



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 64 OF 2018**

**LAWRENCE MUGAMBI RUTERE T/A**

**UPCOUNTRY GUARDS & ALLIED SERVICES.....APPELLANT**

**VERSUS**

**FIDES KENYA LTD.....RESPONDENT**

**JUDGMENT**

1. The appellant herein filed the plaint dated the 6<sup>th</sup> April, 2016 against the respondent in which he claimed payment of Kshs. 113,140/= being the value of the confiscated security equipment and damages in lieu of notice as per Clause 2 of the contract entered between them. He also prayed for the costs of the suit.
2. According to the plaint, the appellant and the respondent, on or about the month of July, 2015, entered into a contract in which the respondent was to offer security to the appellant as per the terms of a written contract entered into between the parties, dated the 27<sup>th</sup> day of July 2015. The respondent is alleged to have unilaterally breached the said agreement and terminated the services of the appellant as a consequence whereof the appellant is alleged to have suffered material loss and damage as itemized in paragraph 10 of the plaint, to the tune of Kshs. 113,140/=.
3. The appellant also claimed for three months' fees in lieu of written notice to terminate the services.
4. The respondent filed an appearance and defence to the appellant's claim. It admitted the fact that it entered into a contract with the appellant to be offered security but denied that it unilaterally breached the same and terminated the services of the appellant. According to it, the contract was terminated by consent.
5. It thus denied the particulars of breach of contract as set out in paragraph 5 of the plaint. It averred that if the appellant suffered any material loss and damages, the same was as a result of the appellant's negligence.
6. The appellant filed a reply to defence on the 23<sup>rd</sup> May, 2016 in which he joins issues with the respondent in his statement of defence and reiterated the contents of the plaint.
7. On the 8<sup>th</sup> December 2017, the respondent filed a notice of preliminary objection on the ground that the court lacked jurisdiction to hear and determine the case at first instance by operation of clause 2(a) of the contract between the parties which in mandatory terms, subjects any dispute arising out of the said contract to arbitration which objection the learned magistrate allowed vide her ruling dated 28<sup>th</sup> day of September 2018.
8. The said ruling by the learned magistrate is the subject of the appeal herein. In the memorandum of appeal dated 15<sup>th</sup> day of November, 2018, the appellant has raised four grounds of appeal which this court shall consider simultaneously.
9. The appeal was canvassed by way of written submissions.
10. In his submissions, the appellant submitted that the trial court closed its eyes on some issues raised by the appellant and ignored some of the grounds of the appellant's opposition to the preliminary objection in the sense that the court opted to rule on the contractual provision to the arbitration clause and failed to determine what the law provides and in particular, Section 6(1) of the Arbitration Act.
11. The appellant further submitted that the learned magistrate failed to state in her ruling, the issues for determination and the findings on such issues and the reasons, which is contrary to Order 21 Rule 4 of the civil Procedure Act. He averred that it was not prudent decision for the learned magistrate to refer the matter to arbitration after spending several years in court and also bearing in mind that the respondent had

opted to offer a settlement on numerous occasions which he latter failed to do.

12. On its part, the respondent adopted the contents of its submissions filed in the Lower Court on the 8<sup>th</sup> day of December, 2017 and in addition submitted that Article 159(2) of the Constitution encourages Alternative Dispute Resolution methods including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms and therefore, the appellant's contention that the respondent had caused numerous adjournments as they sought for a chance to settle the matter out of court, cannot be a ground upon which the court would have refused to hear and determine the preliminary objection before it.

13. The respondent further submitted that the parties to the contract in issue voluntarily ousted the jurisdiction of the court and opted for arbitration in any dispute arising out of the contract. Reliance was had on Section 10 of the Arbitration Act and on the case of **James Heather Vs Hayes African Medical and Research Foundation (AMREF)**.

14. On the appellant's contention that Clause 2(a) of the contract on reference to any dispute to arbitration was to occur during the subsistence of the contract and not after the contract was terminated, the respondent submitted that termination of a contract arises out of a contract and therefore, a dispute arising out of the said termination arises out of the contract. It referred to Clause 17 of the contract in issue which deals with termination and also to paragraphs 4 and 5 of the plaint which lays down the details of breach of the said contract and the prayers sought therein, and reiterated that the arbitration clause is applicable to the proceedings.

15. On the third issue raised by the appellant on whether the respondent was estopped from invoking the arbitration clause after filing appearance and defence in the matter in view of Section 6 of the Arbitration Act, it was contended that the provision envisages a situation where a party to a dispute elects not to file appearance or any other pleadings and instead such a party files an application to stay the proceedings. The respondent argued that the provision is optional and not mandatory and a party is not obligated to so apply. The respondent further submitted that a party's right to raise a point of law, or a preliminary objection is not taken away when they do not move the court under Section 6(1) of the Arbitration Act.

16. The court has considered the grounds of appeal and the submissions by the respective parties. The appellant has raised four (4) grounds of appeal. The main issue for determination in this appeal and in my considered view, is raised in ground three (3) of the appeal which is; whether the learned magistrate erred in failing to recognize and apply the express provisions of the Arbitration Act 1995, Laws of Kenya.

17. This appeal arises from the learned magistrate's ruling dated the 28<sup>th</sup> day of September 2018 in which, she allowed a preliminary objection dated the 8<sup>th</sup> December 2017 challenging the jurisdiction of the court to hear the matter by operation of Arbitration clause contained in the agreement between the parties herein. The objection is premised on clause (2) of the contract which the respondent contended, in mandatory terms, subjects any dispute arising out of the said contract to Arbitration.

