



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT
AT MAKUENI

ELC CASE NO E019 OF 2021

GIDEON BLACKLAW KUBAI.....1ST PLAINTIFF

STEPHEN GIDEON KIBUTHU KUBAI.....2ND PLAINTIFF

RAMESH CHANDRA G. SHAH.....3RD PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LTD.....DEFENDANT

RULING

1. By a Notice of Motion dated 2nd of August 2021 brought under Article 159 of the Constitution 2010, Section 6 of the Arbitration Act Cap 49, Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of the law the Applicant is seeking for the following orders: -

- a. That there be a stay of all proceedings herein pending arbitration.
- b. That the dispute between the parties be referred to arbitration.
- c. That the Defendant/Applicant be at liberty to apply for such further orders and/or directions as this honourable court may deem fit and just to grant in the circumstances.
- d. That cost of this application be awarded to the Defendant/Applicant.

2. The Application is premised on the grounds set out on the face of the application namely: -

- a. That the Plaintiff/Respondent has not complied with the mandatory provisions of Section 3(b) of the Grant of Easement Agreement dated 12th of April 1976 between the parties which expressly provides that the disputes concerning payment of compensations shall be referred to arbitration which mechanism has not been explored by the parties herein despite being incorporated in the Agreement.
- b. That by virtue of the agreement, the parties hereto have agreed and are bound to proceed to arbitration on matters in dispute arising therefrom.
- c. That the Defendant/Applicant is ready, willing and able to proceed to arbitration on any dispute arising from the parties as stipulated in the agreement.

3. The application is supported by the affidavit of Stanley Manduku, the Chief Legal Officer of the Applicant sworn on the 2nd of August 2021.

APPLICANT'S CASE

4. A summary of the grounds and the averments is that vide a Grant of Easement Agreement dated 12th of April 1976, the Plaintiff/Respondent granted the Defendant/Applicant an easement over the suit property for a term of ninety- nine years from the date of the deed of grant or for the residue of the unexpired term of years of the lease whichever shall be shorter. That Section 3 (b) of the easement

agreement provided that any dispute concerning the payment of compensation would be referred to arbitration for resolution.

5. The Applicant argued that the subject matter in the instant suit relates to a disagreement as to whether the Defendant/Applicant is liable to pay compensation for the use and occupation of the suit property belonging to the Plaintiff/Respondent which falls within the dispute resolution mechanism agreed upon by the parties in the Easement Agreement dated 12th April 1976. The Applicant contends that the Plaintiffs claim is improperly before the court owing to the arbitration clause in the Grant of easement agreement between the parties herein. The Applicant asserts that arbitration is the appropriate mechanism to handle the dispute and that it is ready and willing to proceed to arbitration to settle any dispute as stipulated in the agreement.

RESPONDENTS CASE

6. In his replying affidavit sworn on the 16th of December 2020 the 1st Respondent on his own behalf and on behalf of the 2nd and 3rd Respondents opposed the application where he stated that the application was premature, lacks merit and should be dismissed for being incompetent. The Respondents averred that they came to court as a last resort after the Defendant/Applicant refused to make good their claim for more than two years.

7. He averred that there was no need for recourse to arbitration after the Deed Easement dated 12th April 1976 expired. He further averred that the performance of the grant of easement and all its contractual rights and obligation including the arbitration mechanism ended with the tenure as it could not outlive the term of the lease.

8. He argued that during the pendency of the Grant of Easement, the arbitration mechanism was limited to payment of compensation of any damage or loss of any property, obstruction or nuisance that would be occasioned to the grantor and to the land immediately adjoining the easement area which damage that would result from construction, operation maintenance or repair of the pipe by the Defendant/Applicant.

9. The Respondents argued that an Easement runs with the tenure of land and in this case, the grant of easement agreement was extinguished by the lapse of tenure and therefore the contractual relationship between the parties was terminated.

10. The application was canvassed by way of written submissions. The Applicant through its submissions filed on the 24th of May 2021 submitted that the parties were bound by the easement agreement which provided that disputes revolving around compensation should be referred to arbitration. The Applicant argued that the Respondents had not proved that there was any coercion, fraud or undue influence when the parties entered into the agreement.

