



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Application 462 of 2008

JOHNSON KAGO MWAURA PLAINTIFF

VERSUS

ROSE NDUTA GITHUA 1ST DEFENDANT

BIA BORA DISTRIBUTORS LIMITED 2ND DEFENDANT

RULING

On 8th July 2008, the parties to this suit recorded the following consent order:

“By consent the chamber summons dated 26th June 2008 be and is hereby allowed in terms of prayer 3. Pending determination of the arbitration or further orders of this court (the) 2nd defendant respondent do undertake to service its loans with Prime Bank Ltd and Standard Chartered (Bank) Ltd as set out in documents specified under prayer 7 of this chamber summons. Further order the matter be mentioned on 18th September 2008 to enable parties to settle the matter of the arbitrator and enable an independent joint audit in respect of accounts of (the) 2nd defendant and for any other purpose.”

In the chamber summons dated 26th June 2008, the plaintiff had sought in prayer 3 and 7 the following orders:

“3. That this Honourable Court do order that the dispute declared by the Applicant herein under the provisions of Article No.31 of the Second Respondent’s Articles of Association dated 11th February 1998 be referred for Arbitration on the terms set out in the said Article No.31.

7. That pending the determination of the said Arbitration, the Respondents be ordered or be compelled to continue to service and/or pay the Bank loans advanced to the Second Respondent and secured by the Applicant’s properties as follows;

- (i) Charge to Prime Bank Limited dated 6th March 2007 and secured by the Applicant’s property L.R. No. NAIROBI/BLOCK 110/791.*
- (ii) Charge to Standard Chartered Bank Kenya Limited and secured by the Applicant’s property L.R. NO.NAIROBI/BLOCK 73/386.*
- (iii) Further Charge to Standard Chartered Bank Kenya Limited secured by the Applicant’s property*

L.R. NO.NAIROBI/BLOCK 73/386.

(iv) *First Further Charge to Standard Chartered Bank Limited secured by the Applicant's property, L.R. NO.NAIROBI/BLOCK 73/386.*

(v) *Second Further Charge to Standard Chartered Bank Limited dated 5th July 2007 and secured by the Applicant's property L.R. NO.NAIROBI/BLOCK 73/386.*

It became apparent that differences arose between the plaintiff and the defendants in regard to the manner to which the independent joint audit in respect of accounts of the 2nd defendant was to be conducted. The understanding of the plaintiff was that the audit was to be comprehensive so as to determine the current account of the 2nd defendant, the value of the respective shares of the shareholders, the debts of the 2nd defendant and settlement of any amount owed to either the plaintiff or the 1st defendant. The defendants interpreted the consent order differently. They were of the view that the consent related only to the determination of the accounts of the 2nd defendant, the extent of the amount incurred by the plaintiff in form of non-business expenses, the determination of the value of the shares of the 2nd defendant and finally the determination of the extent of the loan advanced by the plaintiff to the 2nd defendant. Due to this impasse, the joint audit contemplated could not be conducted on account of differences in regard to the term of reference of the said auditors. There appeared also to be a disagreement in regard to the audit firm that was to conduct the independent audit. As a result of the disagreement, the dispute between the plaintiff and the defendants could not be expeditiously resolved as envisaged in the consent.

By an application dated 7th January 2009, made pursuant to section 7 of the Arbitration Act, 1995, the plaintiff sought the consolidation of its earlier application dated 29th October 2008 with the present application before the hearing of the substantive prayers in the two applications. He further sought an order of the court to the effect that pursuant to the consent order recorded on 8th July 2008, the court do confirm, adopt and order the auditor's terms of reference of the forensic audit to be conducted in these proceedings be as appears in and in terms of the schedule attached to the application. In the application dated 29th October 2008, the plaintiff had sought an order of the court for the appointment of Messrs. Geoffe & Associates, a firm of auditors, to carry out the forensic audit of the 2nd defendant in terms of the terms of reference proposed by the plaintiff. The two applications were supported by the annexed affidavits of the plaintiff. The applications were opposed by the defendants. Counsel of the parties to this suit appeared before the court and agreed by consent to present to the court written submissions in support of their clients' respective opposing cases. The counsel duly complied. The written submissions were filed.

I have carefully considered the said written submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The parties to this case have agreed by consent to have the dispute between them resolved by arbitration. The said dispute would be resolved by arbitration in accordance with Article 31 in the 2nd defendant's Articles of Association. The parties further agreed by consent in court for an independent joint audit of the 2nd defendant's accounts. The second limb of the consent entered in court on 8th July 2008 is not provided for by the articles of association of the 2nd defendant. In agreeing to have the accounts of the 2nd defendant independently audited, the parties to this suit recognized the fact that the dispute between them related to the determination of the value of the assets of the 2nd defendant and further the determination of what is due to the respective shareholders of the 2nd defendant.

As stated earlier in this ruling, it appears that the parties are not in agreement on the terms of reference for the conduct of the said audit of the accounts of the 2nd defendant. The said accounts are required to be availed to the arbitrator. It is apparent that before the arbitrator can hear and determine the dispute between the parties herein, it is imperative that the accounts of the 2nd defendant be audited as agreed by the parties. The parties herein appear to be at cross purposes on the purpose of the audit. The plaintiff proposes that the auditor's terms of reference annexed to the application be adopted by the court as the

terms of reference to be referred to the said auditors. On the other hand, the defendants propose the terms of reference to be in accordance with their proposal contained in a draft consent dated 27th November 2008.

Having perused the proposed terms of reference by the plaintiff and the defendants, I am persuaded that there is substantially no difference between the said proposed terms of reference. The only difference is in the detail. I therefore direct that the terms of reference proposed by the plaintiff, and which is dated 7th January 2009, and the terms of reference proposed by the defendants in their draft consent dated 27th November 2008 shall be consolidated. The two merged documents shall constitute the auditors' terms of reference. The auditors proposed by the parties, i.e. Messrs. Geoffe & Associates and Messrs Wokabi & Co are appointed auditors by the court for the purposes of the said forensic audit. The costs of the two auditors shall be borne by the 2nd defendant. Thereafter, if the parties shall still be of the view that there is a pending dispute between them, the same shall be referred for resolution by arbitration.

In making this ruling, this court is not determining the matters in dispute between the parties; rather, this court is giving effect to the parties' wishes to have the accounts of the 2nd defendant audited first before the dispute can be referred to arbitration for resolution. I shall make no orders as to costs.

It is so ordered.

DATED at NAIROBI this 27TH day of MAY 2009.

L. KIMARU

JUDGE