



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 598 of 2009**

CRYSTAL HILL LIMITED .....1<sup>ST</sup> PLAINTIFF  
PHOENIX PHARMACY LIMITED .....2<sup>ND</sup> PLAINTIFF  
VERSUS

BEMUDA HOLDINGS LIMITED .....DEFENDANT

**RULING**

1. On 28<sup>th</sup> October 2009 **Kimaru J** allowed the chamber summons by the plaintiff dated 29<sup>th</sup> July 2009 in the following terms:-

That temporary orders of injunction

- i) That a temporary injunction do and is hereby issued restraining the defendant from selling the suit property, that is to say office suite No. B5 at Bemuda Plaza, Nairobi to any other person other than to the Plaintiffs on condition that the plaintiffs complete payment of the purchase consideration within ninety (90) days of the date of this order.
- ii) That the plaintiffs shall pay all the charges required by the defendant to enable the completion of the agreement.
- iii) That the defendant shall co-operate with the plaintiffs if they are still desirous of financing the payment of the balance of the purchase consideration by mortgaging the suit property and in that regard the defendant's advocate shall accept any professional undertaking in terms agreeable to them given by the advocates for any financial institution that is willing to finance the plaintiffs and the said amount shall be paid within ninety (90) days of the date of this order.
- iv) That in default of paying the balance of the purchase consideration within ninety (90) days of the date of this order, the defendant shall be at liberty to dispose off the suit property in the manner that it deems fit.

v) **Those costs of this application shall be in the cause**

2. On 25<sup>th</sup> February 2010 the defendant filed a notice of motion under section 6 of the arbitration Act 1995 seeking for orders that this suit be stayed pending its referral and determination by an arbitrator. This is on the grounds that the agreement, the subject matter of this suit contains an Arbitration Clause. The plaintiff has now extracted summons to enter appearance and served it upon the defendant. That is why the applicant contends the suit derogates from the arbitration agreement and should be stayed.
3. This application is supported by the affidavit of Martha Vincent sworn on 25<sup>th</sup> February 2010. She has annexed a copy of the Agreement especially clause 13 which provides that all disputes and questions arising between the parties thereto touching on the agreement shall be referred to a single arbitrator agreed upon by the parties or otherwise appointed by Chairman of the Law Society of Kenya in accordance with the Arbitration Act. That agreement is signed on 23<sup>rd</sup> January 2008. Mr. Njuguna learned counsel for the applicant argued that this suit was filed in disregard of the Arbitration Clause. Therefore under section 6 of the Arbitration Act, the court should allow a stay of the proceedings because the summons were taken out on 16<sup>th</sup> February 2010 and served on the defendant but they could not file a defence instead they filed this application. When the order by **Kimaru J** was issued the applicant had raised the issue by way of preliminary objection which was subsumed in the main application.
4. This application was opposed, the plaintiff/respondent relied on the replying affidavit **Dr. Mutwiri Muraa** sworn on 3<sup>rd</sup> March 2010. It was submitted that this application is an afterthought and is therefore an abuse of the court process. There is already an order by this court, thus the application is overtaken by event. Moreover this matter was brought up in the application which was determined by **Kimaru J**. It is *res judicata*, thus this suit is properly before the court. Moreover the defendant/applicant has been in contempt of the court orders the more reason why the suit should remain within the jurisdiction of this court.
5. It is not in dispute that the defendant entered appearance in this matter on 27<sup>th</sup> August 2009. The defendant filed a replying affidavit in opposition of the plaintiff's chamber summons dated 29<sup>th</sup> July 2009. Under paragraph 3 of the replying affidavit by **Martha Vincent** the applicant raised the issue of the Arbitration Clause in the Agreement. Even in the defendants' written submissions counsel for the applicant raised the issue regarding the competence of the application and indeed applied for the proceedings to be stayed. The applicant having failed to obtain the order of stay in those proceedings, now invites this court to adjudicate on the same matters that were before **Justice Kimaru**.
6. Am afraid this court cannot visit the same issues that were adjudicated upon by a court of coordinate jurisdiction. Moreover under the provisions of section 6(1) of the Arbitration Act, the defendant has already entered appearance and argued the application and orders were made by this court. The applicant would have filed this application before the court was seized of the matter. This application is being made too late when the court determined the issues and issued orders. The matter is before this court and making an order of stay will compound matters even more because there are

orders issued by this court.

Accordingly I find the application lacking in merit and it is hereby dismissed with costs.

**RULING READ AND SIGNED ON 16<sup>TH</sup> JULY 2010 AT NAIROBI.**

**M. K. KOOME**  
**JUDGE**