REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 440 of 2005

TREADSETTERS TYRES LTD……..……..PLAINTIFF

VERSUS

ELITE EARTH MOVERS LTD……..……DEFENDANT

R U L I N G

The application is a notice of motion dated 26th October, 2005 brought under Order XXXV, rule 1(1) (a) (2) and (3) of the Civil Procedure Rules. It seeks summary judgment against the Defendant as prayed in the plaint and costs of the application.

The application is supported by the affidavit dated 26th October, 2005 sworn by MEHUL GANDHI and a supplementary affidavit dated 13th April, 2006 sworn by JANE BAIYU.

The grounds of the application are that the Plaintiff's claim against the Defendant is liquidated. The prayers in the plaint are as follows:-

"***REASONS WHEREFORE the Plaintiff prays for judgment against the Defendant as follows:-***

a) KShs.1,824,628/47

b) Interest on the above at 17%

c) Costs of the suit

d) Any other relief the court may deem just to grant."

The other ground raised is that the Defendant has not raised any triable issues in its defence. There are 10 paragraphs in the filed defence dated 22nd August, 2005 and filed on the same day. In paragraphs 1, 2, 4, 5 , 6 and 8 the Defendant denies the averments in the plaint. Paragraph 7 of the defence raises an issue that the cheques issued to the Plaintiff and referred to in paragraph 4 of the plaint were for a distinct transaction which does not relate to the one in issue in the plaint.

In paragraph 9 the Defendant avers that no demand was made to it to pay the alleged debt.

In paragraph 10, the Defendant admits paragraph 8 and 9 the plaint which is an admission that there is no case pending between the parties and that this court has jurisdiction to try the suit.

The Defendant's Advocate did not argue the application on behalf of its client. However, the Defendant filed a replying affidavit basically reiterating the defence filed by the Defendant. The Defendant also filed grounds of opposition.

Dealing with the grounds of opposition first, two issue are raised:-

1. That there is a provision of referral to arbitration concerning any disputes relating to matters herein between the parties.

2. That therefore the suit herein should be stayed pending arbitration proceedings.

Mr. Gachoka for the Applicant submitted that it is trite that a party who wishes to pursue an arbitration clause should file for stay of proceedings before filing a defence. He relies on two cases **KISUMU WALLA OIL INDUSTRY LTD** –vs- **PAN ASIATIC COMMODITIES PTE LTD & ANOTHER CA NO. 100 OF 1995** and **GEORGE KANYI KIMONDO & ANOTHER** –vs- **UAP PROVINCIAL INSURANCE LTD MILIMANI HCCC NO. 786 OF 2001**.

The effect of both judgments cited by the Applicant's Advocate are that a defendant who files a defence in a matter dependent on an agreement providing for an arbitration clause waives his right to ask for arbitration. In the instant case, the Defendant filed his defence after entering appearance in the case. 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 appearance or files any pleadings 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 Court of Appeal in **CHARLES NJOGU LOFTY** –vs- **BEDOUIN ENTERPRISES LTD CA NO. 253 OF 2003**, **OMOLO, WAKI AND DEVERELL, JJA** observed concerning Section 6(1) of the Arbitration Act, 1995:-

"**On the plain reading of that section, before the court can consider the issues raised in paragraphs (a) and (b) of Section 6(1) of the Act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court:-**

'……not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings.'

In the Civil Case No. 1756 of 2000 between BEDOUIN ENTERPRISES LTD. V. CHARLES NJOGU LOFTY AND JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS which constituted another aspect of the present dispute now before us, GITHINJI, J. as he then was, had rejected the argument that an application for reference to arbitration can be made at three stages, namely at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The learned Judge had there held that:-

'In my view, section 6(1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act, 1995, was, inter alia*, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.*

Section 6(1) of the Arbitration Act, Cap. 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed'

We respectfully agree with these views so that even if the conditions are 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 of if no appearance is entered, at the time of filing any pleading or at the tie of taking any step in the proceedings."

The Defendant herein filed a defence after entering appearance in the instant case. Consequently he waived his right to rely on the arbitration clause as he took a step in the proceedings by filling these two documents. The Respondent/Defendant cannot therefore raise the arbitration clause at this stage of the proceedings as he is estopped from relying or invoking it. The grounds of opposition have therefore no merit and are dismissed.