18. The court has perused the aforesaid clause in the contract dated the 27<sup>th</sup> July, 2015 and the same provides as follows: -

**Clause 2(a)**

***All disputes arising from this contract shall be excluded from the jurisdiction of all courts in Kenya and shall be referred to an Arbitrator, who should be a member of the Institute of Arbitrators, for an award which shall be binding on both parties.***

19. It is on the basis of the above clause that the respondent brought and argued its preliminary objection.

20. Let me start by pointing out that matters to do with Arbitration are governed by the Arbitration Act No. 4 of 1995 which was assented to, on the 10<sup>th</sup> August, 1995 and which repealed the Arbitration Act Cap. 49 laws of Kenya. The act has been amended from time to time. The recital to Act reads thus;

***“An Act of parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes.”***

21. From the above, it is therefore clear that all matters to do with Arbitration are governed by the Arbitration Act.

22. Section 6(1) of the Act is on stay of legal proceedings and it provides as follows: -

***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.***

23. Section 10 of the Act provides thus;

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

24. This section, however, allows the court to intervene in Arbitration matters under Section 35 in an application for setting aside an arbitral award and also under Section 37 when dealing with grounds for refusal of recognition or enforcement of the award, as long as the applicant

moving the court under the two sections meets the conditions set out herein.

25. It is the appellant's position that in a suit where an appearance and defence has been filed, such a suit cannot be subject of Arbitration even if there exists an arbitration clause in the agreement. On the other hand, the respondent holds a contrary view which is that, this legal position envisages a situation where a party to a dispute elects not to file appearance, or any other pleadings, and instead, such party files an application for stay of proceedings. The respondent further argued that the provision is optional and not mandatory and it is left to the discretion of the party to apply if such a party so desires.

26. The respondent is also of the view that a party's right to raise a point of law, or a preliminary objection, is not taken away when they do not move under Section 6(1) of the Arbitration Act. In other words, it was the respondent's case that an application to stay proceedings and refer the matter for arbitration can be made after filing the defence.

27. The courts have had occasions to deal with this subject. The court of appeal in the case of **Mt. Kenya university Vs Step Up Holdings (K) Limited (Civil Appeal No. 186 of 2013)** held 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.

28. In the case cited hereinabove, the appellant entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. The court of appeal found that the appellant's response to the respondent's application for injunction amounted to taking of a procedural step in the matter before the initiation of the reference process.

29. Similarly, in the case of **Charles Njogu lofty versus Bedouin Enterprises Limited, Civil Appeal No. 253 of 2003** the court considered Section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance. See also **Niazsons (K) Limited Vs China road and Bridge Corporation Kenya (2001) KLR 12, Corporate Insurance Company Versus Loise Wanjiru Wachira, Civil Appeal No. 151 of 1995** and **Kenindia Assurance Company Limited Versus Patrick Muturi Civil Appeal No. 87 of 1993**.

30. This court not only agrees with the holdings in the cases herein above cited, but it is also bound by the decisions.

31. Having analyzed the law as above, I find that the learned magistrate failed to recognize and apply the express provisions of the Arbitration Act.

32. On the second ground of appeal; that the learned magistrate failed to appreciate that statutory provisions supersedes written contractual terms by the parties, the respondent was of the view that the parties to the contract in issue voluntarily ousted the jurisdiction of the court and opted for arbitration in any dispute arising out of the contract.

33. As stated earlier in this judgment, the extent of court's intervention in matters containing an arbitration clause are limited under Section 10 of the Act. The rationale behind the limited intervention of courts in arbitral proceedings lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties, therefore, have consciously opted to resolve their dispute through arbitration, intervention by the courts' in the dispute is the exception rather than the rule. See the case of **Kenya Oil Company Limited & Another Versus Kenya Pipeline Company Limited Civil Appeal No. 102 of 2012**.

34. However, though that may be the case, judicial reluctance to recognize ouster clauses is well demonstrated in a consistent line of cases such as **Davis & Another Versus Mistry (1973) EA 463, PYX Granite Co. Versus Ministry of Housing & Local Government & Another (1958) 1 All ER 625** just but to name a few.

35. In the case herein, the arbitration clause in the agreement subjects all the disputes arising from the contract to an arbitrator. Section 6 is specific at what point a dispute should be referred to an arbitrator which should not be later than the time when that party enters appearance or otherwise acknowledges the claim going by the decision of the court of appeal cited in the **Mt. Kenya university (supra)**. A party who fails to comply with the provision of Section 6(1) loses his right to refer the matter to an arbitrator. This, therefore, in my considered view means that the court assumes jurisdiction from that point to hear the dispute between the parties notwithstanding the existence of an arbitration clause in the contract.

36. In such an instance, the arbitration clause cannot be said to have ousted the jurisdiction of the court to hear the matter. The court must rise to the occasion where a party fails to comply with an express legal provision which parties have voluntarily subjected themselves to, and in this regard, the timelines within which to invoke an arbitration clause as set out in the Arbitration Act.

37. As to the 4<sup>th</sup> ground of appeal, to the effect that the learned magistrate failed to point out issues for determination, the findings on each issue and the reasons for such findings, this court fully agrees with the sentiments raised by the appellant.

38. To this extent, I think I have said enough to show that the learned magistrate erred in law and in fact in allowing the preliminary objection dated the 8<sup>th</sup> day of December, 2017.

39. Accordingly, I find merit in the appeal and the same is allowed with costs.

40. It is so ordered.

**Delivered, dated and signed at Embu this 10<sup>th</sup> day of February, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent