



REPUBLIC OF KENYA

High Court at Meru

Civil Suit 176 of 2012

RAPOK CONSTRUCTION AND GENERAL REPAIRS LTD.....PLAITIFF

VERSUS

CYKIM LTD.....DEFENDANT

RULING

The plaintiff M/S RAPOK CONSTRUCTION AND GENERAL REPAIRS LTD by its plaint dated 12th November, 2012 sued the defendant M/S CYKIM LTD seeking an order referring the dispute between itself and the defendant over a contract dated 21st November, 2011 to arbitration, entry of judgment as per the arbitral award with costs and interest contemporaneously with filing of this suit the plaintiff filed chamber summons dated 12th November, 2012 seeking *inter alia* the following orders:-

- 1. That the honourable court be pleased to certify this application of utmost urgency and to hear it ex-parte and on a priority basis in the 1st instance.**
- 2. That the honourable court be pleased to issue an order of injunction against the defendant by itself, its servants, agents, employees or anyone claiming under them, restraining them from removing, dismantling, or in any other way whatsoever interfering with the plaintiff's plant, machinery, equipment, building materials, tools and personnel
at the project site on plot L.R No.NTIMA/IGOKI/5402 within Meru county, or in any other way whatsoever interfering with the project site either by proceeding with construction or otherwise pending the interpartes hearing and determination of this application.**
- 3. That the honourable court be pleased to issue an order of injunction against the defendant by itself, its agents, employees or anyone claiming under them or otherwise howsoever, restraining them from removing, dismantling or in any other way whatsoever interfering with the plaintiff's plant, machinery, equipment, building materials, personnel at the project site plot L. R. NO.NTIMA/IGOKI/5402 within Meru County, or in any other way whatsoever interfering with the project site, either by proceeding with construction or otherwise pending the hearing and determination of this suit.**
- 4. That an order be issued referring the dispute between the plaintiff and the defendant forthwith to arbitration, as in the contract between the parties dated 21/11/2011, and in terms of s.6 and 7 of the Arbitration Act, 1995.**
- 5. That the orders be served upon the OCS Meru Police Station to ensure compliance.**

6. That costs of the application be borne by the defendant.

The application is premised on the grounds on the face of the application.

- a. 1. That the defendant has purportedly terminated the contract between itself and the plaintiff.**
- b. That the defendant has substantially performed its part in the contract, and has at all times been ready to continue with the remaining obligations.**
- c. That the defendant has not paid for most of the work already done by the plaintiff**
- d. That the plaintiff will suffer irreparable injury as it will be difficult to know the value of the work already done if the defendant interferes with the project site and also the plaintiff's plant, machinery, equipment, building materials will be wasted.**
- e. That the contract stipulated that any dispute regarding the contract between the plaintiff and the defendant should be referred to arbitration for determination.**
- f. That preserving the project site by way of injunction pending reference to arbitration will be in the interests of justice.**

On 14th November, 2012 when the matter came before court on certificate of urgency I granted prayers 1 and 2 of the application and I directed that the application be served for interpartes hearing on 27/11/2012. That on 19th November, 2012 the firm of M/S Charles Kariuki & Co. Advocates filed notice of appointment of advocate together with a notice of motion dated 19th November, 2012 seeking the following orders:-

- 1. That court do certify matter urgent and give very early hearing date.**
- 2. That court do discharge, vary, set aside or stay orders issued herein dated 14/1/2012 and issued on 15/1/2012.**
- 3. That court make any other order for ends of justice.**

The said application is premised on the grounds on the face of the application namely:-

- a) The order has stalled the project herein and the contractor and all workmen numbering about 40 men had to stop work which immediately occasioned heavy losses and every day amounting to at least Kshs.50,000/=**
- b) The investors of the project will suffer irreparably as they have procured loans in anticipation of getting their apartments ready in November, 2012.**
- c) The project may collapse if orders continues in force and attract so many suits.**

On 23/11/2012 after filing of valuation report the orders given earlier on were lifted in the interest of justice and both application set down for hearing on 27/11/2012. On 27th November, 2012 when both applications came up for hearing Mr. C. Kariuki Advocate for the respondent had filed a preliminary point of law dated 23rd November, 2012. Both Mr. C. Kariuki Advocate and Mr. Mutuma Advocate for the plaintiff urged the court to hear them on the preliminary point of law.

That the preliminary point of law by the defendant/respondent is premised on the following grounds:-

- 1. the suit and the sought arbitration is premature in terms of clause 45.5 of page 43 of the contract therefore suit herein plus the application should be struck out with costs.**

2. ***The suit is fatally defective and raises no reasonable cause of action and an abuse of the court process in terms of clause 45.1 of page 43 of the contract.***
3. ***The plaintiff's advocate herein should be disqualified to act for the plaintiff as he acted for both parties in the contract herein and thus a potential witness.***
4. ***That suit is also fatally defective and an abuse of the court process in that the same was filed without authorization resolution from the Board of Directors as required by the law and plethora of authorities.***

The counsel for the defendant/respondent urged this court to strike out both the plaintiff's plaint and the application. He urged that the plaintiff's sought the principal prayer:-

(a) That the dispute be referred to arbitration.

