REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 307 OF 1999

SECA AFRICA LIMITED…….PLAINTIFF/RESPONDENT

VERSUS

KIRLOSKAR KENYA LIMITED…...1ST DEFENDANT/APPLICANT

SAMUEL MUTUNGA MANSI…..…….....…….2ND DEFENDANT

PRINCIPAL REGISTRAR OF TITLES…...……3RD DEFENDANT

COMMISSIONER OF LANDS……..……..4TH DEFENDANT

RULING

The first Defendant's application by Chamber Summons dated 17th September, 2004 was filed on 20th September, 2004. It was brought under Order XLV, rules 1, 2, 3 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The application carried the following prayers:

(a) that the matter be referred to arbitration for hearing and final determination.

(b) that the Court do appoint Mr. Ken Fraser and Mr. Jimmy Rayani to act as arbitrators;

(c) that the Court do fix the time by which the award is to have been made;

(d) that the proceedings herein be stayed until the final determination of the arbitration;

(e) that the costs of this application be provided for.

As supporting grounds, it is stated that there is a binding agreement between the parties, to refer this matter to arbitration, and the same is embodied in a consent order filed in Court on 15th April, 2002. It is also stated that the parties have agreed to appoint ***Mr. Ken Fraser*** and ***Mr. Jimmy Rayani*** as arbitrators herein and both have confirmed that they are able and willing to act as arbitrators.

The evidentiary basis of the application is found in the affidavit of ***Joseph Mugwe Gitau*** sworn on 20th September, 2004. The content of this affidavit may, in substance, be set out as follows:

(i) that, the deponent, as the General Manager of the first Defendant, is familiar with the instant matter;

(ii) that, on or about 16th February, 1999 the Plaintiff had filed suit against the Defendants herein, seeking an order that the Applicant had acquired no valid title to the suit property, and that the same be vested in the Plaintiff;

(iii) that, the Plaintiff's case is founded on alleged fraud on the part of the second Defendant herein;

(iv) that, the said second Defendant has never entered appearance or filed a defence to the Plaintiff's claim in its Plaint dated 12th February, 1999;

(v) that, the first Defendant was a bona fide purchaser for value, without notice of any defect in the title of the vendor;

(vi) that, the deponent believes information received from his advocate on record, that sometime in March, 2001 he had undertaken discussions with the Plaintiff's advocates, M/s. Sobhag H. Shah & V. Goswami Advocates, for solution of the present dispute through arbitration;

(vii) that, during the said discussions between advocates, the Plaintiff's advocate nominated ***Mr. Ken Fraser,*** and the first Defendant's advocate nominated Mr. ***Jimmy Rayani*** to act as arbitrators, and the two proposed arbitrators have expressed their willingness to act as such;

(viii) that, the said agreement to refer the dispute to arbitration was embodied in a consent filed in Court on 15th April, 2002.

On 14th October, 2004 ***Jatish M. Patel***, a director of the Plaintiff company swore a replying affidavit in which he expresses his belief that the instant application is *"mischievous and brought in bad faith with the sole purpose of frustrating the hearing of the Plaintiff's application dated 17th June, 2003 seeking to strike out the first Defendant's defence."* The deponent avers that sometime in October, 2003 the Plaintiff's advocates had indicated to the first Defendant's advocates that the Plaintiff "*was not interested in* [an] *arbitration of the dispute between it and the Defendants."* The deponent states that the Plaintiff *"has not agreed to … bringing the first Defendant's application and does not consent to the dispute being referred to arbitration*."

There were thus two applications competing for first hearing – the Plaintiff's Chamber Summons of 17th June, 2003 and the first Defendant's Chamber Summons of 17th September, 2004. After some deliberation on the order of hearing, ***Mr. Wasuna*** for the Plaintiff generously agreed to the first Defendant's application taking priority; and ***Mr. Shah*** for the first Defendant then proceeded to present his client's application.

