



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Suit 62 of 2008

THE COUNTY COUNCIL OF KIPSIGISPLAINTIFF

VERSUS

JAMES FINLAY KENYA LIMITEDDEFENDANT

RULING

I: Procedure

1. Whenever parties enter into a contractual agreement and within the agreement there is a dispute resolution clause so provided requiring the parties to refer the dispute to Arbitration under the **Arbitration Act 1995**, and where one party instead files a suit at the High Court, the Arbitration Act provides that the Defendant is NOT to file a defence but enter appearance then file an application for stay of the suit. The Court would be requested to then refer the matters to Arbitration.

2. **Section 6(1)** of the **Arbitration Act 1995** provides

“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 an appearance or files any pleadings or takes any other step in 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.

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

3. The Defendants’ right can be waived if they file a defence and or counter-claim or taken any other steps to safe guard the interest of a Defendant an application to stay the proceedings are made at the earliest possible moment.

4. For some unknown reasons, I see time and time again in such cases, Plaintiff’s apply for interlocutory judgment for failure to file a defence by the Defendant. Deputy Registrars on the other hand would endorse such requests under their ministerial powers (*order XLVIII Civil Procedure Rules*) putting a defendant at risk of being executed against. This is an unfortunate situation that would occur. I wish to now turn to the case before me.

I: Background

5. The County Council of Kipsigis (*the Plaintiff/Respondent herein*) are the registered proprietor of land parcel LR.No. Kericho/Kabianga/2 situated within the Kericho District encompassing an area of 121 hectares of planted tea bushes. They had been associated with M/S James Finlay Kenya Ltd (*the defendant/applicant herein*) since 25th July, 1978 as managing agents for the plaintiff.

6. As of 1st April, 2004 a second agreement was entered between the two parties known as the green leaf agreement. The plaintiff described as “*out growers*” in the said green leaf agreement and the defendant the “*company*”

7. This agreement in essence provided for the sale of tea to the Defendant who would manufacture the same and make payments to the Plaintiffs /out growers.

8. What is important about this agreement is **Clause 13** concerning disputes – namely

“ any dispute arising between the parties in connection with this agreement shall be submitted to a single arbitrator to be appointed by agreement between the parties or failing such agreement within thirty (30) days to one party first serving notice or the other of such dispute to be appointed by the chairman at the time of the Chartered Institute of Arbitrators Kenya Branch, any such arbitration shall be conducted in accordance with and subject to the provisions of the Arbitration Act (Chapter 49) or any other act from time to time in force replacing or amending”

9. The Plaintiff/out growers being dissatisfied with the “bad management”, issued a notice with effect from the 1st April, 2008 of four months seeking the termination of the contract.

10. They then filed suit on 17th December, 2008 seeking for these courts orders to compel the defendants releases the “*cash held by them, final accounts, income, expenditures, statement audited account bank statement and cheque books*”.

11. The Defendant/Applicant filed for stay of proceedings pending referral to arbitration.

III: Application 25th February, 2009

12. This application seeking stay of proceedings of the main suit was one that replaced an earlier application of 25th December, 2008.

13. When the suit was filed, the defendants filed for stay of proceedings under the application of 25th December, 2008. The Respondent/Plaintiffs instead filed for request for interlocutory judgment for failure by the defendant to file defence. This necessitated the applicants to withdraw their application of 25th December, 2008 and file another of 23rd February, 2009 seeking not only the stay of proceeding but also the stay of the orders for interlocutory judgment.

14. The grounds put forward by the Defendant/Applicant is that the cause of action arose from the agreement of 2nd January, 2004 between the parties which specifically provided for the matter to be referred to arbitration.

15. The applicant seeks for orders that the suit be stayed as the court has no jurisdiction to hear the matter.

16. In response the Plaintiffs/Respondent raised Preliminary Objection that mainly concerned the technicalities of the application, including the withdrawal of an earlier one. The failure of there being an authority to the deponent of the affidavit by the company.

IV. Findings

17. I hereby find that the applicant indeed have and hold an agreement with the respondent whereupon clause 13th of the said agreement of 2nd January, 2004 provides that if any disputes arises between the parties it be referred to arbitration.

18. The laid down procedure under the agreement for settlement of disputes is to be strictly followed. Where one party, as in this case files suit, the option for the defendant is to envoke **Section 6(1)** of the Arbitration Act (1995) and not to file any defence for counter claim. If they do so they waiver their rights to arbitration and the High Court would then proceed to hear the matter.

19. The Applicant/Defendant has applied, on entering appearance to be referred to Arbitration. I hereby hold that the Defendant/Applicant have duly complied with **Section 6(1)** of the arbitration act and make the following orders:-

19.1. That this suit be and is hereby stayed pursuant to section 6(1) of the arbitration act 1995 Laws of Kenya.

19.2. That this dispute between the parties be and is hereby referred to arbitration in accordance with the provision of clause 1 and 3 of the agreement in question.

19.3. The respondent's preliminary objection is dismissed.

19.4. I award costs to the defendant/applicant to be paid by the plaintiffs/respondents.

DATED this 17th day of March, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

J. Muitui advocates instructed by the firm of M/S Kaplan Stratton & Co. advocates

for the Applicant/Defendant– present

S.K. Sigira advocate instructed by the firm of M/S Siele Sigira & Co. advocates

for the Respondent/Plaintiff– present