11. The Applicant contends that the court lacks jurisdiction to entertain this suit as there is a binding agreement between the parties to refer any dispute on compensation to arbitration. He further submitted that after the Respondent extended the term of the lease by a further period of 50 years, it meant that the easement would automatically be extended for a period of 50 years. He placed reliance on Section 3, 5 and 10 of the Arbitration Act and on the following decisions;

i. Pius Kimaiyo Vs Co-operative Bank of Kenya Limited (2017) eKLR.

ii. Nyutu Agrovet Limited Vs Airtel Network Limited (2015) eKLR.

iii. Wringles Company (East Africa) Vs Attorney General & 3 Others (2013) eKLR.

iv. Kenya Airports Parking Services Limited & Another Vs Municipal Council of Mombasa (2010) eKLR.

12. Through the written submissions filed on 17th of November 2021, the Respondents' submitted that after the lapse of the tenure of the land, the deed of easement agreement together with the arbitration clause ceased to operate. The Respondents argued that the arbitration clause could not be treated independently from other clauses in the agreement as it formed an integral part of the agreement.

13. The Respondents further submitted that the deed of easement dated 12th of April 1976 ran with the tenure of the land. The Respondent argued that after the term ended on the 1st of December 2009 the agreement ceased to exist. He relied on the following decisions to buttress his submissions.

i. Njogu & Co Advocates Vs National Bank of Kenya Limited.

ii. County Government of Kirinyaga Vs African Bank Corporation.

iii. Esmaj Vs Mistry Shamji Lalji & Co (1984) KLR.

ANALYSIS AND DETERMINATION

14. Having considered the application, affidavits, annexures and the written submissions, I find that the issues for determination is;

Whether this court has jurisdiction to hear and determine this matter.

15. The Applicant submitted that the grant of easement agreement dated 12th of April 1976 was binding between the parties and therefore the

dispute between the parties herein should be adjudicated through arbitration. He contends that the parties had clear intentions to settle disputes concerning compensation or any other dispute through arbitration thus ousting the jurisdiction of the court.

16. The Applicant contends that the court has no jurisdiction to hear this matter as clause 3(b) of the grant of easement agreement provides for the arbitration mechanism to resolve the dispute regarding compensation between the parties.

17. Arbitration is one of the alternative forms of dispute resolution mechanisms provided for under Article 159(2) (c) of the Constitution.

18. The Arbitration Act defines an arbitration agreement *as a written agreement to refer present or future differences to arbitration, whether an arbitrator is named in it or not*. The Applicant pegged its application under Section 6 of the Arbitration Act amongst other provisions of the law.

19. 6(1) of the Arbitration Act provides that;

If a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a person claiming through or under him in respect of a matter agreed to be referred-

a. Any party to those proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

20. I have looked at the copy of the grant of easement agreement marked as annexure SKM1 in the Applicant's supporting affidavit and I find that the grant of easement agreement was executed on the 20th of April 1976 between Fred Kubai and Gordhandasn Narandas Shah on the one part and Kenya Pipe Line Company Limited on the other part. The easement agreement expressly provided that the duration of the agreement was to be for a term of 99 years from the date of the agreement or for the residue now unexpired of the term of years more particularly mentioned in the schedule whichever shall be shorter. Clause 3(b) of the agreement provides as follows: -

3. The Company (to the intent and so as to bind the Easements hereby granted in to whosoever hands the same may come and to the intent to benefit and protect the said piece of land) hereby covenants with the Grantor that it will:

a)

b) Pay compensation for or otherwise make good to the Grantor all damage to or loss of any property or undertaking of the Grantor or in respect of his said piece of land (including the easement area) from time to time caused by the construction operation maintenance or repair of the pipe by the company. The amount of such compensation shall be mutually agreed by the Grantor and the Company. In the event of any dispute arising on the liability to pay compensation or the amount of such Act 1968 or any Act in that behalf for the time being in force. In the event of the parties failing to agree on the choice of arbitrator, such arbitrator shall be appointed by the Chairman for the time being of the Law Society of Kenya.

21. The Applicant submitted that after the expiry of the lease, the Respondents extended the lease for a further period of 50 years, which meant that the easement agreement would expire after 50 years.

