



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY COURTS**  
**CIVIL CASE NO. 157 OF 2008**

**BLUE LIMITED**.....**PLAINTIFF**  
**- VERSUS -**

**JARIBU CREDIT TRADERS LIMITED**..... **DEFENDANT**

**R U L I N G**

Before the court is a Notice of Motion dated 6<sup>th</sup> February 2012. Among orders it seeks are that, the court be pleased to set aside the default judgement issued in favour of the Defendant/Respondent against the Plaintiff on 26<sup>th</sup> March 2009 and the subsequent preliminary decree issued by this court on 6<sup>th</sup> April 2009 and also to stay the same pending the hearing and determination of this application. The application is supported by the grounds stated therein.

The brief history of the application is that the Plaintiff and the Defendant had entered in a Sale of Business Agreement (SBA) on 27<sup>th</sup> August 2007. More particulars whereof are in the pleadings. They agreed that any dispute arising out of or in connection with the Sale of Business Agreement shall be resolved by arbitration under the London Court of International Arbitration Rules (LCIA Rules) and these rules were expressly incorporated in Clause 14.2.1 of the SBA. On 20<sup>th</sup> March 2008, it is alleged that the Respondent and its agents carried out an act which was in breach of the said SBA, and on 27<sup>th</sup> March 2008, the Applicant filed the present suit seeking various reliefs stated in the suit and for the purposes of instituting an application under Section 7 (1) of the Arbitration Act, 1995, for interim measures of protection pending the hearing and determination of the dispute by arbitration. Together with the Plaintiff the Applicant filed an application by way of Chamber Summons seeking interim orders of injunction. The Respondent filed a Defence and Counter-Claim on 21<sup>st</sup> April 2008 in which it claimed, *inter-a-alia*, payment of Kshs.43,908,377 as specific losses and USD 1.5 million as loss of goodwill. On 22<sup>nd</sup> April 2008, the Applicant filed a Chamber Summons application seeking to stay all proceedings in the case pending the hearing and determination of the Arbitral Proceedings on ground that:-

§ Arbitration proceedings between the parties had already commenced.

§ The matters raised in the Defence and Counter-Claim filed by the Respondent arose from the SBA and were the subject of the Arbitral Proceedings.

§ It was in the interest of justice that further proceedings be stayed to avoid a multiplication of suits.

The said Chamber Summons application was heard by Honourable Justice Kimaru and a Ruling thereof was delivered by the Judge on 25<sup>th</sup> September 2008 which Ruling effectively referred the suit to

arbitration as per the SBA. The Respondent together with its advocates honoured the said Ruling and participated in the Arbitration Proceedings.

It is now alleged that despite the said Ruling of Justice Kimaru, and while the Arbitration Proceedings were on-going, the Respondent through its then lawyers on record M/s S. Musalia Mwenesi filed in court a Request for Interlocutory Judgement on 24<sup>th</sup> March 2009. The same is alleged not to have been served upon the Applicant's then Advocates on record M/s Kaplan & Stratton Advocates. Judgement was entered by the Deputy Registrar for the Respondent against the Applicant on 26<sup>th</sup> March 2009 on the grounds that "*there was no defence to the counter-claim*". The Applicant now contends that the said interlocutory judgement was irregular and illegal and should be set aside. This is the main prayer in this application.

The application is supported by affidavit of Philip Muturi Mwangi dated 6<sup>th</sup> February 2012 together with its annexures **PMM 1** to **PMM5**.

The Respondent has opposed the application on points of law and has urged the court to dismiss the same.

I have considered the application and the opposing submissions. To dispose off the matter I have raised two issues:-

1.) Did this court on 25<sup>th</sup> September 2008 refer the matter to arbitration in terms of the SBA.

The Applicant is emphatic that this matter was referred to arbitration. The Respondent, however, submits that there is no order of the court referring the matter to arbitration. The only nearest references to arbitration are *obita dicte* in the body of the Ruling. For me, this is not a matter for guesswork. The learned Judge at page 9 of the Ruling said:-

**“ . . . having considered the arguments made, I hold that the arbitration clause is valid and is capable of being performed. In fact, the Defendant acknowledged the fact that the arbitration process has now been put in motion . . . The parties to this suit have agreed for such dispute to be determined by arbitration. It is only the arbitrators who have jurisdiction to determine the matters in dispute between the Plaintiff and the Defendant.”**

The court then went ahead and stated at page 10 thus:-

**“I will therefore grant the interim reliefs sought by the Plaintiff in terms of prayers 2, 3 and 4 of the application.”**

Prayer 2 of the application was:

**“That pending the hearing and determination of this application and the Reference to Arbitration, the Defendant either by itself, its directors, servants, or agents be restrained from dealing with, disposing of or in any way dealing with the files relating to the debtors book or any of them without the consent of the Plaintiff.”**

At page 11 the learned Judge concluded the Ruling by stating:-

**“The Defendant by itself or its directors are restrained from dealing with the debtor's books or interfering with the Plaintiff's business in Nairobi or any part of the country pending the hearing of the dispute by arbitration. The Plaintiff shall have the costs of application.”**

The literal or open book interpretation of the foregoing paragraphs of that Ruling is that the learned Judge effectively referred the dispute to arbitration.

But if there is still some doubt, then the conduct of the Respondent erases the same. It has been alleged,

and the allegation has not been disputed, that the Defendant has been participating in the said Arbitration Proceedings and that there is an Arbitral Award arising from the same.

I am satisfied that the dispute was referred to arbitration.

**2.)** If as I have found that the dispute was referred to arbitration, then, was the whole dispute referred to arbitration, or only part or certain aspects of the dispute were referred to arbitration?

As I have stated earlier the Defence and Counter-Claim was filed by the Respondent in court on 21<sup>st</sup> April 2008. However, the matter was referred to arbitration by the court's Ruling dated 25<sup>th</sup> September 2008. That means that at the time the matter was referred to arbitration all the relevant pleadings were on court record. The court could not have referred only part of the dispute for arbitration and leave out the counter-claim. It is prudent to believe that the Arbitration Proceedings encompassed all aspects of the dispute between the parties including the Applicant's claim and the Respondent's Defence and Counter-Claim. If for some inexplicable reason the Arbitration Proceedings have not considered the entire dispute between the parties, - and that would be really strange - then in my view, the remaining aspect of the dispute must still be within the purview of the said arbitration. The decision to send the matter to arbitration was based on the totality of the claim. It cannot be that some aspects of the claim are left to the arbitrators and other aspects left to the Kenyan court sitting in Nairobi to determine. If that were to be so, it would be an absurdity which the said SBA did not envisage. I therefore find and hold that the entire dispute was referred to arbitration and nothing was left for the court to deal with in respect of the dispute within the court.

That being so, and proceedings in the suit having been stayed, it was no longer open for the Deputy Registrar to enter judgement or issue a decree while the Arbitration Proceedings were on course in South Africa. I also find that the firm of S. Musalia Mwenesi Advocates did not act in good faith when they applied for judgement to be entered in terms of the counter-claim. The said advocates were fully engaged in South Africa dealing with the same matter. It was their duty as officers of the court to disclose to the Deputy Registrar that the matter had already been referred to arbitration. By failure to do so, they deliberately misled the court and abrogated their duty of truthfulness and openness as officers of the court.

I find the so called preliminary decree arising from the said interlocutory judgement was irregular in many ways including the fact that the court having referred the matter for arbitration, it did not have the jurisdiction to enter judgement on the same matter it had referred to arbitration. Further the said Preliminary Decree was irregular since costs had not yet been assessed and the Respondent did not give notice to the Applicant either of its request for judgement or extraction of the Decree. What I find most strange is however why the Defendant, who allegedly had a judgement entered on its behalf on 26<sup>th</sup> March 2009 would give the notice thereof to the Applicant in January 2012 - 3 (three) years down the line - unless of course the Defendant all along was not sure of the legality of its action.

Lastly, all parties knew that upon the reference of this dispute to arbitration, the Arbitration Tribunal heard all the parties and rendered the Arbitral Award on 12<sup>th</sup> October 2009. The said Arbitral Award has already been adopted and issued as a Decree of this court on 9<sup>th</sup> August 2011 and is in the process of being executed. It is clearly evidence that the Defendant is not acting in good faith.

In the upshot, I make orders and direct as follows:-

- 1)** I allow B. M. Musau and Company Advocates leave to come on record as advocates for the Plaintiff/Applicant in the place of Kaplan & Stratton Advocates.
- 2)** I set aside the default judgement issued in favour of the Defendant/Respondent against the Plaintiff on 26<sup>th</sup> March 2009 and discharge and set aside the subsequent Preliminary Decree issued by this court on 6<sup>th</sup> April 2009.

- 3) Should there be any other outstanding claim or claims by the Defendant/Respondent (or indeed by any of the parties to the suit) that claim or claims shall remain within the jurisdiction of the London Court of International Arbitration Case No. 81039 to determine and to proceed as appropriate.
- 4) The only jurisdiction that this court may have over the dispute relates only to the execution of the Award dated 20<sup>th</sup> October 2009, the same having been adopted as a Decree of this court and issued on 9<sup>th</sup> August 2011.
- 5) The costs of this application shall be for the Plaintiff/Applicant.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 20<sup>TH</sup> DAY OF APRIL 2012.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Mrs. Kayugira for the Plaintiff*

*Wachuka H/B for Murugare for the Defendant*

*Teresia – Court clerk*