The main plank in the submissions of learned counsel for the first Defendant/Applicant, ***Mr. Shah***, was that there was a binding agreement in place between it and the Plaintiff/Respondent, to refer the matter to arbitration for final determination, and from this agreement the Plaintiff should not be allowed to resile. This agreement, counsel submitted was filed in Court on 15th April, 2002.

There is on file a consent letter written on the letterhead of M/s. Sobhag H. Shah & V. Goswami Advocates, dated 13th March, 2002; addressed to the Deputy Registrar, High Court, and filed on 15th April, 2002. It is signed for three different legal offices: M/s. Sobhag H. Shah & V. Goswami, Advocates for the Plaintiff; M/s. Kapila Anjarwalla & Khanna, Advocates for the first Defendant; and the Office of the Attorney-General, for the 3rd and 4th Defendants. The content of this letter is as follows:

"We shall be grateful if you will record the following CONSENT:

'BY CONSENT the 3rd and 4th Defendants will not take any active part in the arbitration proceedings between the Plaintiff and the first Defendant but will abide by the award of the arbitrators and perform all acts that they are therein directed to do.' …"

Counsel submitted that on the basis of the consent, appropriate arrangements were made with the two arbitrators who duly gave their consent to serve as arbitrators – namely ***Mr. Fraser*** and ***Mr. Rayani.*** Learned counsel, ***Mr. Shah*** submitted that the content of the consent aforementioned conveys the clear intention on the part of the parties, that the matter be referred to arbitration; and he urged further, that *"a consent order is binding on all the parties who have executed the same."* ***Mr. Shah*** noted further that no application at all had been made to set aside the consent order. Counsel submitted that as *no further consent had been made to set aside the initial agreement as embodied in the Court's consent order, the consent could only be set aside on the ground of fraud.* In the circumstances, learned counsel submitted, there was clearly a binding agreement to refer the matter to arbitration. ***Mr. Shah*** submitted that where, under Order XLV, rule 3(1) an application was made by parties for a matter to be referred to arbitration, the Court shall by order refer the matter in question to arbitration. In the circumstances, it was submitted, the Court did not have a discretion in the matter.

Mr. Meso for the Office of the Attorney-General, stated that he had no objection to the application, and that the Honourable the Attorney-General was ready to abide by the decision of the Court.

Learned counsel for the Plaintiff, ***Mr. Wasuna*** submitted that under the Arbitration Act (Cap. 49) parties are bound to take their dispute to arbitration if either they do have a contract requiring arbitration, or they are parties to a contract which makes it mandatory that a dispute arising be referred to arbitration. If there is such a contract, counsel submitted, then disputes will go to arbitration; so that if one of the parties then files action in Court, the other party will be entitled to stay those proceedings. However, counsel submitted, even where there is such a contract the parties are entitled to waive the arbitration undertaking. Counsel submitted that there has to be an agreement, as a basis for the parties being bound to take their dispute to arbitration; but on the other hand there is no need for an agreement, under Order XLV, as a basis for a hearing before arbitrators; hence consent, and its binding effect, has no role under Order XLV. Under Order XLV, counsel submitted, the parties have to apply to the Court to obtain its Orders, as the obligatory basis of the arbitral arrangement; and the application to the Court has to be by both parties; if one party resiles, then the Court can no longer refer the matter to arbitration. ***Mr. Wasuna*** submitted that the jurisdiction to refer a matter to arbitration under Order XLV is only required by the Court on a case-by-case basis.

Counsel then considered the content of the consent letter of 13th March, 2002. He submitted that the letter, while signed by all the parties, essentially emanated from initiatives on the part of the Plaintiff and the first Defendant; and this led counsel to the conclusion that, unlike in the contemplation of Order XLV, rule 1, *there was in existence no definite matter to be referred to arbitration.* Counsel cited in support of his client's case paragraph 8 of ***Jatish M. Patel's*** replying affidavit of 14th October, 2004 in which he depones:

> "THAT, I am informed by the Plaintiff's advocates on record and verily believe the information to be true that by their letter of 8th October, 2003 they replied to the 1st Defendant's advocates informing them that the Plaintiff was not interested in [an] arbitration of the dispute."

