



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

**Environmental
& Land Case 653
of 2011**

**THE
SALESIANS OF
DON BOSCO**

REGISTERED TRUSTEES KENYAPLAINTIFF

- VERSUS -

DAGORETTI YOUTH CENTRE LIMITED DEFENDANT

RULING

1. I have before me a preliminary objection by the defendant dated 18th January 2012. It is three pronged: that the plaintiff's notice of motion dated 19th December 2011 is incompetent; that it offends sections 5 and 6 of the Arbitration Act 1995; and, that it offends section 10 of the same Act. The plaintiff's notice of motion seeks to evict the defendant from LR Dagoretti/Riruta/4945 forthwith.

2. The principal foundation of the objection is a licence agreement annexed to the affidavit of Sanjey Kizhakkinedath sworn on 19th December 2011 in support of the motion. The agreement is made between the plaintiff and defendant. It provides at clause 18 as follows;

“Any disputes arising out of this licence shall be referred to an Arbitrator to be mutually agreed upon by the parties herein and failing such agreement the Arbitrator shall be appointed by the then Archbishop of the Diocese of Nairobi”.

3. The defendant's case simply put is that this suit and the notice of motion should not have been filed. Instead, the matter should have been referred to arbitration as provided in sections 5 and 6 of Arbitration Act 1995.

4. I take the following view of the matter. Section 5 of the Arbitration Act is irrelevant to the matter before me. That section is a waiver of right of a party to object to arbitration. It provides;

"5. A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object".

5. Section 6 of the Act empowers the court, on application of a party, to refer a suit which is the subject of an arbitration agreement to arbitration. Section 10 of the Act provides that except as provided in the Act, no court shall intervene in arbitral proceedings.

6. I am of the opinion that clause 8 of the licence agreement provides for arbitration and can be invoked to stay these proceedings. Unfortunately, I do not have an application before me to refer the suit to arbitration or to stay the proceedings. The defendant was required to take out a suitable motion not later than the time of entering an appearance. Instead, the defendant has used a most unsuitable vessel of a preliminary objection. The defendant has kept on the journey of defending the plaintiff's application by grounds of opposition dated 18th January 2012 and a deposition titled supporting affidavit sworn by Muscort Musiega on the same date. The defendant has also filed a notice of appointment. But no formal appearance or defence has been filed. I would thus venture to say that the window provided by section 6 of the Arbitration Act 1995 is still open.

7. I have stated that the preliminary objection is ill placed to counter the suit. A preliminary objection should be a pure point of law capable of disposing the suit. The wisdom of the East African Court of Appeal was well evident in the judgment of Sir Charles Newbold, president of the court in Mukisa Biscuit Manufacturing Company Ltd Vs West End Distributors Limited [1969] E A 696 at 700;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop".

8. The preliminary objection raised here is not a pure point of law. It may as well be, as submitted by the defendant, that the defendant is taking care of destitute children who cannot be relocated without great expense. But the court cannot delve into those matters of evidence in a preliminary objection. The goal of protecting the vulnerable children is good but the defendant's counsel has chosen a poor legal and procedural strategy. I have stated *obiter dictum* that there is an open window under section 6 of the Arbitration Act if the defendant is well advised.

9. For all the above reasons, the defendant's preliminary objection dated 18th January 2012 is hereby dismissed. Costs shall be in the suit.

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th Day of June 2012.

**G.K. KIMONDO
JUDGE**

Ruling read in open court in the presence of

Mr. Ngige for Mr. Njuguna for the Plaintiff.

Mr. Munoko for the Defendant.