



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MOMBASA
Civil Appeal 18 of 2012

BILLY GRAHAM OWUOR.....APPELLANT

VERSUS

1. DAUDI SABIN BAHIRA1ST RESPONDENT

2. PETER MBUGUA WAIGI.....2ND RESPONDENT

RULING

1. This is an application by way of Notice of Motion dated 8th February, 2012. It is brought under Sections 1A, 1B, 3A, 63(e) and 75(h) of the Civil Procedure Act and Orders 42 Rule 6, and 51 Rule 1 of the Civil Procedure Rules.

The Applicant, substantively, seeks orders as follows:

“1...

2...

3. That the Honourable court be pleased to stay the execution of the ruling delivered on 16th December, 2011 in the Resident Magistrate’s Court Number 574 of 2011 Mombasa until hearing and determination of the appeal.

4...

5. That the Respondents, their servants, agents and/or employees be restrained by way of temporary injunction from acting, dealing, selling, wasting or damaging the goods belonging to the Applicant herein until the hearing and determination of the instant appeal.”

2. The application is supported by the Affidavit of the Applicant deponed on 8th February, 2012. He states that the parties entered into an agreement dated 13th October, 2010 for a loan; and under which the 1st Respondent was to sell a motor vehicle Toyota KBL 215 Y (“**the vehicle**”) to him through the 2nd Respondent as a dealer. The consideration was Kshs. 830,000/=. The dealer was to facilitate the transaction by making available the initial deposit. The Agreement had an arbitration clause for resolution of disputes.

3. He further asserts that the Respondents failed to perform the agreement, and filed suit in the

Magistrate's court in RMCC suit Number 574 of 2011. There, judgement was entered against the Applicant in default of Defence. On 24th June, 2011 he filed an application seeking to set aside the judgment and to refer the dispute to arbitration. That application was dismissed with costs by the lower court. Thereupon the Respondents sought to execute against the Applicant and caused the vehicle to be attached by proclamation by Kithemu Auctioneers on 2nd February, 2012.

4. The Applicant then filed an appeal from the Ruling of the Honourable Magistrate on 8th February, 2012. Five of the ten grounds of appeal concern the Magistrate's failure to appreciate the essence and effect of the arbitration clause; and the substance of subsequent breach of contract by breach of the arbitration clause.

The Applicant's arguments both before the Honourable Magistrate and here, are, essentially:

- That the Magistrate ought to have appreciated that the agreement between the parties contained an arbitration clause, and that that was their preferred consensual method of resolving their dispute.
- That Section 6 of the Arbitration Act 1995 was applicable by which the suit in court should have been stayed, and referred to arbitration.
- That Section 10 of the Arbitration Act provides that courts shall not intervene in matters in respect of which parties have agreed to be governed under the Arbitration Act.

5. The Respondents in their Replying Affidavit and in the arguments through counsel submitted:

- That on 14th April, 2011 they filed suit against the Applicant. He filed a Memorandum of Appearance on 17th May, 2011 but no Defence or other pleading or instrument, prompting them to request for judgment in default of defence;
- That the Applicant then filed a Notice of Motion on 23rd June, 2011 in the Magistrate's court seeking stay of execution of the default judgment and referral of the dispute to arbitration under Section 6 of the Arbitration Act;
- That the Resident Magistrate could not stay the proceedings and refer them to arbitration when there was already a judgment in default;
- That both the application in the lower court and in the present application are incompetent, as there is nothing remaining to be referred to arbitration;
- That the arbitration proceedings could only arise in respect of Kshs. 10,000/= under the loan agreement which was subject to arbitration and not on any other amount;
- That the appeal filed on 9th February, 2012 was filed two days out of time without leave and is therefore incompetent.

6. I have carefully considered the parties' submissions and the documents availed, in support of, and against the Applicant's motion.

I note that the Agreement for Loan between the parties dated 13th October, 2010 contains an arbitration clause at paragraph 9 thereof. It is a tripartite agreement between the Applicant and both Respondents, all as parties. At paragraph 8, it refers to a previous agreement of 11th October, 2010 which is part of that agreement. I have not seen a copy of the agreement of 11th October, 2010.

There is also another agreement entitled "**Motor Sale Agreement**" dated 18th October, 2010. It is between the Applicant as buyer and David Sabin (Seller) the 1st Respondent herein. It has **no** arbitration

clause.

7. In addition, I have seen the plaint filed by the Respondents in the lower court, and the Defendant/Applicant's Memorandum of Appearance dated 13th April, 2011.

The object of a Memorandum of Appearance is to signify to a complainant and to the court before which the suit is filed, that such suit or dispute has been acknowledged by the Defendant as filed. It is an acknowledgment that a dispute initiated by a Plaintiff has been taken notice of and noted by the Defendant; and that the Defendant will take such steps to file a response or an answer as are necessary. If the Memorandum of appearance is unconditional, as it was in this case, such appearance has been deemed by the Court of Appeal to mean that the party filing appearance submits to the jurisdiction of the court: see **Kanti & Company Limited vs South British Insurance Company Limited** Civil Appeal Number 39 of 1980.

8. In this case, the Defendant/Applicant took no further steps to defend the claim or otherwise deal with the dispute. Consequently, the Plaintiffs/Respondents herein obtained judgment in default. That judgment has not been set aside.

Further, the Respondent was entitled, as a matter of law, at the time of filing appearance to seek a stay of the proceedings and refer the dispute to arbitration. Section 6 of the Arbitration Act 1995 and Amendment Act, 2010 grants him that right. That Section provides as follows:

“6(1) 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 against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration....”

There are two provisos to Section 6(1) which are not relevant here and I have omitted reference to them.

9. Section 6(2) further provides as follows:

“6(2) Proceedings before the court shall not be continued after an application under Sub-Section (1) has been made and the matter remains undetermined”

From the foregoing provisions, it was clearly incumbent on the Applicant herein, to immediately upon or simultaneously with the filing of appearance in the lower court, to also file an application for stay of the proceedings, and to exhibit the arbitral agreement to the court. Instead, the Applicant filed an appearance and went to sleep, leaving provisions of the Civil Procedure Act to apply unabated, and the appearance to act as a submission to the court's jurisdiction. In my view, the court's jurisdiction became thereupon wholly crystallised and irreversible upon the entry of judgment in default.

10. The authorities are clear on this point. See **Joab Henry Onyango Omino vs Lalji Meghji Patel & Company Ltd** Civil Appeal Number 119 of 1997 where the Court of Appeal held that the making of an application for stay of proceedings has the effect of suspending the filing of a defence until the application is determined, and any judgment obtained in the meantime is irregular; and see **TMAM Construction Group (Africa) vs A.G** HCC 236 of 2001.

11. Given the foregoing, I do not consider that the Applicant has made out a *prima facie* case for injunctive relief in this matter. That prayer for injunctive relief is therefore hereby declined.

12. With regard to the prayer for stay of execution, and given what I have stated herein with regard to the position on stay of proceedings, I am only prepared to grant stay of execution upon conditions. Accordingly, I allow stay of execution on condition that the Applicant shall deposit in court the decretal amount within fourteen (14) days from the date hereof, failing which execution may proceed.

Costs shall be in the cause.

Orders accordingly.

Dated and delivered this 15TH day of JUNE, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1.Judge: Hon. R. Mwongo

2.Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)