



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

CIVIL SUIT 190 OF 2010

NATIONAL OIL CO-OPERATION OF KENYA LIMITED.....  
PLAINTIFF

VERSUS

SOMKEN PETROLEUM COMPANY LTD.....1<sup>ST</sup>  
DEFENDANT/APPLICANT

JULIA MUTUMBI.....2<sup>ND</sup> DEFENDANT/APPLICANT

FABIAN LIJOODI.....3<sup>RD</sup> DEFENDANT/APPLICANT

*(sued as legal representatives of the Estate of the late Isaac Mutumbi Lijoodi)*

BRIAN LIJOODI.....4<sup>TH</sup> DEFENDANT/APPLICANT

**RULING**

1. The Application dated 16<sup>th</sup> December 2010 is premised on the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order XXXIX Rules 1 and 2 of the Civil Procedure Rules. The 1<sup>st</sup> Defendant/Applicant seeks the following orders;

1. ***“That the Application be certified urgent and be heard in priority over the plaintiff’s application dated 7<sup>th</sup> December 2010.***
2. ***That there be a stay of the proceedings filed by the Plaintiff herein, including the Chamber Summons dated 7<sup>th</sup> December 2010 pending the reference to Arbitration of the dispute arising between the Plaintiff and the 1<sup>st</sup> Defendant.***
3. ***The costs of Application be provided for”.***

2. The grounds in support as set out in the body of the Application are the following;

- a) ***“By an Asset Purchasing Agreement dated 30<sup>th</sup> May 2008 made between the Plaintiff and the 1<sup>st</sup>***

*defendant, governing inter alia the purchase of various assets by the Plaintiff from the 1<sup>st</sup> Defendant comprising mainly of Petrol Stations (herein after referred to as “the Agreement”), as well as the Deed of Assignment of Lease dated 1<sup>st</sup> February 2010.*

- b) In effect the Plaintiff asserts that a dispute has arisen between the Plaintiff and the 1<sup>st</sup> Defendant relating to the Agreement.”*
- c) The dispute resolution mechanism under the Agreement is by way of Arbitration.*
- d) An Arbitrator has jurisdiction to determine all matters arising from the Agreement.*
- e) The Plaintiff failed to make disclosure of the Arbitration Clause.*
- f) It is necessary for the court to give effect to the Arbitration Clause agreed by the Plaintiff and 1<sup>st</sup> Defendant, which is for all intents a contract between the Plaintiff and 1<sup>st</sup> Defendant, by staying these proceedings.”*

3. In his Supporting Affidavit sworn on 16<sup>th</sup> December 2010, Andrew Mugambi, an Advocate acting on behalf of the 1<sup>st</sup> Defendant/Applicant depones as follows;

- (i) That Clause 25 of the Asset Purchase Agreement provides that all disputes between the parties ought to be referred to Arbitration.*
- (ii) That the Application dated 7<sup>th</sup> December 2010 seeking orders of a Mandatory Injunction compelling the Defendants to hand over possession of the Service Station known as Kakamega Highway Station was baseless as the Plaintiff’s representative, one David Obado was present when handing over was undertaken by the 1<sup>st</sup> Defendant and a Verification Report was duly signed.*
- (iii) That the Plaintiff thereafter signed a Deed of Assignment of Lease and the same was duly registered and there is nothing to be revisited at all.*
- (iv) That the Suit and Application dated 7<sup>th</sup> December 2010 were misguided.*

4. Eunice Arwa, the Plaintiff’s Company Secretary swore a Replying Affidavit on 7<sup>th</sup> February 2011 and her response to the Application is contained at paragraph 4 thereof whereas she states as follows;

***“That whereas Clause 25 of the Asset Purchase Agreement between the plaintiff and the 1<sup>st</sup> Defendant provides that all disputes between the parties with regard to the interpretation, rights, obligations and/or implementations of the provisions of the Agreement should be referred to Arbitration, the dispute herein is not subject to Arbitration for the following reasons:-***

- a) The Service Station sought to be surrendered to the Plaintiff is currently in the control of the 4<sup>th</sup> Defendant.*
- b) There does exist a dispute involving distribution of an Estate of the late Isaac Mutumbi Lijoodi between the Dependants of the late Isaac Mutumbi Lijoodi which is subject of separate Probate and Administration proceedings in this Honourable Court. The Suit Property forms part of the Estate.*
- c) The said 4<sup>th</sup> Defendant and the Estate of the late Isaac Mutumbi Lijoodi are not parties to the Arbitration Agreement between the Plaintiff and the 1<sup>st</sup> Defendant.*
- d) Arbitration can only proceed as between the Plaintiff and the 1<sup>st</sup> Defendant which would not resolve the dispute as possession of the Suit Property is currently in the hands of parties not otherwise*

***bound by the Arbitration Clause between the Plaintiff and the 1<sup>st</sup> Defendant.”***

5. Having taken into account the submissions by Advocates for the parties it seems to me that there is no disagreement on one fact; that Clause 25 of the Asset Purchase Agreement dated 30<sup>th</sup> May 2008 obligates parties to refer any dispute between them to Arbitration. That Clause reads as follows;

