



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 437 OF 2017

LEGEND PETROLUEM EQUIPMENTS LTD.....PLAINTIFF

VERSUS

VICKERS COMMERCIAL COMPANY LTD.....DEFENDANT

RULING

1. By plaint filed on 17th November 2017, the plaintiff averred that it was contracted by the defendant on 29th June 2016 to construct a fuel station for it on the defendant's parcel of land known as Miti Mingi Mbaruk Block 5/1972 at a cost of Kshs.18,576,500/=. The plaintiff complied with the terms of the contract and constructed the fuel station to completion.

2. Owing to some variations requested by the defendant, the total cost of the contract became Kshs.30, 773,801.90 out of which the defendant paid the plaintiff Kshs.22, 662,000/= leaving a balance of Kshs.8, 111,801.90. The plaintiff averred that the defendant breached the contract by failing and refusing pay the said sum.

3. In view of the foregoing, the plaintiff filed a Notice of Motion dated 17th November 2017 seeking an interlocutory injunction and also sought judgment in the plaint against the defendant for:

a) Kshs.8, 111, 801.90.

b) Permanent injunction, restraining the defendant by itself, agents and or agents and or servants from leasing transferring, alienating or howsoever disposing, Miti Mingi Mbaruki Nakuru Block 5/1972 to 3rd parties.

c) General damages for breach of contract.

d) Costs of the suit.

e) Interest on (a) (b) & (c) at commercial rates.

f) Any other order that the court deems fit.

4. The defendant's first reaction to the suit was by way of filing Memorandum of Appearance on 15th January 2018, a Notice of Preliminary Objection dated 18th January 2018 and a Statement of Defence. On 22nd January 2018, the defendant also filed a replying affidavit in respect of the Notice of Motion on 20th February 2018. The Preliminary Objection is pleaded in the following terms:

TAKE NOTICE that the defendant herein shall raise a preliminary objection to entire suit (sic) on the basis that this honourable court lacks jurisdiction to entertain/deal with the matter herein and hence the entire suit out (sic) to be struck out with costs.

5. The preliminary objection was heard by way of written submissions. The defendant's submissions were filed on 8th February 2018 while the plaintiff's submissions were filed on 23rd February 2018.

6. The defendant submitted that the suit is essentially a dispute concerning a construction contracts and that it has nothing to do with rights over land or interest in land. Citing **Articles 162 (2)** of the **Constitution of Kenya**, **Section 13** of the **Environment and Land Court Act** and the cases of **Republic –vs- Karisa Chengo & 2 others [2017] eKLR** as well as **Owners of the Motors Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989) KLR1**, counsel for the defendant submitted that this court lacks jurisdiction to entertain the dispute and that the matter is reserved for the High Court.

7. Additionally, counsel for the defendant referred the court to clause 1.14 of the “Agreement For Construction”, a document submitted by the plaintiff alongside the plaint. The said paragraph states: “In Case of any disputes parties shall resolve the dispute through arbitration.” Counsel relied on Section 10 of the Arbitration Act as well as on the case of **Nyutu Agrovet ‘Limited –v- Airtel Networks Limited [2015] eKLR** and argued that the jurisdiction of the court is ousted by the said provision.

8. On his part, Counsel for the plaintiff submitted that there is a valid dispute before the court and that it should be heard and determined. If the court finds that the matter ought to have been filed in the High Court, the court should invoke the provisions of Section 18 of the Civil Procedure Act and transfer the suit to the High Court. In this regard, the plaintiff relied on the case of **Wycliffe Mwangaza Kihungwa –vs- Grain Bulk Handlers Ltd [2014] eKLR**.

9. Regarding the defendants submission on the issue of ouster of the court’s jurisdiction due to an arbitration clause, counsel for the plaintiff submitted that the defendant failed to apply for stay pursuant to the provisions of **Section 6** of the **Arbitration Act**. Having filed a statement defence on 8th February 2018, the defendant lost its right to seek stay of the proceedings.

