



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 26 of 2004

ERIC JEAN DANIEL STOLZ.....PLAINTIFF

VERSUS

MOHAMED HUSEIN ABDULLA JAFFER..... DEFENDANT

RULING

When counsel for the parties herein appeared before me on 2.02.2005, there were pending for hearing the following applications –

- (1) 6.02.2004 – A Chamber Summons being an application for security of costs;
- (2) 2.07.2004 – A Notice of Motion in which the Plaintiff seeks summary judgment against Defendants;
- (3) 31.07.2004 – A Chamber Summons in which the Defendant/Applicant seeks a stay of proceedings while the matter may be referred to arbitration in Paris.

Mr. Gitonga, learned Counsel for the Plaintiff's had sought to have the three applications all heard and determined simultaneously. Mr. Satchu, learned Counsel for the Defendant however opposed that view. I ruled that the applications be heard in the following order –

- (1) The Chamber Summons dated 31.07.2004 be heard first.
- (2) A chamber Summons dated 6.02.2004 be heard next.
- (3) The Notice of Motion dated 2.07.2004 in which the Defendant seeks summary judgement be heard thereafter.

This ruling is therefore about the Defendants Application dated 31.07.2004 in which the Defendant seeks an order for stay of the proceedings herein pending reference to arbitration in Paris as the parties contemplated.

The application is premised upon the provisions of Section 6 (1) of the Arbitration Act, 1995, and rule 2 of the Arbitration Rules 1997, the grounds set out in the application and the Affidavit of the Defendant/Applicant, Mohammed Hussein Abdalla Jaffer sworn at Nairobi on 30.07.2004.

The Plaintiff/Respondent opposed the application and filed no less than fourteen (14) grounds of

opposition, the most important of which are that –

- (1) The Kenya High court has jurisdiction to try this case,
- (2) No sufficient grounds are disclosed to warrant the stay of proceedings sought.
- (3) The Defendant entered an unconditional appearance on 11.02.2004. He therefore submitted to the jurisdiction of the High Court of Kenya.
- (4) The Documents titled "Memorandum of Conditional Appearance" filed on 20.07.2004 is a document alien to law and ought to be struck out for being an abuse of the process of the Court.
- (5) The issue of jurisdiction of the High Court of Kenya has never been raised by the Defendant but has been admitted by the Defendant who has taken steps and participated in these proceedings. The Defendant has waived his right to plead want of jurisdiction; and that by virtue thereof is estopped from denying the jurisdiction of the court.
- (6) The Defendant is actuated by *mala fides* and cannot seek security for costs and at the same time apply to stay proceedings pending litigation in France.

The issues raised by the application and the grounds of opposition depend upon, firstly, the agreement to refer the dispute to arbitration (the jurisdiction clause), and secondly, the provisions of Section 6 (1) and (2) of the Arbitration Act, and rule 2 of the Arbitration Rules 1997.

The jurisdiction clause herein is set out in a document entitled – **ACKNOWLEDGMENT OF DEBT SECURITY AGREEMENT** Between the Defendant and the First Plaintiff dated 24.03.1998. The relevant clause is Article 4 entitled **Applicable Law - Disputes** and says –

"All disputes arising between the undersigned relating to the interpretation and the enforcement of the present agreement, shall be subject to French Law and brought before the Tribunal de Grande instance of Paris"

This agreement was made between the Defendant herein and the First Plaintiff. It is not made between the Defendant and the Second Plaintiff as it is stated in the grounds of the application.

The "**Acknowledgement of Debt**" dated 27.05.2002 is made by the Defendant (Mohammed Hussein Abdulla Jaffer) to the Second Plaintiff (Gerico France and is made (not pursuant to the agreement of 24.03.1998 as stated in the application) (but "**with reference to Temporary facilities done by Eric Jean Daniel Stolz** (the First Plaintiff", on behalf of Gerico France S. A." to Mr. Mohammed Hussein Abdulla Jaffer (the Defendant) on June 1998.

The date of June 1998 is I think an import from Article 2 of the Acknowledgement of Debt Security Agreement of 24.03.1998 which provides inter alia as follows –

Article 2 – Commitments

".....

.....

"Monsieur JAFFER undertakes and admits that Monsieur STOLZ will sell Monsieur JAFFER personal estate (especially by public auction) if, by impossible his personal cheque (No. 004075) of US \$417,700.00 (four hundred and seventeen thousand and seven hundred United States Dollars) was not duly paid to Monsieur STOLZ by Citi Bank N. A. on June 24, 1998"

It does therefore appear that by June 24, 1998, the Defendant had not paid the acknowledged debt

aforesaid and made arrangements with the Second Plaintiff to execute the Acknowledgement Agreement of Debt of 27.05.2002.

There is no reference to what happened in June 1998. It does however appear from the **Acknowledgement of Debt** to the Second Plaintiff that the Defendant had defaulted in payment to the 1st Plaintiff and the Defendant had sought to make fresh payment arrangements with the 2nd Plaintiff. The new arrangements completely omitted reference to the 1st **Acknowledgement of Debt and Security of 24.03.1998**.

The Acknowledgement of Debt of 27.05.2002 was to my mind a complete novation agreement which apart from disclosing the 1st Plaintiff as an agent of the 2nd Plaintiff to the arrangement of June 1998 (whatever those arrangements were) had the effect of completely displacing the 1st Plaintiff from the debt due from the Defendant. To my mind further the retention of the 1st Plaintiff to this action is probably at best a cost saving exercise for the 2nd Plaintiff if it were to file fresh proceedings against the Defendant. The acknowledgement of Debt Security of 24.03.1998 has no application at all. The Defendant cannot invoke any of those provisions to come to his aid.

Having come to this conclusion of the said agreement, the only reason for considering further the application herein is because the 1st Plaintiff is still a party or at least on record only. I cannot however see what cause of action he has against the Defendant having disclosed his principal and subrogated his rights if any to the principal, and by the debtor having acknowledged liability directly to the principal or 2nd plaintiff herein.

For these reasons, there are no grounds for referring this matter to arbitration and there is no reason to consider further the applicable arbitral provisions or the authorities in relation thereto.

The defendant's application dated 31st July 2004 is therefore dismissed with costs.

Dated and Delivered at Nairobi this 4th day of May 2005.

ANYARA EMUKULE

JUDGE