



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 126 of 2008

TRATTORIA LIMITED..... PLAINTIFF/APPLICANT

VERSUS

JOANINAH WANJIKU MAINA.....DEFENDANT/RESPONDENT

RULING

By chamber summons dated 04.04.08 stated to be brought under Order XXXIX rules 1,2, 3 and 9 of the Civil Procedure Rules; sections 3A and 59 of the Civil Procedure Act, Cap. 21; section 7 of the Arbitration Act, No.4 of 1995 and rule 2 of the Arbitration Rules 1997, the plaintiff applied, *inter alia*, for the following orders, namely, that:

‘3. Pending the hearing and determination of this application *inter partes*, an injunction do issue restraining the defendant, by herself, her servants or agents, or advocates or any of them or otherwise from interfering with the plaintiff’s quiet possession and enjoyment of the demised premises or otherwise howsoever interfering with the premises and/or the water supply to the premises occupied by the plaintiff’s restaurant, or terminating the plaintiff’s tenancy or evicting the plaintiff from the business premises on that piece of land known as land Reference Number 209/2362 Town House building (hereinafter demised premises).

4. Pending the reference of the dispute between the Plaintiff and the Defedant herein to arbitration and pending its final determination in accordance with the law, an injunction do issue restraining the Defendant, by herself, her servants or agents, or advocates or any of them or otherwise from interfering with the Plaintiff’s quiet possession and enjoyment of the demised premises or otherwise howsoever interfering with the premises and/or the water supply to the premises occupied by the Plaintiff’s restaurant, or terminating the Plaintiff’s tenancy or evicting the Plaintiff from the business premises on the demised premises.

5. Pending the hearing and determination of this application *inter partes* this Honourable Court be pleased to order the Defendant to pay forthwith any and all outstanding water bills owed to Nairobi City Water & Sewerage Company Limited to ensure the free and uninterrupted passage and supply of water to the demised premises.

6. Pending the reference of the dispute between the Plaintiff and the Defendant herein to arbitration and pending its final determination in accordance with the law, this Honourable Court be pleased to order the Defendant to pay forthwith any and all outstanding water bills owed to Nairobi City Water and Sewerage Company Limited to ensure the free and uninterrupted passage and supply of water to the demised premises.

7. Pending the reference of the dispute between the Plaintiff and the Defendant herein to arbitration and pending its final determination in accordance with the law, this Honourable Court be pleased to order the Defendant to accept rent paid to her by the Plaintiff in terms of the Lease, or in the alternative, this Honourable Court be pleased to order that the rent be paid to Court on the due dates.

8. Costs of this application be provided for,'

The grounds upon which the application is based are that:-

- i. There is presently subsisting, a registered lawful and valid Lease dated 11.11.05 in favour of the Plaintiff against the Defendant's premises L.R. No.209/2362 Town House, Nairobi.
- ii. Under the terms of the said Lease all questions in dispute and claims not mutually settled and agreed between the parties shall be referred to arbitration by a single arbitrator.
- iii. The Plaintiff has received from the Defendant an illegal notice of termination of lease vide a letter of 14.03.08 giving the Plaintiff three months notice effective 01.04.08.
- iv. The Defendant has threatened to and has on several occasions caused the disconnection or otherwise interfered with the supply of water from Nairobi City Water & Sewerage Company Limited to the Plaintiff's premises in contravention of the said Lease.
- v. There is no other source of water to the Plaintiff's premises.
- vi. The Defendant through Gatma Investments Limited has been frustrating the Plaintiff 'by refusing accept and receipt of Plaintiff's cheques for the payment of periodic rent due and payable to the Defendant.'
- vii. The Defendant refuses to maintain the sewer as required by the terms of the registered Lease dated 11.11.05 or to co-operate or offer any assistance in maintaining the sewer notwithstanding requests by the Plaintiff to do so.
- viii. Unless the Defendant is restrained by the Honourable Court, the Plaintiff will suffer irreparable loss of business and damage and the use and enjoyment of his business premises will be severely curtailed or stopped altogether.
- ix. The Defendant has in the past unilaterally and illegally attempted to vary the terms of the Registered Lease dated 11.11.05.

On 15.04.08 the Defendant/Respondent filed a replying affidavit sworn on 15.04.08 in response and opposition to the Plaintiffs/Applicant's application and its supporting documents.

At the hearing of the application, the Plaintiff/Applicant was represented by learned counsel M/S M. Nyaoga, P. Murgor and P. K. Kiprop while the Defendant/Respondent was represented by learned counsel, Messrs P.C. Njuguna and J.W.Kahari.

Counsel for both parties informed the Court that they had filed skeleton arguments in support of their respective clients' cases.

I have given due consideration to the application now before Court, the opposition thereto and the grounds upon which each is based.