(b) That court do enter judgment as per arbitral award.

Mr. C. Kariuki argued that the plaint is fatally defective and premature. He urged under ground No.2 the suit is an abuse of the court process in terms of clause No.45.1 of the contract, which in event of a dispute each party is to request for submissions to arbitration within 30 days of notice and if no agreement the party requesting is supposed to write to the Chairman or Architectural Association of Kenya.

Clause 45.1 of Agreement for building works between Cykim Ltd (Employer) and Rapok Construction and General Repairs Co. Ltd (Contractor) provides:

45.1 In case any dispute or difference shall arise between the Employer and Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of the Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya, on the request of the applying party.

Mr. C. Kariuki submitted that the plaintiff issued notice on 12/10/2012 and averred the other side was not agreeable. That plaintiff was supposed to have taken issue with the Chairman of Architectural Association of Kenya. He urged that under Clause 45.5 the plaintiff was not supposed to come to court.

Clause 45.5. provides:-

In the event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.

Mr. Kariuki contended that as notice was issued on 12/10/2012, ninety(90) days have not lapsed. That 90 days he urged would lapse on 13/1/2013. He urged the suit should not have been filed.

Mr. C. Kariuki referred to **KENYA AIRPORT & PARKING SERVICES LTD & ANOTHER –V- MUNICIPAL COUNCIL OF MOMBASA CIVIL CASE NO.434 OF 2009** in which case Hon. Justice L. Kimaru, stated:-

Under Section 10 of the Arbitration Act, this court lacks jurisdiction to deal with a dispute where parties have agreed to have a dispute between them resolved or determined by arbitration. This position applies even where one parties is challenging the validity of the agreement. A party who wishes to challenge the validity or legality of an agreement may do so at the first instance when the matter is placed before the arbitral tribunal.

Mr. C. Kariuki's position was and is that this court lacks jurisdiction as parties to the suit anticipated that any dispute between them would be resolved by the arbitrator.

On ground No.4 Mr. C. Kariuki urged that the plaintiff company filed this suit without authorization by the Board of Directors. He referred the court to the case of **KARIUKI NJOROGI & OTHERS –V- STEPHEN MUGO MUTOTHORI & OTHERS HCCC NO.609 OF 2004(NRB)** in which case Hon. Lady Justice M. G. Mugo stated:-

The issue of authority and capacity to sue goes to jurisdiction. The applicants have submitted, and properly so, that a company can only sue in its own name with the sanction of its Board of Directors or under a resolution in general or special meeting. The Respondents have not shown this Court that they have been authorized to take out these proceedings in the name of the 5th Defendant or at all. It matters not whether or not they have certain legal rights that they would wish to enforce as beneficiaries under the relevant Trust deed. They must come to Court properly and with authority.

On ground No.3 Mr. C. Kariuki urged that the agreement had shown how it was witnessed. He referred to the case of **WESTERN PUMPS LIMITED –V-JOSEPH WAINAINA IRAYA(T/A QUEEN CHICK INN & ANOTHER HCCC NO.186 OF 2006** in which Hon. Fred A. Ochieng stated:-

After the defendants' submissions, the plaintiff's advocate submitted that Mr. Sunkuli, Advocate, should not have addressed this court, as counsel. It was said that all officers of the court have a duty to conduct themselves in a manner that was beyond reproach.

There is absolutely no doubt in my mind that advocates, in their capacity as officers of the court, need to always conduct themselves in such manner as would be beyond reproach.

In that regard, if an advocate is likely to be a witness in any matter, he should take all necessary steps to avoid a situation which could result in his playing the role of an advocate in the said matter.

The honourable Judge in his ruling declined to expunge the submissions by the advocate concerned. However, he directed that the said advocate would not continue to appear as a Counsel for any of the parties to.....

Mr. C. Kariuki urged that Mr. Mutuma as he acted for both parties he was standing on a ground in which he could be a witness and should as such cease acting for the plaintiff in this matter.

Mr. Mutuma, advocate for the plaintiff on the other hand contended the respondent/defendant's submissions. On ground No.3 he admitted that he witnessed the agreement. However the suit is filed by M/S J. Wanjohi & Co. Advocates who did not witness the agreement and even submitted ever if he was to be barred from acting in this suit. The suit won't be affected in anyway. Mr. Mutuma referred to case of **WESTERN PUMPS LTD –V-JOSEPH WAINAINA IRAYA T/A QUEEN CHICK INN & H.E.DANIEL ARAP MOI(Supra)** in support of his reposition.

