



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 434 of 2009

**KENYA AIRPORTS PARKING SERVICES LTD.....1ST PLAINTIFF
KAPS MUNICIPAL PARKING SERVICES LTD.....2ND PLAINTIFF
VERSUS
MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANT**

RULING

The plaintiffs filed suit seeking various orders from the court arising out of an alleged breach of an agreement that was allegedly entered between the plaintiffs and the defendant on 28th June 2006 in respect of provision of certain park management and revenue collection services within certain designated areas of Mombasa Township. The plaintiffs averred that the alleged agreement contained an arbitration clause which mandated any dispute between the plaintiffs and the defendant to be referred for resolution by arbitration. Pending the hearing and determination of the dispute that had arisen between the plaintiffs and the defendant by arbitration, the plaintiffs are seeking interim measures of protection pursuant to **Section 7** of the **Arbitration Act, 1995**. Contemporaneous with filling suit, the plaintiffs moved the court by an application made pursuant to the provision of **Section 7** of the **Arbitration Act, 1995, Rules 2 and 8** of the **Arbitration Rules 1997** and **Order XXXIX Rule 2** of the **Civil Procedure Rules**. In the application, the plaintiffs seeks to restrain the defendant whether by itself, by its directors, its servants, its employees or agents from purporting to terminate the agreement which was alleged to have been entered on 28th June 2008, or to do anything that may jeopardize the continued taking effect of the said agreement pending the hearing of the dispute that has arisen by arbitration.

The plaintiffs' counsel appeared before the court on 17th June 2009 under certificate of urgency. The court was persuaded by the urgency of the matter and duly issued orders at the ex parte stage restraining the defendant from terminating the said agreement between the plaintiffs and the defendant. Hearing inter partes was fixed for 19th June 2009. The hearing of the application did not proceed on that day because counsel for the parties to the suit informed the court that they were exploring the possibility of amicably settling the matter out of court. The interim orders that were granted by the court on 17th June 2009 were extended to the next date that the application was to be heard. On 7th July 2009, the plaintiffs sought to have Tubman Otieno, the defendant's Town Clerk, Kenneth Maranga, the defendant's Deputy Town Clerk, Andrew Wanyonyi, the defendant's Treasurer and Felix Munga, the defendant's Chief Revenue Officer committed to prison for a term not exceeding six (6) months allegedly on the grounds that the said officers of the defendant had breached the orders of the court that were issued on 17th June 2009.

In response to the application, the defendant moved the court by notice of motion pursuant to provisions of **Order XXIX Rule 4** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking to have the ex parte order issued by the court on 17th June 2009 and variously extended thereafter be set aside and the injunction granted be discharged. The grounds in support of the application are stated on the face of the application. The defendant contends that the plaintiffs had failed to make full and frank disclosure of all material facts and documents. The defendant argued that the plaintiffs had abused the process of the court by seeking to enforce an unlawful and illegal agreement which is contra-statute and had therefore obtained an unfair advantage in process. The defendant was aggrieved that the plaintiffs failed to disclose the existence of another suit at Mombasa High Court vide **Mombasa HCCC No.116 of 2008 Kenya Airports Parking Services Ltd & Anor vs Ahmed Abubakar Mohdhar**. The defendant reiterated that the court did not have jurisdiction to grant interim protective relief to the plaintiffs in reinforcement of an alleged agreement that is plainly illegal and unlawful, hence invalid *ab initio*. The defendant insists that the alleged agreement cannot bind it by virtue of the provisions of **Section 143(8)** of the **Local Government Act** because it was executed by individuals in abuse of their offices. The application is supported by the annexed affidavit of Tubman Otieno,

the Town Clerk of the defendant.

The application was opposed. Lawrence Madialo, the plaintiffs' legal officer swore a replying affidavit in opposition to the application. In it, he deponed that the agreement between the plaintiffs and the defendant was valid having been approved by the relevant organs of the defendant. He swore that the internal management rules of the defendant cannot be used to invalidate a valid agreement that was entered between the two parties. He denied the suggestion by the defendant that any law had been broken when the said agreement was executed between the plaintiffs and the defendant. He reiterated that the existing suit at Mombasa did not determine the validity or otherwise of the agreement which is within the province of the arbitrator who will hear the dispute.

