



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE HCCC 487 OF 2009

SAGAR BUILDERS LIMITED.....PLAINTIFF

VS

SPEEDWAY INVESTMENTS LIMITED.....DEFENDANT

RULING

1. By a Chamber Summons application dated 15th June 2011 and expressed to be brought under Section 6 of the Arbitration Act 1995, Rule 2 of the Arbitration Rules and Section 3A of the Civil Procedure Act, the Plaintiff/Applicant has applied for orders to stay the proceedings in this suit to allow for referral of the dispute between the parties to Arbitration as provided for in Agreements entered into by the parties dated 4th October 2006, 20th April 2004 and 25th March 2009. The application also prays for orders that the Chairman of the Chartered Institute of Arbitrators Kenya Branch or the Vice-Chairman do preside over the arbitration.

2. The Application is based on grounds set out on the face of the Chamber Summons as follows:

1) The plaintiff filed this suit together with an application on 7th July 2009 seeking an order of temporary injunction with the hope that the defendant would pay an outstanding sum of Kshs. 12, 052,295.15 which is the subject matter of the present suit.

2) Although a temporary injunction was granted, this was later vacated when the application dated 7th July 2009 was heard and a ruling made thereon.

3) Since the Agreements provide for differences between the parties to be referred to arbitration, the court should allow such referral.

4) The defendant has no problem with the matter being referred to arbitration.

5) In order to save time and costs, the Chairman of Chartered Institute of Arbitrators Kenya Branch should appoint an arbitrator to preside over the arbitration.

These grounds are buttressed by a supporting affidavit sworn by Virji Meghji Patel one of the directors of the company. The affidavit essentially supports the contention that as the agreements between the parties have an arbitration clause, this matter should be referred to arbitration.

3. The application is opposed by the defendant. Grounds of opposition filed on 14th July 2011 are rendered as follows:

1) The application for referral of the matter to arbitration has been made after the parties have filed their pleadings and taken substantial steps in the proceedings.

2) By taking substantial steps to prosecute the matter, the plaintiff has waived its right to refer the matter to arbitration.

3) There is no dispute over the amounts being demanded as deposed in the replying affidavit of Virji Meghji Patel, the plaintiff's director sworn on 23rd July 2009.

4) The application is therefore misconceived and an abuse of the process of the court.

4. At the hearing of the application, Mr. Kitonga learned counsel for the Plaintiff reinforced the grounds in support of the application and emphasized that the that the respondent had not filed a defence in the matter at the time of filing the application to refer the matter to arbitration hence pleadings had not closed. The filing of the defence on 14th July 2011 after the present application had been filed was therefore a ploy to buy time and defeat the present application. He urged the court to dismiss the grounds of opposition and allow the application.

5. On his part, Mr. Masika learned counsel for the defendant relied on the grounds of opposition filed and submitted that under Section 6 of the Arbitration Act, a party who desires recourse to arbitration must do so within the time allowed for entering appearance. He referred the court to the case of Lofty vs. Bedouin Enterprises Limited where the court held that it was entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so was not made at the time of entering appearance. Mr. Masika argued that in the present matter, the Plaintiff did not contemplate referral of the matter to arbitration. Further, the Plaintiff had already taken a substantial step in the matter by applying for summary judgment. The effect of this was to forestall referral of the matter to arbitration.

6. I have carefully considered the application, the supporting documents and the grounds and documents filed in reply. I have also considered the submissions made by counsel for both parties as well as the authorities cited before the court.

7. Section 6 of the Arbitration Act, provides:

“a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies, not later than the time when that party enters appearance or

otherwise acknowledges the claim (emphasis added) against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration”.

8. The plaint in this matter was filed on 7th July 2009. Although the averments in the Plaint made reference to the agreements between the parties containing the arbitration clauses, the Plaintiff did not give any indication that it wished the dispute pleaded referred to arbitration. Contemporaneous with the filing of the Plaint, a Chamber Summons application was filed seeking orders of a temporary injunction to issue against the defendant restraining it from disposing a property known as Plot L.R. 330/667 Nairobi until the suit was determined. The application was heard and orders made by the court on 8th July 2009 granting a temporary injunction was issued in favour of the plaintiff. On 30th November 2009 the plaintiff applied for summary judgment, which judgment was entered on 18th February 2010. Meanwhile, a memorandum of appearance was eventually entered by the defendant on 13th January 2010 triggered by the plaintiff’s application for summary judgment and entry of an ex-parte judgment in favor of the plaintiff. The judgment was thereafter set aside with the consent of the parties recorded in court on 19th June 2010. The present application was then filed.

9. The implication of the chronology of events rendered above is that there have been very substantial steps taken in this matter and which now preclude the Plaintiff from the prayers now sought for referral of the matter to arbitration. Section 6 of the Arbitration Act contemplates that a party wishing to refer the matter to arbitration should do so at the earliest opportunity possible and in any event within the time allowed for entering appearance. In the present matter, the plaintiff pursued the suit to the extent of obtaining judgment which judgment was capable of being executed to bring the whole court proceedings to conclusion.

10. I therefore think that, without more, the present application by the Plaintiff does not meet the legal threshold for referral of matters to arbitration and is hereby dismissed with costs.

11. I further direct the parties to prepare the suit for hearing in accordance with Order 11 of the Civil Procedure Rules and that the matter be mentioned within 60 days from today to review the status of compliance with the said pre-trial requirements.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 19th day of January 2012.

J.M. MUTAVA

JUDGE