There is no dispute that the Plaintiff's claim in this suit is for a liquidated sum as pleaded in the plaint. The Applicant has annexed proof that the parties entered into an agreement dated 9th January, 2006 and signed by the two parties. It is annexure "M.G.2" in the affidavit in support of this application. It is dully signed by the authorized representatives of the Plaintiff and Defendants company and is witnessed by two other persons also named. The agreement is comprehensive and speaks for itself.

It is the Applicant's contention that as agreed the Applicant gave tyre management services to the Defendant following which invoices were raised. The invoices are annexure "M.G.I" and are four in number. They bear the Defendant Company's stamp as an acknowledgement of receipt. The first invoice is for KShs.777,200/=, the second for KShs.22,535/32, the fourth one for KShs.660,620/=.

It is the Applicant's contention that the Defendant defaulted in paying the sums claimed being the sum outstanding as stated in the plaint. It is the Applicant's contention that in attempts to settle the outstanding sum, the Defendant issued 3 cheques annexure 'M.G.3". These were dishonored on presentation to the bank.

The Defendant has averred in his defence that the three cheques related to other distinct transaction which were frustrated and have no relationship to the present claim. The particulars of the alleged distinct transaction have not been pleaded nor were they particularized in the Defendant's replying affidavit.

The issue may have been taken into consideration but for the other developments in the matter as set out in the supplementary affidavit sworn by JANE BAIYU the Finance Manager of the Defendant's Company.

I have perused the said affidavit. At paragraph 4 and 5, the deponent avers that the instant application was adjourned on 28th November, 2005 to enable the parties herein to pursue out of court settlement. That subsequently the Respondent issued two cheques for KShs.200,000/= which the Plaintiff received. They are annexure "J.B.1". The deponent avers further at paragraph 7 that the first of the cheques No. 069962 was dishonoured by the bank as per the letter from the bank dated 29th March, 2006 marked as annexure "J.B.2". The annexure has the dishonored cheque with remarks:-

"***effects not cleared".***

At paragraph 7 of the replying affidavit a Director of the Defendant Company avers:-

"That the position of the Respondent is that the cheques exhibited were given for a consideration which failed and therefore it was not necessary to make any payment."

I have considered the two rival averments in the Applicant's supporting and supplementary affidavit and the Respondent's replying affidavit. I find that the two cheques annexure "J.B.1" in supplementary affidavit of Jane Baiyu were sent by a covering letter from the Respondent's Advocates Mwaniki Gachoka & Company Advocates marked same exhibit. The letter is open and not on a 'without prejudice' basis. It is dated February 21st, 2006. It forwards both cheques to the Applicant's Advocate. The letter reads in part:-

"***We send you herewith two cheques numbers 069962 and 069963 to be banked on their respective due dates.***

Note that our client view of appropriate consent would be payment of the monies due less interest of 17%."

I find that the letter itself was an admission by the Respondent's known Agent that the Respondent had a debt owing to the Applicant. The fact the letter forwarded cheques as part payment and negotiated to pay money due less interest is proof that the debt is acknowledged by the Respondent. The Respondent averment in the replying affidavit and the statement of defence that nothing is due to the Plaintiff and further that the cheques were for payment of a transaction that was frustrated cannot be true.

I find that the fact the cheques were issued long after the suit herein was filed and long after the instant application was set for hearing further confirms the position I have taken that the Respondent averments concerning the two cheques is untrue.

I do find that the Respondent has no ***prima facie bona fide*** defence which would entitle it to defend the suit. I am satisfied that the Respondent is truly indebted to the Applicant herein. I find this a clear case in which summary judgment can be entered.

I am satisfied further that demand letters were sent to the Defendant before the suit was filed as evidenced by the two demand letters marked 'M.G.4'. Mr. Gachoka has in his submissions admitted that the Defendant has paid part of the debt to the tune of KShs.400,000/= and that the Applicant is ready to give the Defendant credit for said sum.

Having come to the conclusions I have in this ruling I find that the prayers sought in the notice of motion dated 26th October 2005 are merited.

I allow the application by entering summary judgment for the Plaintiff against the Defendant as prayed in the plaint with costs of the application.

Dated this 8th day of June, 2007 at Nairobi.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of :-

Mr. Ndirangu for Mr. Gachoke for Applicant.

N/A for Respondent.

LESIIT, J.

JUDGE