***“Should any dispute arise between the Parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation. However, should such negotiations fail to achieve a resolution within fourteen (14) days, either Party may within the next ten (10) days declare a dispute by written notification to the other, whereupon such dispute shall be referred to Arbitration under the following terms:-***

***a) the dispute shall be resolved under provisions of the Kenyan Arbitration Act, 1995 (as amended from time to time or replaced by a subsequent enactment);***

***b) the Arbitration Tribunal shall consist of one Arbitrator to be appointed by agreement of the Parties within fourteen (14) days of the first date when either party gives notice of the identity of the proposed Arbitrator and failing which the Arbitrator shall be appointed by the Chairman for time being of the Kenya Chapter of the Chartered Institute of Arbitrators upon the application of either party PROVIDED THAT the Arbitrator shall be a person with at least fifteen (15) years experience in the petroleum industry;***

***c) the place and seat of Arbitration shall be Nairobi and the language of Arbitration shall be English;***

***d) the award of the arbitration Tribunal shall be final and binding upon the parties to the extent permitted by law and either party may apply to a court of competent jurisdiction for enforcement of such award. The award of the Arbitration Tribunal may take the form of an order to pay an amount or to perform or to prohibit certain activities; and***

***e) notwithstanding the above provisions of this Clause, a party shall be entitled to seek preliminary injunctive relief or interim or conservatory measure from any court of competent jurisdiction pending the final decision or award of the Arbitrator.***

6. The 1<sup>st</sup> Defendant, while admitting the above provision however argues that the same cannot be implemented for reasons set out above. Is that contention plausible?

7. Firstly, the matters to be referred to Arbitration are those that are with regard “to the interpretation, rights, obligations and/or implementation of the provisions of [the] Agreement.” The Parties to the Agreement are the Plaintiff and the 1<sup>st</sup> Defendant as Vendor and Purchaser respectively. What was being purchased were the assets listed in the Agreement, and whereas that issue was raised at paragraphs 5, 6, 7 and 8 of the Plaintiff, the Plaintiff at paragraph 9 and 10, thereof pleaded as follows;

***“9. Despite the Plaintiff having fulfilled its obligations under the Agreement aforesaid, the 1<sup>st</sup> Defendant, the Estate of the late Isaac Mutumbi Lijoodi (now represented by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) and the 4<sup>th</sup> Defendant have failed to handover the suit property to the Plaintiff as per the terms contracted despite execution of the contracts aforesaid and payment of the agreed purchase price.***

***10. The 4<sup>th</sup> Defendant is currently running and managing the Service Station on the suit property either on behalf of the estate of the late Isaac Mutumbi Lijoodi or on his own behalf and has failed to hand over possession of the suit property to the Plaintiff pursuant to the Deed of Assignment of Lease.”***

8. Further, what is in issue in the Suit and the Application dated 7<sup>th</sup> December 2010 is handing over or failure thereof, of the premises to the Plaintiff pursuant to the Asset Purchase Agreement signed with the 1<sup>st</sup> Defendant only and where there is no privity of contract with other Defendants.
9. Secondly, the issue in contest is also whether the 1<sup>st</sup> Defendant has refused to hand over the Service Station to the Plaintiff or it is itself hampered from doing so by fact of the 4<sup>th</sup> Defendant being the one in possession. On that issue, the Plaintiff has a point. Suppose I order the dispute to be taken to Arbitration and it is ordered that the 1<sup>st</sup> Defendant should hand over possession, will the dispute end there? I do not think so because, it is not in possession of the Service Station and the order of the Arbitrator may not bind the 4<sup>th</sup> Defendant.
10. Thirdly, the Arbitration proceedings can only be of use to the parties to the Assets purchase Agreement and not the Lijoodi family who are not party to it. I am aware from where I sit that there are Probate proceedings before this Court involving the Estate of Isaac Lijoodi (deceased) and the determination of those proceedings may well impact on the present dispute. I am not aware how far those proceedings have reached but there is certainly an inter-connection.
11. Fourthly, whereas the 1<sup>st</sup> Defendant is at liberty to take any dispute arising from the Asset Purchase Agreement (*including whether there is breach on the part of any party*) to an Arbitrator I am satisfied that the dispute before me has facts that may not fit the wording of Clause 25 and which would best be tried by this Court.
12. Ordinarily, this court would have been more than happy to invoke Article 159(2)(c) of the Constitution as well as the provisions of the Arbitration Act, 1995 and refer this matter to arbitration but the present dispute should in the wide interests of justice be tried by this court.
13. Lastly, I am convinced that the objection to the matter being referred to Arbitration is well founded and I will dismiss the Application dated 16<sup>th</sup> December 2010 with costs.
14. Let parties now take a date for hearing of the Application dated 7<sup>th</sup> December 2010.
15. Orders accordingly.

**I. LENAOLA**

**JUDGE**

**DELIVERED, DATED AND COUNTER-SIGNED BY L. KIMARU, JUDGE AT KAKAMEGA  
THIS 4<sup>TH</sup> DAY OF JULY, 2011**

**L. KIMARU  
JUDGE**