Prior to the hearing of the application, Mr. Kiragu Kimani, counsel for the plaintiffs, and Mr. Khagram, counsel for the defendant agreed to have the application seeking the citing of the defendant's employees for contempt of court and the application by the defendant seeking the setting aside the interim orders granted by the court heard together. The two counsel further agreed to file written submissions in support of their clients' respective opposing positions. The said written submissions were duly filed. At the hearing of the application, I heard oral submissions made by Mr. Khagram for the defendant and Miss Babu for the plaintiffs. I have carefully considered the said submissions, both oral and written. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issues for determination by the court are twofold: firstly, whether the defendant laid sufficient basis for the setting aside of the interim orders of relief granted by this court on the ground that there is no valid agreement which can be enforced by this court. The second issue for determination, if the above issues determined in favour of the plaintiffs, is whether the defendant breached the orders of this court, to entitle this court punish the identified officers of the defendant for contempt of the orders of this court.

As regard the first issue, it is the defendant's case that there exists no valid agreement between the plaintiffs and the defendant that is capable of being enforced by this court granting the interim relief sought pending the hearing of the dispute by arbitration. The defendant relied on the provisions of **Section 143** of the **Local Government Act** which provides as follows:

“(1) A local authority may enter into contracts necessary for the discharge of any of its functions.

(2) A local authority may enter into contracts with any other local authority for or with respect to, the doing and the control or management by either or both of the contracting parties of any of the things provided for in this Act, or of any other matter or thing which both the contracting parties are by law empowered to do control or manage.

...

(8) All contracts lawfully made under this section shall be valid and binding on the local authority, its successors, and all other parties thereto.”

It was the plaintiffs' case that the agreement that it had entered with the defendant was valid for all intents and purpose. It was in this regard that the plaintiff wishes the dispute between itself and the defendant be determined by arbitration as provided for in the agreement. On its part, the defendant is of the firm view that the court cannot grant interim protective relief pending reference of the dispute to arbitration when, in their view, the agreement was clearly entered contrary to the law and executed by officers of the defendant who had abused the mandates of their offices.

The main plank of the defendant's case on this issue is that the alleged agreement was entered into between the plaintiffs and the defendant in the absence of any resolution of the defendant council and in the absence of any authority of the defendant council. The plaintiffs on their part, argued that the validity or otherwise of the agreement cannot be determined by this court where clearly the agreement provides for a dispute resolution mechanism by arbitration. It was the plaintiffs' case that all issues regarding the agreement can only be determined by the arbitrator and not by the court. The defendant submitted that the issues it had raised in regard to the validity of the agreement were so fundamental that this court has jurisdiction to consider it and issue appropriate orders. The defendant explained that in view of the invalidity of the agreement, even the arbitration clause in the said agreement cannot be enforced by this court.

What is the legal position where a party disputes the validity of an agreement which has an arbitration clause? In this case, the defendant does not deny that there exists an agreement between itself and the plaintiffs. The defendant challenges the manner in which the said agreement was entered between the plaintiffs and the defendant. It is the defendant's case that the said agreement was invalid from the moment it was entered into between the plaintiffs and the defendant by the fact that appropriate legal procedures were not followed before the same was executed on behalf of the defendant. The defendant concedes that the disputed agreement was entered between the plaintiffs and persons who had the ostensible authority of the defendant to execute the same. The agreement was sealed with the seal of the defendant. It is this court's view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement.

The Court of Appeal in **Adopt-A-Light Ltd v Magnate Ventures Ltd & 3 Others [2009] eKLR**, held at page 3 of its ruling as follows:

“In view of the elaborate provisions set out in Section 17 of the Arbitration Act, we doubt whether the learned Judge could have made any such order. Under the Section:

“The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose:

(a) An arbitration clause which forms part of the contract shall be treated as an independent agreement of the other terms of the contract: and

(b) A decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.” See section 17(1).

It is clear under this section that an arbitrator has power to rule on the issue of his own jurisdiction and on the validity or otherwise of the agreement, the subject of the arbitration and may even rule that the contract is null and void.”