The suit filed on 04.04.08 on which the application is founded has its origins in a 21 – day notice dated 07.09.07 by the defendant as new owner of the suit premises. The essence of the notice was that the Lease of the said premises entered into between the plaintiff and the former owners of the premises, M/S Kenya National Assurance Company (2001) Ltd should be re-negotiated, failing which the defendant

would terminate the plaintiff's tenancy. Following certain discussions, the 21 – day notice for re-negotiation of the Lease was suspended. However, on 14.03.08 the Defendant issued a 3 – month notice of intention to terminate the Lease. As a result of the 3 – month termination notice, suit was filed by the plaintiff on 04.04.08. Concurrently with the suit, the Plaintiff filed the chamber summons application now under consideration. On 15.04.08 the Defendant filed a replying affidavit sworn on the same date in response and opposition to the application. On 16.04.08 the defendant entered appearance and filed statement of defence and counter-claim.

The Lease being challenged by the Defendant provides for referral to arbitration under Clause 33 thereof which states:

'33. Save as may hereinbefore be otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration by a single arbitrator (assisted by such assessors or professional advisors as the arbitrator shall deem necessary to appoint) in like manner as provided by paragraphs 1 and 2 of the Second Schedule hereto for a Valuer and every award made under this Clause shall be expressed to be made under the Arbitration Act (Cap.49) or other Act or Acts for the time being in force in Kenya in relation to arbitration.'

Counsel for the defendant/respondent contended that there is no prayer in the plaint seeking referral to arbitration. This is not correct as prayer (g) in the plaint seeks a mandatory injunction directing and compelling the defendant to refer any or all alleged disputes or claims regarding the terms of the registered Lease dated 11.11.05 to arbitration.

Defendant's/respondent's counsel also contended that by virtue of section 6 of the Arbitration Act, 1995, the plaintiff/applicant should have applied for stay of the proceedings before filing any pleadings. Defendant's/respondent's counsel said that the plaintiff/applicant never applied in his chamber summons application for stay of proceedings and that this is fatal. He (defendant's/respondent's counsel) sought to rely for this submission on Court of Appeal Civil Appeal No.253 of 2003, Charles Njogu Lofty -vs- Bedouin Enterprises Ltd. That appeal arose from High Court Civil Case No.1756 of 2000 between Bedouin Enterprises Ltd -vs- Charles Njogu Lofty and Joseph Mungai Gikonyo t/a Garam Investments where the High Court (Githinji, J – as he then was) considered the meaning of section 6 (1) of the Arbitration Act, 1995. That section provides:

'6. (1) 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 pleading or takes any other step in the proceedings, stay 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; or
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.'

The aforesaid section 6(1) was held by the High Court in Charles Njogu Lofty's case to mean that the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance – pointing out that the object of section 6 (1) of the Arbitration Act, 1995 seems, *inter alia*, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings. The Court of Appeal endorsed that interpretation in Civil Appeal No. 253 of 2003 alluded to above. In the appeal, the Court of Appeal elaborated that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time or taking any step in the proceedings.

The act of entering appearance in court proceedings applies to a Defendant. In such a scenario, the

Defendant would be expected, latest by the time of entering appearance, also to apply for stay of the proceedings in which he has entered appearance and seek referral of the dispute to arbitration. In the present case, the Defendant/Respondent does not want any referral to arbitration. She maintains that the arbitration clause is inoperative. It is the Plaintiff/Applicant company which wants referral to arbitration. Defendant's/respondent's counsel submitted that the Plaintiff/Applicant should have applied for stay of 'proceedings' before filing any pleadings. Which 'proceedings' would be Plaintiff/Applicant have applied to be stayed without filing the present pleadings first?

I note from prayers 4, 6 and 7 in the chamber summons application dated 04.04.08 that the Plaintiff/Applicant seeks interim injunction pending reference of the dispute to arbitration but there is in fact no actual prayer, in the application, for referral to arbitration. Defendant's/Respondent's criticism of the omission is valid. I note, however, that the plaint on which the interlocutory application now under consideration is based that it (plaint) seeks vide prayer (g) a mandatory injunction directing and compelling the Defendant to refer any or all alleged disputes or claims regarding the terms of the registered Lease dated 11.11.05 to arbitration. As already noted, the present application was filed concurrently with the plaint. The application was thus filed early enough. I hold that the omission, in the application, of a prayer for referral to arbitration is a curable procedural irregularity not fatal to the application.

I find that there is a clear dispute between the parties on weighty issues pertaining to the Lease dated 11.11.05. Clause 33 of the said Lease provides for mandatory referral of such dispute to arbitration. The Plaintiff/Applicant company omitted to include in its application an actual prayer for referral of the dispute to arbitration. As I have found the omission to be a curable procedural irregularity, I invoke the inherent powers of the Court under section 3A of the Civil Procedure Act and order that the dispute between the parties be referred to arbitration in accordance with clause 33 in the Lease dated 11.11.05.

The upshot is that the chamber summons application dated 04.04.08 succeeds and prayers 4, 6 and 7 thereof are granted as prayed. Prayers 3 and 5 are also granted pending the outcome of the arbitration proceedings subject matter of prayers 4, 6 and 7.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 15th day of December, 2008.

B.P. KUBO

JUDGE