



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1295 of 2005

PETER MWEMA KAHORO1ST PLAINTIFF

SAMUEL KUNGU2ND PLAINTIFF

(Suing as the Administrators of the Estate of JOSEPH KAHORO (DECEASED))

VERSUS

BENSON MAINA GITHETHUKI.....DEFENDANT

R U L I N G

Under and by virtue of an agreement dated the 13th August 1981 the Defendant agreed to sell to Joseph Kahoro (“the Deceased” having died in 1985) an unsurveyed plot then known as Plot No.8/X New Market, Nanyuki and now known as L.R. No.2787/967, Nanyuki (“the suit property”) at the price or sum of Kshs.50,000/= which was paid in full and receipt thereof acknowledged by the Defendant on the 20th August 1981.

The Defendant failed despite demand to transfer the suit property to the Plaintiffs in their capacity as the personal representatives of the deceased and the Plaintiffs accordingly instituted this suit on the 27th October 2005 seeking, *inter alia*, the following Orders, namely —

- (a) An order compelling the Defendant to transfer the suit property to the Plaintiffs.**
- (b) A permanent injunction to restrain the Defendant from interfering with the Plaintiffs’ ownership, use and/or possession of the suit property.**

Simultaneously with the filing of the Plaint, the Plaintiffs also took out a Chamber Summons dated the 19th October, 2005 under Order 39 rules 1(a) and 7 of the Civil Procedure Rules and Sections 3A and 63(c) and (e) of the Civil Procedure Act in which the Plaintiffs sought to restrain the Defendant from transferring or otherwise dealing with the suit property pending the hearing and determination of the

application and this suit.

Interim Orders were granted, *ex parte*, on the 28th October 2005 pending the hearing of the application which orders have since been extended and remain in force to date.

Before the hearing of the application, *inter partes*, the Defendant took the following steps in these proceedings —

- (a) **He entered appearance on the 7th November 2005.**
- (b) **He filed Grounds of Opposition to the application also on the 7th November 2005; and**
- (c) **He took out a Chamber Summons under Order 6 rule 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which the Defendant seeks orders to strike out this suit on grounds that it discloses no cause of action and further that pending the hearing and final determination of the application these proceedings should be stayed.**

When both applications respectively dated the 27th October and 5th November 2005 came up for hearing before me on the 16th February 2006, the parties agreed that I should first hear and rule on the Defendant's said application dated the 5th November 2005.

In his submissions, Mr. Mwangi Kariuki, learned counsel for the Defendant, relying on his own affidavit sworn on the 5th November 2005 in support of the application, opted to abandon all the other grounds stated in the application other than ground (a), namely that

“The court is not seized of jurisdiction to try the matter”.

He argued that the Plaintiffs were bound by the provision in the Agreement dated the 13th August 1981 to refer any and all matters in difference arising thereunder to a single arbitrator to be nominated by the parties thereto and in default of agreement by the Chairman of the Law Society of Kenya as is expressly provided thereunder. Mr. Kariuki stated that as the Defendant had failed to invoke fully the arbitration clause in the said Agreement, this court would have no jurisdiction to entertain this suit nor any application herein as in any event, an application for any interim measures of protection of the Defendant's rights ought to have been brought under Section 7 of the Arbitration Act [No.4 of 1995] which the Plaintiffs had failed to do.

Miss Muchiri, learned counsel for the Defendant, in her reply relied on the Replying Affidavit of Munyalo Nthuli, Esq. Advocate, filed on the 14th February 2006. As this Affidavit is not dated, learned counsel cannot rely thereon as it is incompetent and I accordingly order that it be and is hereby struck out and expunged from the court record.

The foregoing notwithstanding, Miss Muchiri submitted that the arbitration clause in the Agreement dated the 13th August 1981 does not in any way limit or oust the jurisdiction of this court to entertain or grant the reliefs sought in the Plaint. She cited the case of Rawal –v- The Mombasa Hardware Ltd. [1968] E.A. 392 in this regard.

I have considered the submissions of both learned counsel in light of the law and in particular the provision in Section 6 of the Arbitration Act which reads as follows —

“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 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.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made.”

It is clear from the foregoing that an application by the Defendant ought to have been brought under Section 6(1) of the Arbitration Act, 1995 and that to be successful, such application ought only to have sought orders —

(a) to stay these proceedings; and

(b) to refer the parties to arbitration unless the court finds otherwise as is stated in the Section.

Further, and in order to succeed on the application, the Defendant ought not, in the words of the Section, to have taken **“any other steps in the proceedings.”**

In the Application before me dated the 5th November 2005, the Defendant does not only seek to strike out the suit, which is beyond the ambit of Section 6 of the Arbitration Act, 1995 aforesaid, but has also failed to move the court to refer the parties to arbitration pursuant to the 13th August 1981 Agreement.

In addition, and by filing the Grounds of Opposition dated the 5th November 2005, the Defendant has also actively taken other step in the proceedings and thereby waived his right to invoke and rely on the Arbitration Clause in the said Agreement.

The result is that the Chamber Summons application dated the 5th November 2005 fails and it is ordered that the same be and is hereby dismissed with costs to the Plaintiffs/Respondents.

Dated and delivered at Nairobi this 24 day of February 2006.

P. Kihara Kariuki

Judge