22. The Respondents submitted that the grant of easement ran with the tenure of the land. The Respondents argued that the tenure of the land expired on 01/12/2009 therefore extinguishing the easement. They further submitted that the deed of easement was invalid and inoperative since it could not out live the tenure of the land. That after the lease expired the deed of easement together with the arbitration clause ceased to exist.

23. Under Section 136(2) of the Land Act, the law outlines that;

“Subject to the provisions of part X, an easement shall be capable of existing only during the subsistence of the land or lease out of which they were created or in any other manner provided by any other legislation.”

24. It is in the nature of an easement to run with the tenure of the land out of which it has been created.

25. Section 138(3) provides as follows;

“Unless an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event or on the death of the grantor, the grantee or some other person named in the grant, an easement burdens the servient land and runs with the land for the same period of time as the land or lease held by the grantor who created that easement.”

26. Section 138(4) provides that;

“Subject to the provisions of this part, an easement shall be capable of existing only during the subsistence of the lease out of which it was created.”

27. I have looked at annexure GBK1 in the Respondents replying affidavit which is a letter dated 5th September 2019 authored by the Acting Managing Director of the Defendant/Applicant Company to the Respondents Advocate. The reference of the letter is **L.R NO 1426 MAKINDU (LOSS OF LAND AND EXPIRED GRANT OF EASEMENT)**.

28. In the letter, the Applicant acknowledged that the grant of easement had expired and stated as follows;

“After scrutinising the easement documents signed between your client and KPC in 1978, we noted that the easement runs with the land tenure and the leasehold of the above land expired in 2009.”

29. The Defendant/Applicant expressed its wish to meet the owner of the land to resolve the matter amicably. The Applicant acknowledged that an easement runs with the tenure of the land and that the leasehold of the land had expired in 2009.

30. The Applicant submitted that after the expiry of the lease, the Plaintiffs/Respondents applied to the Government for the extension of the lease period. The Applicant submitted that the term of the lease was extended for a period of 50 years from the 01/12/2012. This was confirmed by the annexure GBK2 in the Plaintiff’s list of documents. The lease dated 4th September 2020 was issued to the Respondents who are the beneficiaries of the original lessee by the National Government.

31. It is therefore evident that the grant of easement agreement between the parties ceased to exist after the term of the lease expired. It therefore follows that clause 3(b) of the grant of easement agreement was not binding upon the parties herein as the term of the lease had expired. I am in agreement with the Respondents submissions that the arbitration clause cannot be treated separately or independently from the other clauses in the agreement. I find that the deed of easement agreement having ceased to be operative, the Respondents are not bound by the terms and conditions of that agreement.

32. The Applicant having confirmed that the lease expired in 2009 and that an easement runs with the tenure of the land, I find that the grant of easement agreement is not binding upon the parties.

33. Consequently, clause 3(b) which provides for disputes to be resolved by the arbitration mechanism is invalid and not binding upon the parties. Having found that the easement agreement is inoperative, it therefore follows that the application to stay the proceedings and refer the matter to arbitration must fail. In the end, I find that this court has jurisdiction to hear and determine this suit.

34. In light of the forgoing, the Application dated 2nd August 2021 is dismissed with costs to the Respondents.

RULING DELIVERED, DATED AND SIGNED THIS 9TH DAY OF FEBRUARY 2022 VIRTUALLY VIA TEAMS’

PLATFORM.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Odongo for the Defendant/Applicant.

Kinoti for the Plaintiff/Respondent.

Court -Assistant Kwemboi.

Court: Parties to take a date for pre-trial directions.

HON. T. MURIGI

JUDGE

Odongo: The parties are engaging in an out of court negotiations. We pray for a date to confirm if parties have reached a settlement

HON. T. MURIGI

JUDGE

Kinoti: I confirm. That notwithstanding, we could have a mention date for pre-trial directions.

HON. T. MURIGI

JUDGE

Court: By consent mention on 21st of March 2022 for pre-trial directions. Parties are at liberty to approach the court in the event they reach a settlement.

HON. T. MURIGI

JUDGE

09/02/2022