He also referred to Rule 9 of the Advocates practice Rules under Advocates Act and urged that no party is objecting to the terms of the Agreement and as such he is safe to continue acting in this matter for the plaintiff.

On ground No.4 Mr. Mutuma contended that the same lacked merits. He contended the case referred to by counsel for the defendant dwelt with an application and further the issue of authorization is a matter of evidence and all facts on point of law must be admitted.

Mr. Mutuma referred me to the case of **MUKISA BISCUIT MANUFACTURING CO. LTD –V-S WEST END DISTRIBUTORS LTD(1969) EA. 696** in which Court of Appeal for Eastern Africa stated:-

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or

which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

On ground No.1 and No.2 on clause No.45.1 and 4.5 Mr. Mutuma urged the suit was filed for the purposes of obtaining preservative orders. He urged that pending arbitration one can proceed to court for preservative order. Mr. Mutuma urged that the plaintiff proceed in a proper manner. Mr. Mutuma further relied on case of **DAN WOOD COMPANY LTD –V-KENYA PIPELINE COMPANY LTD HCCC 1041 OF 2004(NBI)**, which case was similar to the present suit and in which injunction**** 17 costs were granted.

I have carefully analyzed the submissions and the authorities and pleadings relied upon by their respective opposing positions. The issues raised by the defendant/respondent in my mind, and not pure points of law.....18. A preliminary objection should consist of a point of law which has specifically been pleaded and which arises by clear implication at the pleadings and if argued as a preliminary point of law having dispose of the suit.....18/

On ground No.1 the defendant averred that this court and the application is premature as per clause No.45.5. on page 43.

The clause merely sets a procedure as to when arbitration shall commence following compliance with clause 45.1 of the contract. The plaintiff has in this only served notice pursuant to clause 45.1 and proceeded to this court for an order of referral of the dispute to arbitration.

Section 6(1) (a) and (b) of the Arbitration Act provides:-

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 unless it finds –

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

The claim relied upon by the respondent/defendant do not specifically state what would become of a matter submitted to arbitrator before 90 days expires. I believe all that clause 45.5. requires is to give parties sufficient time to prepare and arbitrate.....20 after 90 days from date of notice. The parties I believe did not intend to have an arbitration claim dismissing for being filed even upon expiry of 90 days.

On ground No.2 the defendant averred that the plaintiff's suit was fatally defective and raised no reasonable cause of action and was an abuse of court process in terms of clause 45.1 of the contract simply lays down the procedure to be followed in commencing the arbitration. It does not involve any point of law but deals only with the issue of procedure. The action or result or failure to follow the procedure laid down under the said clause is not stated. Our Constitution has clearly spelt out under Article 159(2),(d) of the Constitution 2010, that courts in exercise of Judicial authority shall administer justice without regard to procedural technicalities.

I therefore do not find any merits in ground No.2 of the defendant's preliminary point of law. The plaintiff's suit is therefore not fatally defective.

On ground No.3 there is no dispute that Mr. Mutuma witnessed the execution of the agreement. There is likelihood of Mr. Mutuma being called as a witness by any of the parties, and in view of that fact, it would be in the best interest of the said counsel if he reconsiders his position and even if he won't be

called as a witness cease appearing for the plaintiff as the matter is filed with another firm of Advocates.

I however do not find any basis whatsoever of striking this suit on that basis. This do not in any way affect the suits filed and so far as prosecuted. So far I have found no basis for me to hold that any party had been prejudiced by appearance of any of the Counsel in this suit.

On ground No.4 the plaintiff's suit is alleged to be fatally defective and abuse of the court process in that the same is alleged to have been filed without authorization resolution from the Board of Directors as required by law. This court is aware that the issue of authority and capacity to sue goes to jurisdiction in matters involving registered company.

In this case defendant contended that this suit was filed without authorization by Board of Directors under a resolution of General or Special Meeting. Mr. Mutuma considered that the ground has no merits and that the issue whether there was authorization or not is an issue of evidence. Mr. Mutuma was as I understand him stating that the issue of authorization is not a point of law and cannot be determined without calling or producing evidence. The defendant did not submit that it was mandatory that at the time of filing a suit involving a limited liability company the party27 suit must file the plaint together with a resolution from the Board of Directors authorizing filing of the suit. That can be an issue where some of the Directors are challenging the authority of some other Directors of the same entity to file suit which is not the case in the instant case. In this case the issue is being raised by a third party whereas the plaintiff implies the issue can only be successfully canvassed by way of evidence.

In view of the foregoing and the conclusion, i have come to, I find no merits in the preliminary objection. The same is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of

1. Mr. Mutuma for the plaintiff/applicant
2. Mr. C. Kariuki for the defendant/respondent

J. A. MAKAU
JUDGE