10. I have considered the preliminary objection and the submissions in respect thereof. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

11. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

12. At the core of the preliminary objection is the question of whether this court has jurisdiction to entertain the present case. The jurisdiction of this court is circumscribed by **Article 162** of the **Constitution of Kenya** which provides:

162. System of courts

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

13. In line with the above constitutional provisions, parliament enacted the **Environment and Land Court Act, Section 13** of which provides:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

14. Simply put, and to use the description adopted by the Constitution, the jurisdiction of this court is to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

15. A perusal of the averment in the plaint herein and the prayers sought therein reveals that the case primarily concerns a dispute over the terms of a contract for the construction of a fuel station and the rights and obligations of the parties in regard thereto. One such right according to the plaintiff, is its right to be paid Kshs.8, 111, 801.90 being the alleged balance of the amount it ought to be paid for constructing the fuel station. I am aware that the plaintiff has also included a prayer for a permanent injunction to restrain the defendant from leasing, transferring, alienating or disposing of the suit property in the plaint. The prayer for injunction addresses issues of **use** of the suit property, thus bringing the claim within the jurisdiction of this court. Needless to state, it will be for the trial court to determine whether or not that prayer should succeed. I am therefore satisfied that the prayer for liquidated damages does not, *per se*, take the matter beyond the jurisdiction of this court.

16. Even if I were to find that the matter ought not to have been filed in this court, I would have taken into account that the parties herein have a dispute which they have brought before the court. The defendant has not denied existence of dispute. It would be the height of injustice if parties were to be made to file a fresh case at extra expense in another court. It is the duty of the court to ensure that justice is done and without undue regard to procedural technicalities. The court must also ensure that disputes are resolved expeditiously and affordably. These are some of the expectations cast upon the court by **Article 159 (2) (d)** of the **Constitution of Kenya** and **Sections 1A and 1B** of the **Civil Procedure Act**.

17. The Court of Appeal has recently addressed the issue of the court's duty to do substantive justice in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR** as follows:

We draw from the judgment of this Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013) where Ouko, JA, in the majority stated that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.”

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements, particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...

18. I would therefore have found that filing of this suit in this court is not fatal and that it could be cured simply by a transfer to the appropriate court. I would still not have upheld the preliminary objection. A valid preliminary objection should be one that results in termination of the proceedings. I don't think the preliminary objection herein would have resulted in the proceedings being terminated.

19. Regarding the limb of the objection concerning **Section 10** of the **Arbitration Act , 1995**, I note that the said Section provides:

Except as provided in this Act, no court shall intervene in matters governed by this Act.

20. In essence, therefore a court can intervene in matters governed by the Act but only as provided in the Act. Now, it is provided in the Act at Section 6 as follows:

6. Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

21. The court of Appeal has as recently as on 15th December 2017 restated in **Adrec Limited v Nation Media Group Limited [2017] eKLR** as follows:

Consequently, in pursuance with Section 6(1) of the Arbitration Act, it was open to the respondent to apply “not later than the time when the respondent entered appearance or otherwise acknowledged the claim against which the stay of the suit was sought. The record shows clearly that the respondent merely filed a notice of appointment of advocates and proceeded to apply for stay of the suit. Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the Arbitration Act. It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position.

22. The defendant herein has not filed any application seeking stay on the ground that this matter is subject of an arbitration agreement. Further, having entered appearance on 15th January 2018 and then proceeded to take further steps in the matter such as filing statement of defence, the preliminary objection on 22nd January 2018 as well as a replying affidavit on 20th February 2018, the defendant lost its right to seek stay of the proceedings herein.

23. I am not persuaded that the preliminary objection has any merit. Nevertheless, I note that the value of the subject matter in the suit is within the pecuniary jurisdiction of the subordinate court. I will therefore make orders transferring the case to the subordinate court.

24. In view of the foregoing, I make the following orders:

a) This suit is hereby transferred to Chief Magistrate’s Court Nakuru for hearing and determination.

b) Costs of the preliminary objection shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 4th day of October 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kamau for the plaintiff

No appearance for the defendant

Court Assistants: Gichaba & Lotkomo