



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL SUIT NO. 37 OF 2005

MEHTA ELECTRICAL LIMITED1ST PLAINTIFF
TRIPPLE NINE ASSOCATES LIMITED2ND PLAINTIFF
ELECTRO WATTS LIMITED3RD PLAINTIFF
PETE AVIATION & ELECTRONICS LIMITED4TH PLAINTIFF
EZEMAK REFRIGERATION & CONTRACTORS LTD.....5TH PLAINTIFF

VERSUS

N.K. BROTHERS LIMITED1ST DEFENDANT
NATIONAL HOSPITAL INSURANCE FUND.....2ND DEFENDANT

RULING

The plaintiff has raised a preliminary objection to the 2nd defendant chamber summons dated 10th march 2005 brought under section 6 of the Arbitration Act Cap 49. in that application the 2nd defendant seeks stay of these proceedings pending Arbitration.

The plaintiff's preliminary objection dated 15th March 2005 is in the following terms: -

“TAKE NOTICE that the plaintiffs/Respondents will raise a preliminary point of law to the application dated 10th march 2005”.

The plaintiff's counsel said that the 2nd defendant's defence contained only mere denials of the plaintiffs claim but it accepted that the court had jurisdiction. Counsel submitted that the court had to determine the question whether, the 2nd defendant having accepted the court's jurisdiction can the defendant now deny the same, when that defence-admitting jurisdiction is still on record. Plaintiff's counsel submitted that he 2nd defendant should not be entitled to do so. Counsel further stated that the 2nd defendant did not even plead, in that defence, that there were issues that were to be determined by the arbitrators. This plaintiff counsel argued constituted a step taken in the suit, after which it was not open to the 2nd defendant to raise an issue of stay. The application he concluded, by the 2nd defendant was therefore mischievous and was an abuse of the courts' process.

Plaintiff's counsel relied on the cases: -

- EAST AFRICAN POWER AND LIGHTING COMPANY LTD V KILIMANJARO CONSTRUCTION LTD (1983) KLR 392.

- AGIP (K) LTD V KIBUTU (1981) KLR 20.
- NAIROBI GOLF HOTELS (K) LTD AND LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS CIV. APP. NO 5 OF 1997.
- ESMAILJI V MISTRY SHAMJI LALJI & CO (1984) KLR 150.

The jurisprudence of these cases is that for a party to benefit from a stay of proceeding for purpose of referring a dispute to arbitration, he ought to have taken action to initiate the arbitration; that the court had discretion whether or not to grant stay; the burden of proving that there was strong cause for stay to be granted was upon the applicant; that an application for stay must be made before any steps are taken in the suit.

The 1st defendant's advocate said that he supported the application for stay, which he said, ought to be heard on merit, rather than by way of preliminary objection.

The 2nd defendant attacked the objection by saying that the plaintiff had failed to state what law he relied upon on his preliminary objection. He further said that there were two sets of agreement and both contained arbitration clause. That the 2nd defendant is not a party to first set of agreement under which the present suit was brought but that agreement was between plaintiff and the sub contractor, accordingly when the 2nd defendant filed its defence it denied amongst others, the agreement hereof. What occurred after the filing of that defence, counsel said, was that the 1st defendant gave a notice of claim to 2nd defendant and that notice brought the contract between them into play upon which they will be seeking stay pending arbitration.

The plaintiff's counsel in final response said that it matters not what contracts are invoked but that the 2nd defendant has admitted the jurisdiction of this court.

Those are the arguments presented before me. The court wishes to remind the plaintiff that a preliminary objection ought to only be taken on a point of law and it is raised on the basis that the facts are not in dispute.

The 2nd defendant relied on the case of OMINO V LACJI MEGHJI PATEL & COL LTD (1995 – 1998) I E.A. 264 and relied on a pertinent portion:

“When an application under section 6 (1) of the Act is made by a party to an arbitration agreement, it is incumbent upon the court to which such an application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement for if it does it is for the opposing party to show cause why effect should not be given to the agreement.”

That quote I believe is the correct position and for a party to seek by way of preliminary objection to shut out the court examination of such agreements or contracts, with arbitration clause, is I believe wrong.

As stated before for a preliminary objection to succeed it ought to be on point of law and on facts that are not disputed the 2nd defendant talked of two contracts, and during the argument of this point the plaintiff's counsel did attempt to object to the mention of this contract, but resisted when the court, pointed out that if he was objecting that may be a basis of rejecting the preliminary objection.

The issue raised by the plaintiff that the 2nd defendant having accepted this court's jurisdiction it cannot be heard on its application for stay, I would in turn ask does the court have exclusive jurisdiction. Is it not possible that, yes, the court has jurisdiction but so also that an arbitrator would equally have jurisdiction by virtue of the same contract.

The issues raised about different contracts and on jurisdiction not being exclusive make this matter not suitable one to be decided by way of preliminary objection. I think plaintiff like so man parties of late, rush without first considering the clarity of their objection, by filing a preliminary objection. As a consequence of that objection the plaintiff will not; at the main hearing of the application be entitled to once again raise the issue of jurisdiction.

That being the finding of this court the order of this court is · That the plaintiff's preliminary objection dated 15th March 2005 is dismissed with costs being awarded to both defendants.

Dated and delivered at NAIROBI this 18th May 2005.

MARY KASANGO

JUDGE