 and found that the 1st Defendant/ Applicant was in breach of the agreement. That there were several guidelines and timelines in the award which the 1st Defendant/ Applicant has not complied with. The Respondent therefore contented that this suit is properly before the Court as the Defendant is currently enjoying possession of the property and it has not fully paid for the purchase price at the expenses of the Plaintiff who is losing out as a result of not been in possession or not having received the full purchase price for the shares of the SPV. He further stated that the Court is competent enough to settle the issues arising between the two parties. The parties herein filed their written submission. The Applicants counsel submitted that the issues to be determined by the Court are whether the Arbitration Award was **final** and **binding** upon the parties and if so whether suit is properly before this court or it an abuse of the Courts process.

The other issues are whether the Respondent can enforce the Arbitration Award through this suit and whether the letter dated 18/7/2000 can sustain this suit. The Applicant submitted that clause 13.4 of the Agreement provided that the determination of the Arbitrator shall be final and binding upon the parties. Furthermore, Section 32 A of the Arbitration Act provides that :-

" *Except otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act"*

The Applicant relied on the case of **<u>Mumbi Hinga Vs Victoria Njoki Gathara (2009) eklr Page 11</u>** where it was stated :-

" *The concept of finality of arbitration awards and pro – arbitration policy is something shared world wide.....the common thread....is to restrict judicial review of arbitral awards and to confine the necessary* review to *that specified in the Acts". The provisions of the Act are wholly exclusive except where a particular provision invites the Courts intervention or facilitation"*.

Applicant therefore submitted that the Arbitration Award delivered on 13/5/2011 was final and binding to the parties.

He further submitted that disputes has been adjudicated upon and this suit is an abuse of the Court process. To emphasize that point, the applicant relied on the case of **<u>Tony Mark Tonui Vs Andrew Stuart & another (2012)eklr page 3</u>** where it was held:-

" *There is a general principle captured therein to reduce intervention by the Court in the arbitral process. Recourse to the High Court is thus limited. It is within very narrow confines".*

Applicant also submitted that the letter dated 18/8/2011 cannot sustain the suit as it was not a **compromise** of the arbitration Award but rather an enhancement. In their submissions, the Respondent submitted that the prayers in the Plaint were never issues between the parties before the Arbitrator and therefore the finality of the Arbitration Award does not touch on them. That none of the issues in the Plaint were canvassed before the arbitrator. That issues raised in the Defendants application are triable and the Court is required to consider the merits of the suit both on issues of law and matters of fact.

Further, that for an application to strike out a suit to succeed for being an abuse of the Court process, the applicant should meet the requirements stated in the case of **<u>Muchanga investments Ltd Vs Safaris Unlimited (Africa) Ltd , Registrar of Titles and Attorney General Civil Appeal No. 25 of 2002 .</u>**

Respondent also relied on the case **<u>of DT Dobie & Co. (Kenya) Ltd Vs Muchina (1982) KLR1</u>** where the Court of Appeal held that:-

" As the powers to strike out pleadings is exercised without court being fully informed on the merits of

the case, through discovery and oral evidence it should be used sparingly and cautiously"

Further J. Madan in the same case held that "*The power to strike out should be exercised sparingly only after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge.....The Court should aim to sustain rather than terminating a suit".*

The application is premised under **Order 2 Rule 15 (1)d** which states that " ***At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that...it is otherwise an abuse of the process of the Court".***

The applicant states that the Plaintiff suit is an abuse of the Court process because an Arbitration Award was given herein on 13/5/2011 . That the said award is a finality and the Court should not entertain the instant suit. There is no doubt that there is a final Award by the Arbitrator herein **DKK1**. There is also no doubt that the Applicant is in possession of **LR No. 209/12299.** The Respondent alleges that the Applicants have not fully paid for the purchase price and they are thus losing out as a result of not being in possession of land and not having been paid the full amount of the purchase price.

The Respondent alleges that the issues raised in the plaint were never arbitrated for and so the issue of finality cannot arise. The Applicant seeks to have the suit struck out. The Respondent opposes the said application. Since the court is being called upon to exercise its power without being informed fully on the merit of the case through discovery and oral evidence, I will find and hold as it was held by the Court of Appeal in the **<u>DT Dobie & Co Vs Muchina's</u>** case (early quoted) that, I should use that power sparingly and cautiously.

Having considered the instant application and written submissions by both Counsels, I find that the application by the applicant herein raises triable issues. There are issues of both law and fact that require evidence for a decision to be made. The issues raised by the parties are issues in controversy and though an Arbitral Award was given, parties did not adhere to it. After a careful consideration of the rival Submissions, I find the Applicant has not satisfied this Court that the Plaintiff Suit herein is an abuse of the Court Process and that it *ought and should be struck out.*

In the upshot, I decline to allow the applicants' application dated 19/6/2012. Consequently, the Court *dismisses the applicants application dated 19/6/2012 with costs to the Respondent.*

Orders accordingly.

Dated, Signed and delivered this 17th day of May 2013.

L.N. GACHERU
<u>JUDGE</u>

In the Presence of:-

………………………………………For the Plaintiff/Applicant

……………………………………..For the Defendant/Respondent

…………………………………..   Court Clerk

L.N. GACHERU
<u>JUDGE</u>