In the United States of America, the Supreme Court affirmed the principle of separability of arbitration clauses in agreements in the case of **Buckeye Check Cashing, Inc, v Cardegna et al 546 U.S 440 (2006)**. In that case, a party to an agreement which contained an arbitration clause moved to a state court challenging reference of a dispute to arbitration that had arisen in respect of the agreement on the grounds that under the State Laws of Florida the issues that formed part of the dispute were contrary to statute and therefore contrary to public policy. At page 8 of its opinion the Supreme Court stated as follows:

*“It is true, as respondents assert, that the **Prima Paint** rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents’ approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. **Prima Paint** resolved this conundrum – and resolved it in favour of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”*

The principle of separability of an arbitration clause in an agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or legality of the agreement itself. As stated in the above U.S case, the issue as to the validity of the agreement is an issue that the arbitrator has jurisdiction to deal with.

In the present case, the agreement entered between the plaintiffs and the defendant on 28th June 2006, provided for the resolution of any dispute between the plaintiffs and the defendant by arbitration. Clause 22.2 of the agreement provided as follows:

“Save as herein otherwise specifically provided, any dispute between the parties hereto as to matters arising pursuant to this Agreement which cannot be settled amicably within thirty (30) days after receipt by one party of another party’s request for such amicable settlement may be submitted by any party to arbitration in accordance with the provisions of clauses 22.3 to 28.8 (both inclusive).”

Clause 22.3 states that:

“If the parties hereto so agree, the dispute shall be referred to a single arbitrator or if they are unable to agree upon the person to be the arbitrator within fourteen (14) days after the expiry of the thirty (30) day period referred to in clause 23.2, the sole arbitrator shall, at the request of either party hereto, be appointed by the Chairman of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom. The arbitration shall be held in Mombasa.”

It is therefore clear that the parties to the agreement anticipated that any dispute between them would be resolved by arbitration. Although the defendant would like this court to render an opinion regarding the legality of the agreement, 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 of the 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.

Under **Section 17(1)** of the **Arbitration Act**, the arbitral tribunal has powers to render a decision in regard to its own jurisdiction. The defendant is not prohibited by law from raising the issue regarding the validity or otherwise of the agreement before the arbitral tribunal. In a recent Court of Appeal decision, **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, the Court of Appeal reiterated the principle of non-intervention by the courts where parties have agreed to resolve any dispute between them by arbitration. The appeal arose from a decision of this court. At page 13 of its judgment, the Court of Appeal had this to say:

“A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states:

“Except as provided in this Act no court shall intervene in matters governed by this Act.”

In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award of the judgment/decreed arising from the award.”

It is clear from the above decisions of the Court of Appeal, that this court cannot intervene and consider matters to do with the merit of the dispute between the plaintiffs and the defendant. That is an issue that is squarely within the province of the arbitrator. I decline the invitation by the defendant to consider issues regarding the validity of the agreement between the plaintiffs and the defendant. That issue shall be determined by the arbitrator. The upshot of the above reason is that the defendant’s notice of motion dated 16th July 2009 lacks merit and is hereby dismissed with costs to the plaintiffs.

As regard the plaintiffs’ application which they sought to have the defendant’s principal officers committed to civil jail for allegedly disobeying the orders of this court, having read the affidavit sworn by Tubman Otieno, the Town Clerk of the defendant, I am satisfied that the said officers of the defendant appreciated the consequences of disobedience of this court’s orders. In this regard, I wish to commend Mr.

Khagram, the advocate of the defendant for impressing upon his client the importance of compliance with orders of the court. At this stage of these proceedings, I will refrain from making any determination in regard to whether or not the defendant disobeyed the orders of this court. It suffices for this court to state that the orders issued by Lesiit J on 17th June 2009 shall continue to apply until the plaintiffs' application for interim protective reliefs is heard and determined. The defendant should not interfere with the *status quo* as it existed on 17th June 2009 until the plaintiffs' application dated 17th June 2009 is heard and determined. So that the plaintiffs do not sit on the orders, this court shall give a date in court for the hearing of the said application for interim protective orders. I decline to allow the plaintiffs' application dated 25th June 2009. However, I direct that costs in respect of the said application shall be in the cause.

DATED AT NAIROBI THIS 24TH DAY OF MARCH 2010

L. KIMARU
JUDGE