



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 55 OF 2019

BETWEEN

SAN ELECTRICALS LIMITED.....APPELLANT

AND

TUMAZ AND TUMAZ ENTERPRISES LTD.....1ST RESPONDENT

MWAL MART LTD.....2ND RESPONDENT

JULIUS MWALE.....3RD RESPONDENT

(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 457 of 2018 by Hon. J.Ngárngár (CM) on 20th March, 2019)

JUDGMENT

Background

1. The Appellant's claim against the Defendants jointly and severally is as pleaded in the plaint dated 14th September, 2018 filed on 02nd November, 2018.
2. The Respondents entered appearance on 08th October, 2018 and on simultaneously filed an application seeking orders that the proceedings be stayed and the matter be referred to arbitration.
3. The Appellant opposed the application by way of a replying affidavit sworn on 06th November, 2018 and filed on 07th November, 2018 by its director NISHIT CHOTAL.
4. By a ruling dated **20th March, 2019, the court allowed the application dated 08th October, 2018, referred the matter to arbitration and stayed the proceedings.**
5. The Appellant being dissatisfied on 16.04.19 filed the memorandum of appeal dated 15.04.19 which set out 3 grounds of appeal to wit:
 1. **The agreement dated 05th April, 2017 upon which the ruling was premised was not executed by the Appellant and bear no legal binding effect on the Appellant**
 2. **The learned trial magistrate disregarded Section 4 of the Arbitration Act**
 3. **The agreement dated 05th April, 2017 was in respect of purchase of goods valued a Kshs. 54,868/- and not the subject of Kisumu CMCC No. 457 of 2018 which is for the aggregate sum of USD 31,320**

Analysis and Determination

6. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it

should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR and Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.

7. I have considered the appeal in the light of the trial court's record, written submissions and authorities cited by the Appellant. There is evidence that the Respondent's advocate was served but Respondent neither filed its written submissions nor attended the hearing.

8. Section 6 of the Arbitration Act No. 4 of 1995 provides that:

(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 an appearance or files any pleading or takes any other step in the proceedings, 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.”

9. I have considered the Court of Appeal decision in the case of Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR where it concurred with the views of Githinji J in Civil Case No. 1756 of 2000, Bedouin Enterprises Ltd–vs- Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments Civil Case No. 1756 of 2000, and stated that:

“We respectfully agree with these views so that even if the conditions set out in paragraph (a) and (b) of section 6(1) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof for arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings”

10. From the foregoing, I am persuaded that the court was properly moved at the earliest opportunity.

11. The Appellant holds the view that the business agreement dated 05.04.17 (*agreement*) upon which the impugned ruling was premised was not executed by the Appellant and bears no legal binding effect on the Appellant.

12. A perusal of the *agreement* reveals that it was only signed by the 3rd Respondent who described himself as the director of the 1st and 2nd Respondent. The issue in question is whether the agreement which is not signed by the Appellant is binding on the Appellant.

13. Section 4 of the Arbitration Act No. 4 of 1995 provides that:

3) An arbitration agreement is in writing if it is contained in-

a) A document signed by the parties;

14. On the other hand, Section 3 of the Law of Contract Act (cap 23 Laws of Kenya) provides that:

(1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

15. I have considered the foregoing together with the holding in Kenya National Highways Authority v Masosa Construction Limited & another [2015] eKLR and I have come to the conclusion that there was no arbitration agreement between the Appellant and the Respondents capable of being enforced.

16. From the foregoing, I am persuaded that learned trial magistrate erred in forcing the Appellant into a contractual relationship through an agreement that it was not party to.

17. Even in the event that the agreement was binding on the Appellant, it does not appear to me to have any nexus with the Appellant's claim for the reason that the agreement was for purchase of goods valued a Kshs. 54,868/- whereas the Appellant's claim is for the aggregate sum of USD 31,320.

18. On the material before the court, I am satisfied that this appeal has merit and is allowed in the following terms:

1. The ruling and order dated 20th March, 2019 staying the proceedings in Kisumu CMCC No. 457 of 2018 and referring the said matter to arbitration is set aside and substituted with an order dismissing the Respondents' application dated 08th October, 2018 with costs to the Appellant

2. The Respondents are condemned to pay the costs of this appeal.

DATED AND DELIVERED AT KISUMU THIS 20th DAY OF February 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - Mr. Mwesigwa

For the Respondent - N/A