REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 32 OF 2008

ABIGAEL MWAMBURI

HELLEN K. KONGANI t/a ALAVENDER SCHOOL .....PLAINTIFFS

VERSUS

MARTIN NG'ANG'A NYABOKE MATUNDURA

CAROLINE NYABOKE MATUNDURA.....DEFENDANTS

R U L I N G

The application dated 11-9-08 by way of Chamber Summons under Rule 3 of the Arbitration Rules 1997, section 6 of the Arbitration Act No. 4 of 1995 and section 3A of the Civil Procedure Rules, seeks that this suit be struck out and/or in the alternative, the suit and the Chamber Summons dated 19-5-08 be stayed and the same be referred to Arbitration.

It is premised on grounds that:

(1) The suit is an abuse of court process.

(2) The basis of the suit are lease agreements containing an arbitral clause for dispute resolution as a condition precedent to either party's right of recourse to the courts of law.

(3) This Honourable Court, by dint of the said Arbitral Clause, lacks jurisdiction of the 1st instance to entertain this suit, and the Chamber Summons dated 19-5-08.

In the supporting affidavit sworn by the 2nd defendant, it is deponed that the parties entered into a tenancy agreement on 24-7-06 – which was for a ten year term.

Under Clause 7 of that agreement, any dispute arising out of the said agreement shall be referred to a single Arbitrator in accordance with the provisions of the Arbitration Act. She avers that Clause 7 of the said agreement bore a phrase commonly referred **Scott V Avery** clause which ousts the jurisdiction of this court, and all disputes and questions which shall arise between the parties, touching on the lease or the construction of application thereby or any clause or thing contained in the lease or to the rights or liabilities of any party under the lease, shall be referred to the decision of a single arbitrator to be appointed in accordance with provisions of the Arbitration Act or any Acts amending the same.

The application is opposed, and respondent in the grounds of opposition states that the application is bad in law, misconceived and is otherwise or an abuse of the court process.

(2) That from the pleadings on record, the applicants have breached and/or circumvented the arbitration clause and it cannot now found a defence to the action.

3) the respondents are right to bring this action by virtue of the express provisions of the Arbitration Act, 1995,

4) The application for stay of proceedings is, in the circumstances, brought in contravention of section 6 of the Arbitration Act, 1995.

That the application should be dismissed.

The party's counsel filed written submissions in respect of the application Mr. Mayaka, counsel for the applicants submitted that the suit ought to be struck off with costs or in the alternative it be stayed and be referred to the parties for arbitration as per the annexed lease agreement (CNM 1) containing the arbitral Clause.

He argued that by that clause; the parties freely submitted to any dispute resolution to be referred to an arbitrator within the provisions of the Arbitration Act.

Mr. Mayaka submitted that Clause 7 was based on the **Scott V Avery** clause emanating from the celebrated case of **Scott V Avery 25 LJ EX 308,** which ousts the jurisdiction of the court in the first instance if the pre-condition for which a party has recourse to, has not been exhausted before coming to court.

Mr. Mayaka's argument in the spirit of **Scott V Avery**, the applicants herein can either use the said clause 7 of the said agreement as a defence or apply for stay of proceedings in the matter in accordance with section 6 of the Arbitration Act. He cited the decision in **Kisumuwalla Oil Industries V Pan Asiatic Commodities PTE and AN C.A. (Msa) No. 100/95.**

It is further submitted that the defendants cannot be denied chance to rely on provisions of the Arbitration Act, on grounds that defendants applied for adjournments and the defendants changed their advocates on record on certain occasions and whether the circumstances of this matter and the operation/application of the arbitration agreement call for the ousting of the said lease agreement is moot.

It is argued that parties should be bound by the actions and/or agreements they put their mind at and if clause 7 is to be disregarded then that would be re-writing the agreement and that should not be the case unless its terms are incapable of performance or unconscionable.

In response, Mr. Mwakisha submitted that there was some disagreement concerning the status of the tenancy on the property and the defendants marched to the property and ejected the pupils therefrom, threw out the furniture and equipment, then locked up the premises. Mr. Mwakisha points out that this was the kind of misunderstanding contemplated by the parties in Clause 7 of the agreement, yet without paying heed to that and therefore referring the matter to an arbitrator, the defendants took matters into their own hands.

It is this action, and faced with such a state of affairs and the imminent danger of the premises being turned over to a third party, the plaintiffs rushed to court and filed these proceedings to restore the status quo ante the eviction and stop the defendants from putting in a new tenant to their prejudice.

