REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 295 OF 2008

MOHAWK LIMITED …… PLAINTIFF

VERSUS

LEO INVESTMENTS LIMITED ……..…… DEFENDANT

RULING

Briefly stated, the dispute herein between plaintiff and the defendant involves a building contract made on the 15th November 2005 between the two parties. In that contract, the plaintiff was supposed to construct a food court facility for the defendant according to the terms and conditions stipulated in that building agreement. In the cause of executing the agreement, disputes arose that snowballed into the plaintiff filing the present suit together with an application which was dated 29th May 2008.

In that application, the plaintiff sought for interim orders of injunction against the defendant. That application came up for hearing before **Kihara J** on 11th June 2008 and the following consent order was recorded. By consent:-

"***1. That the Chamber Summons filed on the 29th May 2008 be and are hereby stood over for mention before Kihara Kariuki J. or any other judge on the 20th June, 2008 at 9.00 a.m. so as to enable the parties appoint an Arbitrator to determine the matters in dispute between them pursuant to Article 45 of the Agreement dated the 25th November 2005***

2. That the party's expert to record consent order in respect of this application or the suit generally".

It is discernable from the proceedings that the matter has taken several twists and turns. By an order made on 15th January 2009 by **Khaminwa J**., the court directed the Chairman or the Vice Chairman of the Architectural Association of Kenya to appoint arbitrator pursuant to clause 45 of the building agreement. It is also determinable from the material before this court that an arbitrator was appointed and the matter is before the arbitral tribunal as per clause 45 of the building agreement between the parties.

On 9th April 2009, the defendant filed the present Notice of Motion under order **XXXXIV of the Civil Procedure Rules** seeking for orders that there be a stay of the enforcement of the consent order recorded on 11th June 2008 and subsequent proceedings before the arbitrator. This application is premised on the grounds stipulated in the body of the application. It is also supported by the affidavit of **Mr. Omogeni**

counsel for the defendant as well as the affidavit of **Madatali Chatur** a director of the defendant sworn on 7th April 2009 and a further affidavit sworn on 11th June 2009.

It is the defendant/applicant's contention when the order was recorded on the 11th June 2009; counsel was of the mistaken belief that the parties would firstly make an attempt to settle the disputes between them, as per clause 45.5 of the building agreement. However the plaintiff has refused to co-operate so that a meeting could not be held to negotiate an out of court settlement. Secondly, a notice of dispute is supposed to be issued within 90 days before the arbitral proceedings could commence. Despite several requests by the defendant and counsel, the plaintiff has not yet issued a formal notice.

Moreover the defendant has duly made payments due to the plaintiff as per the Architects certificate. Thirdly the contract in dispute was for Ksh.12.400,000/- which was to be completed within 32 weeks, the period lapsed and no extension was given. Thus the plaintiff could not invoke clause 45 of the building agreement. The provisions of clause 45 have not been complied with; therefore the order of 11th June 2008 cannot be enforced in the manner that the plaintiff intends to enforce it.

In the claim lodged by the plaintiff with the arbitrator, it has been loaded with other claims and a third party has been included. According to counsel for the defendant, when he recorded the consent for the appointment of an arbitrator, he had not known the plaintiff would alter the terms of the contract and introduce additional parties. In further arguments counsel relied on the decision in the case of **Tropical Food Products International Limited vs. The Eastern and Southern African Trade and Development Bank (the PTA Bank)** to support the contention that the court can set aside a consent order based on the mistake of counsel. Also under section 7 of the Arbitration Act, the High Court can give an interim measure of protection for a matter which is before Arbitration Tribunal.

This application was opposed, counsel for the defendant relied on the replying affidavit by **Farooq Chowdhry** sworn on 28th April 2009. This application was faulted for not invoking the provisions of section 7 of the Arbitration Act. It was argued that counsel for the defendant cannot rely on that provision that was a mere afterthought. In any case the procedure which the defendant would have followed if it intended to bring this application under the ambit of section 7 of the Arbitration Act, the present application would have been by Chamber Summons and not by way of Notice of Motion.

