



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

CIVIL SUIT NO. 99 OF 2007

COUNTY COUNCIL OF MALINDI
PLAINTIFF

-VERSUS-

PISCES LIMITED.....DEFENDANT

RULING

The Chamber Summons application dated 11th day of January 2008 is made under section 3A of the Civil Procedure Act and section 6(1) of the Arbitration Act No. 4 of 1995 and rule 2 of the Arbitration Rules 1997.

It seeks that there be stay of proceedings and that the matter herein be referred to arbitration. It is based on grounds that:-

- (a) The agreement relied upon, provides for settlement of disputes by way of arbitration.
- (b) The defendant has a claim against the plaintiff for breach of contract.
- (c) The notice of the aforesaid breach was given prior to this suit.
- (d) The defendant had indicated to plaintiff, prior to filing of this suit, to appoint an arbitrator.

The application is supported by the affidavit sworn by Jessie Otieno who is the defendant's managing Director. He depones that by an agreement between the plaintiff and defendant made on 6th September 2006, the parties agreed inter-alia that any dispute arising out of or in conflict with the agreement would be referred to arbitration – copy of that agreement is annexed and marked JO1.

On 23rd November 2007, the plaintiff filed legal proceedings against the defendant to recover the sum of Kshs. 4,340,000 arising out of the said agreement and in consequence the defendants entered appearance. However no further steps have been taken in the proceedings and it is applicant's contention that plaintiff should abide by the clause in the agreement which provides for arbitration.

A letter dated 9th October 2007 and another dated 20th November 2007 drew to the respondent's attention the applicant's intention to have the matter handled by an arbitrator. In response, by a letter dated 20-11-07, the respondent's Counsel stated that the procedure was not necessary. Applicant says by filing this suit in court first instead of referring it to an arbitrator, the respondent has acted in breach of their agreement.

In opposing the application the respondent has filed a replying affidavit sworn by the County Clerk Maurice Ogolla in which he confirms that the parties entered into an agreement dated 6-9-2006. However he states that the contract was terminated subsequent to recommendations made on 3rd April 2007 at a Council Meeting and that this was communicated to the applicant by a letter.

He then sets out the reasons why the contract was terminated and explains that they eventually filed suit to recover what had already been obtained by the defendant/applicant. It is further deponed that filing the suit in court was the only viable option because the issues at hand and the cause of action is so grave that it cannot be competently and completely adjudicated upon by an ordinary arbitration tribunal.

He then explains that the arbitration issues are essentially contractual matters and the disputes over issues in respect of which the parties may compromise in their own interest.

Secondly that the process of arbitration belongs to the sphere of compromises and bargains among those affected and the plaintiff's suit is predicated on the torts of frauds and misrepresentation, which would best be handled by the High Court and the arbitration tribunal would be ill equipped to deal with matters.

It is not denied that the agreement of 6th September 2007 at Clause 7.2 provided as follows:

“DISPUTE SETTLEMENT: Any dispute between the parties as to matters arising pursuant to this contract cannot be settled amicably within 30 (thirty) days after receipt by the party of the other party's request for such amicable settlement, may be referred by either party to the arbitration...failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the chairman of theInstitute of Arbitrators Kenya Branch, on the request of the applying party”

However, the respondent now says it is not bound by that agreement because it was obtained by fraud and fraudulent misrepresentation.

The applicant's counsel submits that section 6(1) of the Arbitration Act comes to the applicant's aid. Section 6(1)

“A court before which proceedings are brought in a matter which is the subject of an 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 arbitration unless it finds:-

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

(b) That there is in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration.”

The applicant's counsel submits that there exists a valid and subsisting arbitration clause in the contract of 6th September 2006 and which clause conforms with the provisions of section 4(1) of the Arbitration Act to the extent that:

- (1) It forms a clause in the contract
- (2) It's in continuity
- (3) It is in a document signed by both parties

Counsel argues that the claim for 4.34m paid out during the existence of the agreement is the subject of that very agreement and the purported termination by the respondent cannot in law exempt any dispute arising therefrom, from arbitration within the terms of the agreement.

Mr. Gakuo for the respondent is totally opposed to these arguments seeking to invoke the legal maxims of *ex dolo malo non oriur actim* and *ex turpi causa non oriur actia*, both which stand for the principle that one cannot found a cause of action on an immoral or illegal act. He explains that this is precisely because “it would be an affront to public conscience because the court would appear to assist or encourage the

....illegal conduct or encourage other similar acts”

Mr. Gakuo points out that the replying affidavit sets out several misleading acts by the applicant – which the respondent’s officials detected and which led to them terminating the contract.

The issue here is very simple – has there been a finding made by a court or a competent tribunal that the contract between the parties was grounded on fraud and misrepresentation?

The answer is in the negative – that assertion is merely the position or grievance raised by the respondent so it would be premature for this court to swallow that argument wholesale when the position has not yet been determined – that was a unilateral pronouncement by the respondent. Then there is the question of grave matters arising from the dispute – my reading of the provisions of clause 7.2 disclose that there was no condition attached to sending the matter for arbitration – once the dispute arose – the first option was to refer it to arbitration – no matter how complex or grave one party perceives the issues to be.

This court cannot begin to re-write the contract that was entered into between the parties so as to vary the terms. I detect nothing inoperative or incapable of being performed were the matter to be referred to arbitration and the applicant has by the previous correspondences demonstrated an intent and willingness to refer the matter or arbitration as provided in the contract. My finding is that the application has merit and is allowed. The proceedings herein are stayed and I direct that the matter be referred to arbitration as per the contract document.

Costs of this application shall be borne by the respondent.

Delivered and dated this 2nd day of **November 2010** at Malindi.

H. A. Omondi
JUDGE

No appearance for parties