



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 48 OF 2018**

TABITHA NDUTA NGURU.....1<sup>ST</sup> PLAINTIFF

JACQUELYNN PAULYNN AWINO OGWANG.....2<sup>ND</sup> PLAINTIFF

VERSUS

GANZA LIMITED.....1<sup>ST</sup> DEFENDANT

VALLEY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT

ECO BANK LIMITED.....3<sup>RD</sup> DEFENDANT

**RULING**

The Plaintiffs/ Respondents filed the suit herein vide a Plaint dated 13<sup>th</sup> February 2018, seeking for Orders of Specific Performance, Permanent injunction and General Damages for breach of Contract and concurrently filed an Application, dated 13<sup>th</sup> February 2018, seeking interlocutory injunctive reliefs stopping the imminent Statutory sale.

Before the Notice of Motion Application could be heard, the 1<sup>st</sup> Defendant/ Objector filed a Notice of Preliminary Objection on 3<sup>rd</sup> March 2020, and sought to have the entire suit dismissed on the following points of law;

- 1. That Clause 17.4 of the Agreement for sale dated 10<sup>th</sup> March 2014 and 6<sup>th</sup> May 2014, have an arbitral clause for resolution of disputes through Arbitration.*
- 2. That the suit is therefore in contravention of the Arbitration clause*
- 3. That parties are bound by Section 6 of the Arbitration Act, to resolve the dispute by way of Arbitration.*
- 4. That by dint of Arbitration clause in the agreements between the Plaintiffs and the 1<sup>st</sup> Defendant which forms the subject matter of the dispute between the parties this honorable Court lacks the requisite jurisdiction to entertain the Plaintiffs' suit.*

The Notice of Preliminary Objection was canvassed with by way of Written Submissions and the 1<sup>st</sup> Defendant/ Objector through the Law firm of **Kitur & Company Advocates** filed its written submissions dated 9<sup>th</sup> June 2021, and submitted that the clear intentions of the parties through Clause 17 of the Agreement was that if any dispute arises, they oust the jurisdiction of the Court and have the dispute settled through Arbitration, which is in line with Article 159 (2) of the Constitution. That the parties are bound by **Section 6 of the Arbitration Act** and further that **Section 10 of the Arbitration Act** states that no Court shall intervene in a matter governed by the Act except as provided under the Act. The Objector relied on the case of **National Bank of Kenya Ltd....Vs.... Pipeplastic Samkolit (K) Ltd & another (2001) eKLR**.

It was further submitted that the Court is seized with the obligation to give effect to the contractual terms agreed upon by the parties and therefore a constitutional obligation to refer the matter for Arbitration. It was further submitted that the matter has been placed before Court prematurely and the Court should honour the intentions of the parties and allow the parties to solve the dispute by Arbitration. They relied on various decided cases and submitted that the Preliminary Objection has merit and it is only just and equitable that the Court grants the orders sought.

The Plaintiffs/ Respondents filed their written submissions dated 6<sup>th</sup> April 2021, through the **Law Firm of Kamamu, Lando & Associates Advocates** and submitted that the present Preliminary Objection has been raised outside the stipulated timelines as contemplated by **Section 6 of the Arbitration Act** and enunciated in various decisions. The Respondent relied on the case of **Charles Njogu**

**Lofty...Vs... Bedovin Enterprises Ltd ( 2005) eKLR** where the Court held that;

**“.. In my view Section 6(1) of the Arbitration Act, 1995 which (this) Court is construing means that any Application for stay of proceedings cannot be made after an Applicant has entered appearance or after the Applicant has filed pleadings or after the Applicant has taken any other steps in the proceedings so the latest permissible time for making an Application for stay of proceedings is the time that the Applicant enters appearance.**

That further the Court of Appeal upheld this position in **Mt. Kenya University...Vs... Step Holding ( K) Limited (2018) eKLR** where the Court of Appeal reiterated that an Application seeking reference to Arbitration must be filed simultaneously with the entry of appearance with no procedural steps being taken thereafter .

That the Courts have allowed for an objection to jurisdiction on the grounds of an existing Arbitration agreement not later than fourteen days after the objecting party has entered appearance. Further that in the case of **Diocese of Marsabit Registered trustees ....Vs... Techocrade Pavillion Ltd (2014) eKLR** the Court held that filing an Application under **Section 6** of the Arbitration Act **fourteen days** after filing the Memorandum of Appearance was unreasonable. That the 1<sup>st</sup> Defendant/Objector has raised the Preliminary Objection as a delay tactic to slow the wheels of justice.