As regards the consent order of 11th June 2008, noting turns on it because the parties merely expected to record consent in respect of the application that was before the Judge generally. The order in which the appointment of the arbitrator was made by Justice Khaminwa, and if the defendant is aggrieved by that order of the appointment by the arbitrator, that is the order to challenge. In any event under section 10 of the Arbitration Act the court is not supposed to interfere with matters governed by the Arbitration Act, except in accordance with the Act. Under section 7 of the Act, the court cannot stay arbitration proceedings.

The issues raised by the defendant regarding the inclusion of a third party, the additional contract and settlement of the payment due to the plaintiff are all defences which the plaintiff should forward to the arbitrator. The arbitrator has jurisdiction to determine whether he can deal with the matter, or apply to the court to determine whether he can deal with the matter as provided for under section 18 of the Arbitration Act.

On the merit of the application, Mr. Omogeni contends that when he recorded the consent he thought Article 45 of the building agreement would be complied with. This cannot have been a mistake which can render a consent order to be set aside, because a party cannot rely on his own mistake to discharge his own mistakes. This was a condition of his mind when he was recording the consent there was no mutual mistake and that was the holding in the **Trufoods** case. The defendant is merely procrastinating this matter in a bid to frustrate the arbitration proceedings which is demonstrated by the facts of the matter. The defendant has been difficult and refused to cooperate to get the appointment of the arbitrator and has been clogging the matter from proceeding.

The twin issues for determination in this application are whether this court should set aside the consent order of the 11th June 2008. Secondly, whether this court should stay the arbitral proceedings. The principles to bring to bear when dealing with an application on whether to set aside a consent order are set out in the oft cited case of the **Flora Wasike v Wamboko [1982-88] 1 KA 625** where the court of appeal accepted the principle that:-

"***Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them. ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of he court …, of if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."***

As I understand it, a consent order can only be set aside on the same grounds as those involved in setting aside a contract. That is, if there is fraud, mistake or collusion. In the case of Trufoods the court of appeal adopted a passage by Lord Dennis in the case of **Solle v Butcher [1949] 2 ALL ER 1107 at page 1119**.

"***Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v Lever Eros., Ltd (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty it the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity form the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other did not know of the mistake, but shared it"……***

I have carefully reviewed the contents of the consent order in this matter; I am not persuaded that Mr. Imogene's so called mistake can render the consent herein voidable. Firstly the reasons given that he expected parties to enter into negotiations and to record a settlement are not plausible because the records reveal several correspondences exchanged between his client and the plaintiff in which the plaintiff was seeking for a meeting. Secondly, both parties are represented by counsel who should have advised their clients and set up a meeting to discuss settlement. What is discernable from the records is the defendant adopting a very difficult stance and in my humble view it stood on the way of the appointment of the arbitrator or the matter proceeding in any way even before the court. This is further demonstrated in the filing of this application.

Thirdly, the issues raised regarding additional contract, inclusion of third parties and the allegations that the defendant had paid the contractual sum are all matters to be placed before the arbitrator. For those reasons I do not think Mr. Omogeni made a mistake in his mind, and even if he did, he cannot rely on his own mistake to nullify the consent, because the mistake was not mutual.

The other matter to consider is whether this application can be made before this court, when there are arbitration proceedings pending before the arbitrator under the Arbitration Act. The Arbitration Act clearly provides that the only time the jurisdiction of the High Court can be invoked is as provided for under the Arbitration Act. This application speaks for itself. It was not brought under section 7 of the Arbitration Act.

From the above analysis of the matter, the defendant's application lacks merit, and it is hereby dismissed with costs to the plaintiff/respondent.

RULING READ AND SIGNED AT NAIROBI THIS 13TH DAY OF JULY 2009.

M.K. KOOME

JUDGE