REPUBLIC OF KENYA

HIGH COURT AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
Civil Case 119 of 2005

K-REP BANK LTD………………………………………………………PLAINTIFF

VERSUS

FRANCIS NGIGE NYOKE……………………….………………...1ST DEFENDANT

WAIGI PAINTS & HARDWARE LTD…………...…………………2ND DEFENDANT

BENSON MBUCHU GICHUKI …………………………………… 3rd DEFENDANT

RULING

On 8th March 2005, the Plaintiff filed suit against the Defendant claiming two main orders: a declaration that there is no arbitration agreement between the Plaintiff and the Defendant and the dispute between them be resolved by the Court and a Permanent injunction restraining the 1st and 2nd Defendants from taking any further steps in the reference to arbitration and restraining the 3rd Defendant from entering into and proceeding with the arbitration of the dispute between the first and second Defendants and the Plaintiffs.

Simultaneously with the Plaint the Plaintiff filed a Chamber Summons in which it sought *inter alia* orders of injunction in terms of the prayers in the plaint pending the hearing of the Application and the suit.

The Application was on the same date certified as urgent by Waweru J. and subsequently was fixed for inter partes hearing on 25th May 2005. On this date Counsel for the Defendants raised a Preliminary Objection to the Plaintiff's Application as per his Notice thereof dated 22nd March 2005. The Notice reads:

1) That the Application is defective and bad in law as it is brought under the wrong provisions of the Law as the same is challenging an Arbitration Tribunal duly constituted under the Arbitration Act No.4 of 1995 and hence the Application ought to have been brought under the said Arbitration Act.

2) That the Application is incompetent, bad in law, fatally and incurably defective as it offends the mandatory provisions of Order L Rules 3 and 7 of the Civil Procedure Rules.

3) That the Application is fatally defective as it is supported by an affidavit which does not comply with Section 5 and 8 of the Oaths and Statutory Declarations Act Cap. 15 of the Laws of Kenya.

4) ***That the Application is otherwise an abuse of the process of the Court as it is contrary to the express provisions of Sections 4,5,6,7 (2) 13 (4) and 14 (1) (2) and (3) of the said Arbitration Act*.**

In his oral submissions in Court Counsel for the Defendants argued that the Applicant should not have invoked the Court's jurisdiction under Order 39 Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as in doing so it had offended against the provisions of the Arbitration Act. Counsel further argued that the Application was not supported by an affidavit in accordance with the law since the one purportedly filed does not show where it was sworn or before whom it was sworn.

Responding to the Preliminary Objection Counsel for the Applicant argued that the purported Preliminary Objection was not a valid and proper Preliminary Objection. The basis of Counsel's submission was that the Objection cannot be determined without considering contested matters of fact, the main ones being the very existence of an arbitration agreement and the relationship between the Plaintiff and the 1st and 2nd Defendants. Counsel further argued that the 1st Defendant has filed a suit against the plaintiff being HCCC No.661 of 2004 praying for an injunction, a declaration and damages which suit is pending hearing. In Counsel's view, the fact that the 1st Defendant has his own suit against the Plaintiff in respect of their borrower/lender relationship, clearly suggests want of an arbitration agreement. Counsel *inter alia* placed reliance on the Court of Appeal decision of MUKISA BISCUIT MANUFACTURING CO. LTD –V- WEST END DISTRIBUTORS LTD (1969) E.A. 696 for the proposition that a Preliminary Objection cannot be taken where any fact has to be ascertained.

Responding to the objection raised against the supporting affidavit, Counsel for the Applicant argued that there is no doubt that the affidavit was sworn in Nairobi and his file copy showed that the affidavit was taken before J.M. Mugo – Commissioner for Oaths. Even if the affidavit was found to be defective, Counsel argued that the defect was not fatal.

The above are the rival submissions made for each side. I have given due consideration to the submissions. I have also carefully considered the Application and the authorities cited. Having done so, I take the following view of the matter.

I agree with Counsel for the Plaintiff that the crucial facts in this dispute are disputed. A Preliminary Objection is argued on the assumption that all the facts pleaded by the other side are correct (See Sir Newbold J.A.'s judgment at page 701 in MUKISA BISCUIT MANUFACTURING COMPANY LTD –V- WEST END DISTRIBUTORS LTD (SUPRA) In the case at hand the very existence of the arbitration agreement is disputed. The issue of whether or not the Arbitration Act No.4 of 1995 applies must therefore be resolved after the same has been canvassed.

Under Order 39 Rule 2 a party has liberty to apply for temporary injunction where breach of contract is threatened. In my view although the rule does not say, so, a party may show the threatened breach by affidavit. This however is not mandatory. An Application cannot therefore be defeated merely because it is not supported by an affidavit.

In any event in my view the alleged defect is not fatal even if I were to hold that the said affidavit is indeed defective, I would overlook the same.

The challenge made against the order and rule under which the Applicant has moved the Court in my view has also not been well taken as the Applicant denies that the Arbitration Act No. 4 of 1995 is applicable. Even if indeed the Court's jurisdiction had been incorrectly invoked, this perse would not be a ground for a Preliminary Objection. Order 50 Rule 12 expressly forbids such objection.

I would repeat what Sir Charles Newbold J.A. said in MUKISA BISCUIT MANUFACTURING COMPANY LTD –V- WEST END DISTRIBUTORS Ltd (supra) that "***the improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse the issue. This improper practice should stop*".**

I wish I could use stronger language regarding the Defendants' Preliminary Objection to the Plaintiff's Application. It is not a proper Preliminary Objection. It is absolutely without merit. I dismiss it with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:

No appearance for either party.