It was further submitted that there is no dispute capable of referral at the present stage as Section 6 contemplates Arbitration in the first instance, unless the Court satisfies itself that Arbitration agreement is void, inoperative or incapable of being performed and that there is not in fact any dispute between the parties with regard to matters agreed to be referred to Arbitration. . That the Rules of Procedure under **Section 6 (1)** cannot simply be wished away by **Article 159** of the Constitution. That the cause of action in this matter is pegged on a Sale Agreement executed in **2015**, and the matter has been in Court since 2018 and the Preliminary Objection is a delay tactic.

It was further submitted that the Notice of Preliminary Objection is improper as Rule 2 of the **Arbitration Rules 1997** states that Applications under Sections 6 and 7 of the Act shall be made by summons in the suit and therefore an Application for stay of proceedings under **Section 6 (1)** should be made by way of a Notice of Motion. That there exists no privity of Contract between the Plaintiffs and the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants in relation to the Arbitration Agreement and therefore pursuant to the privity of contract, the dispute cannot be referred to Arbitration by the Court. It was thus the Plaintiff's / Respondents submission that the Court is vested with jurisdiction to hear and determine the suit, as the Preliminary Objection has been filed outside the stipulated timeline.

The Court has carefully read and considered the Written Submissions by the parties, the Preliminary Objection and the relevant provisions of law finds the issue for determination is **whether the Notice of Preliminary Objection is merited.**

Do the Grounds of Objections raised by the 1<sup>st</sup> Defendant/ Objectors qualify to be a **Preliminary Objection** as was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696**, where Law J A stated that;

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.**

Further the Court stated;

**“A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.**

The 1<sup>st</sup> Defendant/ Objector has raised various issues in his Objection that all culminate into calling the Jurisdiction of this Court into question. It is not in doubt that the issue of whether or not this Court has jurisdiction to entertain the matter is a pure point of law and does not require the ascertaining of facts as Jurisdiction is everything and without Jurisdiction, the court has no option but to down its tools. See the case of **Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR**, where the Court held that:-

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”**

Does the instant *Notice of Preliminary Objection* as raised by the 1<sup>st</sup> Defendants/ Objectors meets the test of what amounts to a **Preliminary Objection** as per the **Mukisa Biscuits case (supra)**. **The Court will then determine whether the Preliminary Objection on jurisdiction is merited.**

**The basis upon which the Preliminary Objection has been raised are the provisions of section 6(1) of the Arbitration Act** which provides:

**“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.”***

It is not in doubt that the instant suit was filed on **16<sup>th</sup> February 2018**. On **16<sup>th</sup> April 2018**, Mr. Kitur appeared for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants and notified the Court that he just came on record and was granted leave to file a Replying Affidavit to the Plaintiffs Application that had been filed and further that the same would be canvassed by way of written submissions. Further on **31<sup>st</sup> July 2018**, Mr. Kitur indicated to the Court that he would be filing his Written Submissions on behalf of the 1<sup>st</sup> Defendant/ Objector and on **11<sup>th</sup> December 2018**, the Court gave directions that parties comply with **Order 11** of the Civil Procedure Rules and in subsequent Court appearances parties sought to settle the matter out of Court.

The 1<sup>st</sup> Defendant/ Objector has now moved the Court vide a Preliminary Objection dated **3<sup>rd</sup> March 2020** seeking to have the matter referred to Arbitration on the grounds that the Court lacks jurisdiction.

The Provisions of **Section 6 (1) of the Arbitration Act** are to the effect that if a party so wishes to apply for stay of proceedings, the party should apply not later than the time that the party enters appearance. This Notice of Preliminary Objection which does not even seek to stay the proceedings has been brought almost two years after the 1<sup>st</sup> Defendant/ Objector entered appearance and also delivered a pleading to wit a Notice of Preliminary Objection and therefore the 1<sup>st</sup> defendant / objector acknowledged the Plaintiffs claim and also the Court’s jurisdiction. See the case of **Mt. Kenya University ...Vs...Step Up Holdfing (K ) Ltd [2018] eKLR** where the Court of Appeal held that;

***“We have construed section 6 of the Arbitration Act on our own and considered it in light of the case law highlighted above. We adopt the position taken by the Court in the above pronouncements as in our view; they represent a correct interpretation of the provision. Considering the above in light of the findings of the trial Judge, it is our finding that the trial Judge correctly exercised his discretion and properly appreciated both the facts and the law and arrived at the correct conclusion on the matter. We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent’s application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant’s response to the respondent’s application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge’s findings. They are accordingly affirmed.”***

The Upshot of the above therefore is that the Court finds that the Preliminary Objection dated **3<sup>rd</sup> March 2020** by the 1<sup>st</sup> Defendant/ Objector is not merited and the same is dismissed with costs to the Plaintiff/ Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – .....**