Eventually, the parties appeared by Hon. Justice Ombija on 26th May 2008, when an order was recorded restoring applicants into the suit premises. After several aborted attempts to have the

outstanding issues on the plaintiff's application dated 19-5-08 proceed to hearing, Counsel for the defendant ultimately filed the present application seeking inter alia, stay of proceedings and reference of the matter to the arbitrator.

The respondent's counsel seeks to rely on the provision of section 6 of the Arbitration Act 1995, in urging the court to dismiss the application. Mr. Mwakisha submitted that the defendant/applicants having breached and/or circumvented the arbitration clause, then the same clause cannot found a defence to the action precipitated by their own transgressions. He argues that it is the applicant's action which set in motion the process that led to the plaintiff's resorting to court.

Drawing from the provisions of section 6, Mr. Mwakisha argues that the section has a rider which puts a caveat on the court's power to stay proceedings and refer a matter to arbitration where the court finds that:-

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

(b) that there is no dispute between the parties with regard to the matters agreed to be referred to arbitration

It is Mr. Mwakisha's contention that the plaintiff/respondent's case falls within these two caveats and the court should decline to refer the matter to arbitration. It is his argument that in the peculiar circumstances of this case, the arbitration clause would be inoperative or incapable of being performed posing the question that since plaintiff/respondents were already forcefully evicted, how are they to be reinstated through an arbitral process on an urgent basis.

Secondly, that the arbitration clause is inoperative as it has not state how such an arbitrator is to be appointed. He explains that ordinarily there would be clear modalities of how an arbitrator would be a appointed so that the aggrieved party can quickly approach him where matters take a turn for the worse and he draws an example from the Architects and Quantity Surveyors Act where legislation provides for an arbitrator in the form of an appointee of the Chairman of the Architectural Association of Kenya and argues that in the present instance, there are no guidelines as to the manner of appointment or the nature of the appointee.

Mr. Mwakisha also submits that there is nothing wrong with the plaintiff seeking injunctive relief because section 7(1) of the Act also provides that it is not incompatible with an arbitration agreement for party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

It is also argued that the application for stay is brought in contravention to section 6 of the Arbitration Act which requires that such application should be brought not later than the time when the party applying enters appearance or files any pleadings or takes any other step in the proceedings. In this instance the defendants entered appearance on 2-5-08 but did not simultaneously apply for stay as required by section 6 – instead there was a flurry of activities on eight occasions when between 26-5-08 when consent was entered effectively restoring the plaintiffs into the suit premises, to 11-9-08 when leave was granted to defendants to file and serve a replying affidavit. Mr. Mwakisha submits that by virtue of section 6 of the Act, the steps taken by defendants such entering appearance disentitles them to stay of the proceedings and reference is made to the decision in Kisumuwalla Oil Industries Ltd V Pan Asiatic Commodities PLC Ltd and Anor 995 – 1998 I EA 150.

The issue here is simply whether by virtue of clause 7 in the agreement entered into by the parties, the proceedings herein should be stayed or dismissed and the dispute be referred to an arbitrator. The tenancy agreement which is annexed as CNM 1 Clause 7 reads as follows;

"Any dispute hereunder shall be referred to single arbitrator in accordance with the provisions of the Arbitration Act and any statutory modification or re-enactment, thereof for the time being in force"

So that ab initio, this matter, ought to have been referred to an arbitrator, including whatever propelled the plaintiffs to evict the defendants – the dispute ought to have been handled by the single arbitrator before even the eviction. However this was not done and defendants then in bid to have some damage control rushed to court to obtain orders which would preserve their interests.

To that extent then it is the plaintiffs who were in breach of the agreement and which action then had a spiralling effect propelling respondents to come to court. The agreement recognized that parties would need to pay heed to provisions of the Arbitration Act which then brings into operation the provisions of Section 6 of the Arbitration Act 1995, concerning the steps taken by the defendants/applicants in this matter – I concur with Mr. Mwakisha that the applicants having breached and/or circumvented the arbitration clause (then attempted to repair it by entering into a consent to restore the plaintiff/respondent into the premises) cannot now found a defence on the same clause to the action precipitated by their own transgression. This application is indeed a contravention of section 6 as evident by the flurry of activities applicants were involved in once they entered appearance and their entire conduct disentitles them to use Clause 7 of the agreement as a fall back and the Scott V Avery Clause cannot be applied here. Indeed the Kisumuwalla Oil case cited by Mr. Mwakisha offers a very useful guide.

The application there has no merit and is dismissed with costs to the respondents.

Delivered, dated and signed this 16th day of June 2009 at Malindi.

H. A. Omondi

JUDGE

Mr. Mwakisha for respondent

Mr. Mayaka for applicant