Mr. Shah in response submitted that the fact of filing the consent in Court had created a commitment to take the dispute to arbitration; and unless the Court order was set aside, the commitment remained. Counsel further submitted that it was well settled that an advocate represents his clients fully in Court, and any undertaking or consent he makes in this regard, has a binding effect on the client-and therefore the Plaintiff as a client could not resile from the arbitration arrangement which had been adopted by counsel in the consent order. ***Mr. Shah*** submitted that the subject-matter for referral to arbitration was by no means unclear or indefinite: it was the entire basis and subject of the suit.

From the depositions and from the submissions of counsel, it is clear that the solution to the issues in dispute rests within the simple question, *what was the effect, in law, of the consent embodied in the letter of 13th March, 2002 addressed to the Deputy Registrar, High Court, signed by counsel on behalf of all the parties, filed in Court on 15th April, 2002?*

Counsel for the Plaintiff is of the view that the said letter bears hardly any legal significance; and to support this position he seeks to draw a distinction between Order XLV on the one hand and the Arbitration Act (Cap. 49) on the other, in the manner in which they create a jurisdiction for the Court to transfer a matter from its direct jurisdiction to the forum of arbitration. While, from a purely technical standpoint ***Mr. Wasuna's*** argument has much to commend it, its full adoption would, I think, tend to defeat the ends of justice which I believe to le closer to the line of argument adopted by ***Mr. Shah.*** Learned counsel for the first Defendant has produced incontrovertible evidence of a consensual position arrived at, on behalf of all the parties, by counsel: that the fundamental question forming the gravamen of the contest be submitted to arbitration; and for this purpose complete arrangements had been made for an arbitration hearing. This consent was formally adopted by the Court, under the hand of the Deputy Registrar, on 25th April, 2002.

While it is quite true that the substantive issues in the dispute are eminently cast for effective hearing and disposal by the regular judicial process, it serves the goal of better use of Court time if, where the parties think arbitration will serve them more fittingly or more expeditiously, this Court accords respect to their preferences and passes on the essential decision-making task to an agreed team of arbitrators.

Secondly, the flipside of the established principle that Courts do not act in vain, is that *they should allow non-judicial procedures of conflict settlement to take effect where the parties express themselves to be likely to be better served by these*.

Thirdly, and perhaps even more important, the *judicial system must accord respect and sanctity to the formally-expressed agreements made between parties.* It would be a breach of a cardinal aspect of civilisation-founded-on-legality, if parties were left entirely free to make solemn agreements and then blithely resile from the same. I am not convinced that the Plaintiff was not in this case party to a quite solemn agreement to have the dispute in question resolved through arbitration; and I will now give fulfilment to the laudable principle of *sanctity of agreements*, and hold that the dispute before me should be resolved by arbitration. In this respect the line becomes very thin, between the provisions of Order XLV of the Civil Procedure Rules, regarding arbitration, and the provisions of the Arbitration Act (Cap. 49).

I will, therefore, make the following Orders:

1. That, this matter be and is hereby referred to arbitration for hearing and determination.

2. That, ***Mr. Ken Fraser*** and ***Mr. Jimmy Rayani*** be and are hereby appointed to act as arbitrators in the instant matter.

3. That, the said ***Mr. Ken Fraser*** and ***Mr. Jimmy Rayani*** as arbitrators shall hear and determine the dispute herein within 60 days of the date hereof.

4. That, the proceedings herein be and are hereby stayed pending compliance with the substantive orders herein.

5. That, this matter shall be listed for mention on Tuesday, 26th April, 2005.

6. That, the costs of the instant application shall be in the cause.

DATED and DELIVERED at Nairobi this 28th day of January, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the first Defendant/Applicant: Mr. Shah, instructed by M/s. A.R. Kapila & Co. Advocates

For the Plaintiff/Respondent: Mr. Wasuna, instructed by M/s. Wasuna & Co. Advocates.

For the 3rd & 4th Defendants: Mr. Meso, represented by the Hon. the Attorney-General

2nd Defendant absent and unrepresented