Republic of Kenya

In the High Court of Kenya

at Nairobi (Milimani Commercial Courts)

Civil Case 574 of 2000

Welcome Properties Limited

v

Reliance Bank Limited

T Mbaluto, Judge

September 19, 2000

Judgement

This ruling relates to two different applications filed by each of the parties hereto. The first one in point of time is dated June 6, 2000 and has been filed by the defendant, Reliance Bank Limited which then was under statutory management. It seeks an order of this court to set aside an arbitral award made on March 24, 2000. The second application is dated July 19, 2000 and has been filed by the plaintiff. It seeks an order of the court to confirm the award and recognize it as a judgment of the court. A further order requiring the defendant to deposit in court the sum of Kshs 4,210,480 awarded by the arbitrator within 14 days is also sought. Both applications are supported by affidavits sworn by J K Karuga and Kamal Shah respectively annexed to which are various documents relevant to the matters being urged.

Briefly, the facts of this matter are that the plaintiff is the owner of all those premises known as L R No 209/477/37 situate along River Road, Nairobi.

By a lease dated August 17, 1994, the plaintiff demised the premises for a term of five years one month from August 1, 1994 to the defendant then known as Lake Credit Finance Limited. The lease therefore expired on August 31, 1999.

One of the conditions of the lease was that upon the expiry or sooner determination of the lease, the defendant would to the satisfaction of the plaintiff remove all partitions and fixtures introduced in the lease premises by the defendant and make good all damage occasioned to the lease premises by installation, removal of the partitions or fixtures at the defendant's costs. According to the averments in the plaint, since the expiry of the lease on August 31, 1999, the defendant has not handed over possession of the lease premises to the plaintiff nor has it paid any rent or mesne profits to the plaintiff. It is further averred in the same plaint that the defendant has failed both to remove the partitions and fixtures installed in the premises and to restore the lease premises to their original status. The plaintiff also claims that an inspection of the premises carried out by quantity surveyors known as Messrs Mururu & Associates in the presence of both parties, the cost of restoring the premises to their original status was assessed at Kshs 3,800,000. But the defendant in the replying affidavit sworn on April 13, 2000 denies that particular

claim.

There is an arbitration clause in the lease by virtue of which all questions in dispute between the parties should be referred to arbitration by a single arbitrator. Pursuant to that clause, both parties agreed through a consent letter dated April 28, 2000 to refer the matter to arbitration by Mr Mohammed Ali Kassamali Madhani as sole arbitrator. The agreed points of reference were:-

> "1) i) Whether or not the Respondent is under a duty to restore the suit premises to its original condition. If yes
>
> ii) Has the Respondent refused and/or neglected to restore the suit premises to its original condition?
>
> 2) How much will be the costs of restoration of the premises to its original condition?
>
> 3) i) Did the Respondent deliver up possession of the rented premises to the Claimant after expiry of the Lease if so when?

ii) If the answer to 3(i) is No, is the claimant entitled to mesne profits for the period the suit premises has remained unoccupied in the possession of the Respondent, and if so how much?

4) How much is the claimant entitled to from the Respondent under 1, 2 and 3? 5) Is the Respondent's statutory manager liable to settle forthwith what is due to the Claimant?

6) What is the appropriate order as to costs?"

After hearing both parties to the arbitration, the arbitrator made his award on May 24, 2000. The major findings of the award were that:-

> (a) The statutory manager was liable to perform the obligations and covenants arising from the lease;
>
> (b) The defendant was liable to restore at its own costs the premises to their original condition; and
>
> (c) The plaintiff was entitled to the following sums from the defendant:-
>
> (i) Costs of repair and renovations to restore the suit premises to their initial condition … Kshs.3,797,730.00
>
> (ii) Cost of valuation and preparation of Quantity Surveyors Report ……. Kshs 28,750.00
>
> (iii) Mesne profits …… Kshs 384,000.00
>
> TOTAL ……..… Kshs 4,210,480.00

The above award is what the defendant seeks to set aside. In support of that move, it was argued that the award was against public policy.

Mr Abuodha who argued the application for the defendant stated that the issue before the arbitrator was whether or not the defendant was obliged to restore the premises to the original status. However, the matter of the restoration of the premises to their original status was not the only issue that came for consideration by the arbitrator. Those issues are however not the matters that this court is called upon to determine in the two applications before it. In my view, they have no bearing whatsoever to the question whether or not the award is against public policy. Indeed the impression one gets from Mr Abuodha's general approach to the matter is that he was thinking more of an appeal against the decision of the

arbitrator rather than the setting aside of the award. That assessment is also borne out by the contents of the affidavit in support of the application sworn on June 6, 2000 by J K Karuga whose contents is not really a statement of facts but merely a restatement of the grounds of the application. It is trite law that an appeal does not lie against the decision of the arbitrator.

As to the claim that payment of the award will amount to preference of a particular creditor, there is no evidence that the statutory manager has declared any a moratorium on the payment by the defendant of its depositors and other creditors in terms of section 34 (6) of the Banking Act and clearly that argument is an afterthought. I say so because it was not one of the issues put forward by the parties for consideration by the arbitrator in the points of reference stated above and in any case given the issues put before the arbitrator, the defendant should have anticipated an award in favour of the plaintiff as one of the likely outcomes of the arbitral process.

The application is also as observed by Mr Harit Sheth for the plaintiff, wholly defective in that it was brought by way of originating summons, which said procedure is not permitted by the Arbitration Rules 1997.

According to those rules only application under sections 12, 15, 17, 18, 28 and 37 of the Arbitration Act can be made by originating summons.

In my opinion therefore, the application lodged by the defendant not only lacks substance but is also procedurally defective and cannot succeed. It is for those reasons dismissed with costs.

As to the plaintiff’s application, I think the same is clear and straight forward. The plaintiff having obtained an arbitration award in its favour is asking for the deposit in court of the moneys awarded by the arbitrator pending the resolution of the issues which the defendant has raised. I have already determined that the defendant’s application to set aside the award lacks merit. Given that finding, there cannot be any basis for resisting the application to deposit the sum awarded by the arbitrator in court.

Accordingly, the plaintiff’s application is allowed with costs.