



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 55 OF 2020

ORIOLE INVESTMENTS LTD.....PLAINTIFF

VERSUS

BANDARI SAVINGS AND CREDIT COOP SOCIETY LTD.....1ST DEFENDANT

QUEENO INVESTMENT LIMITED.....2ND DEFENDANT

RULING

1. As pleaded, the plaintiff blames the defendants for breach of a contract for the construction of a perimeter wall fence around that property said to be situate within Kiembeni area in Mombasa and known as PLOT SUB-DIVISION NO. 817(ORIGINAL NUMBER 324/2, SECTION II /MN. The agreement was dated 04.08.2016 and had all the terms the parties deemed pertinent for their joint purposes including an arbitration clause at clause 17.

2. In the suit the plaintiff sought permanent injunction, a declaration for being entitled to his claim and final accounts as well as general damages for breach of contract. At the time of filling the plaint the plaintiff simultaneously filed a Notice of Motion under a certificate of Urgency seeking to restrain the defendants from continuing with the building of the wall pending determination of the application and subsequently the suit.

3. That application was placed before Njoki Mwangi j, as the duty judge who in exercising her discretion certified the matter urgent and granted an interim temporary order of injunction, ordered service upon the defendants and set a return date for the 25th 08.2020.

4. Upon being served the 1st defendant took the earliest opportunity to bring to the court's attention the covenant to arbitrate by filling the Notice of Motion dated 13.8.2020 which was later amended on the 17.08.2020 as well as a Notice of Preliminary objection dated the 19.08.2020. the motion seeks in the main that the further proceedings in the matter be stayed and the matter referred to arbitration. On the other side the Preliminary objection seeks that the suit be struck out on account of the fact that the court has been divested of jurisdiction by the parties and secondly that the matter is re judicata having been heard and determined in Mombasa ELC Pet No. 15 of 2017.

5. When the matter came before this court on the 02.09.2020 the counsel informed the court that there were in fact two applications a piece from each side; by the 1st defendant seeking reference to arbitration and that by the plaintiff seeking to have the 1st defendants' managing Directors committed to civil jail for contempt. The two counsel addressed the court on the need for directions on how the applications could proceed with the plaintiff's advocate urging that the two applications be heard together while the advocate for the 1st defendant insisting that his application having challenged jurisdiction should take precedence. The court then directed that the 1st defendant's Notice of Motion and the Preliminary objection, in so far as they touched on jurisdiction, be heard first. Parties then informed the court that they would not insist on addressing the court on the matter but would rely on the papers filed. The papers filed which the court was expected to look at were agreed to include; the amended notice of motion, the Notice of preliminary objection, written submissions by the 1st defendant and the replying affidavit of one Obede Njiru, a director of the plaintiff.

6. The application for stay of proceedings and reference to arbitration was premised on section 6 of The Arbitration Act and the agreement to arbitrate contained at clause 17 of the suit contract. The application is supported by the Affidavit sworn by KEN TOBIAS ODERO SUNGU whose gist was that on the face of the arbitration agreement between the parties, the parties were bound not to litigate before the court they had contractually divested of jurisdiction. The affidavit exhibited to court several documents including; the document of title to the land subject matter of the suit agreement, the agreement between the parties as well as a letter various orders and proceedings taken in other cases involving the parties. The history of the dealings between the parties was then delved into including the allegation that the plaintiff was unable to deliver as contracted and therefore the 1st defendant contracted the 2nd defendant to execute the works instead and that the plaintiff had concealed from the court the very material fact of the arbitration agreement. In the objection the 1st defendant sought that the suit be struck out on the twin issues of arbitration agreement depriving the court of jurisdiction and on the basis that the matter was *res judicata*.

7. The application was opposed by the plaintiff on the facts deponed to in the affidavit of Obede Njiru whose gravamen was that the 1st

defendant had frustrated efforts at arbitration and ought not be allowed to invoke the same now to frustrate the plaintiff in pursuit of his claim in court. He placed reliance on his letter to the defendant dated 27.08.2018. It was additionally asserted and averred that the 1st defendant had actually misled it by failure to disclose that the land on which the construction was to be executed did not belong to it but to another entity called Bandari Investments Ltd. The charge that the said Bandari Investments Ltd filed the petition 15 of 2017 in the Environment and Land court was admitted with a contention that the plaintiff here was erroneously named therein as the 5th Respondent. The plaintiff denied his lack of capacity and asserted that the award of the same work to the second defendant was propelled by desired for unjust enrichment owing to the fact that the second contract was equally terminated upon payment of 60% of the contract sum.

8. Having had the benefit of reading the papers filed by the parties I have noted that the all-important issue for determination are two, namely; if the arbitration agreement need enforcement and if the suit herein is res judicata. Those are the two issues I discern from the width and breath of the motion and accompanying objection.

9. The agreement relied upon by the first defendant must be the starting point. It must be interrogated to establish if the parties chose arbitration as opposed to litigation for their dispute resolution and if indeed there is a dispute concerning any aspect of the agreement revealed in this suit. My reading of the file reveals no contestation by the plaintiff on the validity of the agreement. The same is indeed acknowledge the faint challenge being that the defendant was given a demand but took no steps and therefore the same is not available to it as a shield in this litigation. While the declaration of a dispute and demand for arbitration has been exhibited, nothing was shown on how and when the same was served upon the 1st defendant and what other steps were taken to effectuate the demand. I am thus not convinced that the agreement has been frustrated to the extent of inoperability nor has it become null and unenforceable. It is only when the court gets satisfied that the agreement is null and void, inoperative or incapable of enforcement or that there exists no dispute on any matter agreed to be referred to arbitration that the court can decline a request for reference to arbitration.^[1]

10. In the absence of anything to negate the parties' agreement the court is bound to enforce party autonomy and choice of forum unless it sets out to cast the repute of usurper of jurisdiction. If the court was to entertain the matter contrary to parties' agreement, it would be embarking on the task of rewriting the terms of the contract for the parties a duty it is not permitted to perform. See *National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another [2001] eKLR*.

11. The foregoing brings me to the conclusion that there being a dispute between the parties who had agreed that all dispute, of whatever nature concerning their contract, would be resolved by arbitration, I do accede to the prayer (d) in the Amended Notice of Motion. Let the dispute in this suit be referred to arbitration within 30 days from today for the matter to be mentioned on 03.11.2020 with a view to the parties reporting progress that shall have been made. With such reference, all further proceedings in this matter are stayed.

12. Having declined jurisdiction and referred the matter to arbitration, I take the view that the matter has left my hands and that it has thus become unnecessary and in fact untidy to consider whether or not the suit should be struck out. I may only add that arbitration agreed in terms of the clause in this matter merely postpones jurisdiction and limit it to considering an application for stay and reference together with enforcement of the award proceedings. Even the question whether this matter is res judicata cannot be ideally considered here because the matter not pends elsewhere for merit determination.

13. The upshot is that I do allow the Amended Notice of Motion in terms of prayer d while the prayer for striking out in the Notice of Preliminary objection is dismissed.

14. The costs of the Notice of motion and the Preliminary objection shall await the outcome of the arbitration proceedings.

Dated, signed and delivered at Mombasa this 4th day of September 2020

P J O Otieno

Judge

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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