REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 4 OF 2020

STANLEY SUGUVI KEGODE t/a KIRINDA DISTRIBUTORS.....PLAINTIFF

VERSUS

EQUATOR BOTTLERS LIMITED.....DEFENDANT

RULING

1. The suit herein was commenced by the plaintiff, by way of plaint, dated 15th May 2020, against the defendant founded on a distributorship contract, with respect to products to be supplied by the defendant. A dispute arose over payments, whereupon the defendant is said to have stopped supplying the plaintiff with the said products, and went to the extent of removing products that were in the plaintiff's custody, and forcefully took over the plaintiff's business. The plaintiff claims to have suffered damage as a result, and the suit herein is for both general and special damages, declarations, injunctions, accounts, among others.

2. The plaintiff followed up its plaint with a Motion, dated 15th June 2020, seeking, in the main, injunctive relief. He also seeks an order to compel the defendant to issue the plaintiff with a recognition letter as current distributor which he can use to secure credit for his businesses. The foundation of the Motion is the argument that there was a subsisting distributorship agreement between the parties, which the defendant had dishonoured.

3. Upon being served, the defendant filed a Notice of Preliminary Objection and grounds of objection. It averred that the suit violated sections 6, 12(3)4) and 42(3) of the Arbitration Act, No. 4 of 1995, and was an abuse of the court process and violated the *sub judice* rule. It is also argued that the suit undermines the principles provided under Article 159 of the Constitution, and that the remedies sought by the plaintiff were not available to it.

4. Even though no concrete directions had been given for filing of written submissions, the parties appeared to be of the understanding that they could dispose of the matter by way of written submissions. From the record it would appear that only the defendant filed submissions, which it limited to the issues raised to its preliminary objection.

5. I have read through the pleadings, the witness statements, the Motion, the supporting affidavit, the preliminary objection and grounds of opposition, as well as the written submissions. I am well acquainted with the issues in controversy.

6. The anchor of the suit, as emerges from the pleadings, application and the response is the distributorship/dealership agreement dated 1st January 2015. The plaintiff has enumerated it as the first item in its list of documents. However, much as the said document is the foundation of the plaintiff's case and the defendant's reaction to the suit, none of the two parties have seen it fit to place a copy of the said distributorship agreement on record for consumption by the court for the purpose of determining these interlocutory proceedings.

7. Be that as it may, the preliminary objection raises issues that revolve around jurisdiction of the court to handle the dispute at this stage, principally as the distributorship agreement had an arbitration clause, and that clause had been invoked. Since the issue of jurisdiction has been raised, I should consider it first before, I consider, if I will have to, the rest of the issues raised in the application.

8. The plaintiff has not raised any issue in his plaint about the arbitration clause, but in his witness statement, dated 15th May 2020, he does talk about it, and this is what he says:

> "18. On 10th March 2020, I sent a notice of invoking the arbitration clause contained in the Soda Distributorship Agreement of 1st January 2015 between the defendant and me. The envisioned arbitration was to address my claim of Kshs. 26, 811, 910/= against the defendant brought out in the first report of 3rd February 2020. The defendant ignored this notice and did not respond to it."

9. The letter dated 10th March 2020, from the advocates for the plaintiff, Messrs. Amena Amendi J. & Company, Advocates, addressed to the defendant, has been placed on record. The relevant portion of it reads as follows:

> "TAKE NOTICE that our client has now invoked the arbitration clause in Clause 14 of the Soda Distributorship Agreement of 1st January, 2015, between your company and our client.
>
> Our client shall appoint one arbitrator while you appoint the other and the 2 arbitrators shall jointly appoint a 3rd arbitrator. We expect that this exercise of appointing arbitrators should be undertaken and done within 21 days of the date hereof. Consequently, we expect to receive your response to this letter together with the name of your appointed arbitrator within 14th days of the date of this letter.
>
> TAKE FURTHER NOTICE that if we do not receive a positive response from you in 14 days we shall take this matter to Court entirely at your risk as to costs and other consequences attendant thereto."

10. Clearly, therefore, the plaintiff concedes the arbitration clause. As said elsewhere, I do not have before me the distributorship agreement, and, therefore, I do not have the benefit of the exact wording of the arbitration clause. Anyhow, the issue for me to consider is whether a party can file a suit when arbitration proceedings are pending, and whether such a suit would be *sub judice*.

11. I have taken time to look up the provisions in the Arbitration Act, that the defendant has invoked, that is to say sections 6, 12(3)4) and 42(3), and this is what they state:

> "*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."*
>
> "*12(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default")—*
>
> *(a) has indicated that he is unwilling to do so;*
>
> *(b) fails to do so within the time allowed under the arbitration agreement; or*
>
> *(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),*
>
> *the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.*
>
> *(4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —*
>
> *(a) make the required appointment; and*
>
> *(b) notify the other party that he has done so,*
>
> *the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement."*
>
> "*42. Repeal of Cap. 49 and saving*
>
> *(3) For the purposes of this subsection, any arbitral proceedings shall be deemed to have commenced on the date the parties have agreed the proceedings should be commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration."*

12. Sections 7, 10 and 22 of the Arbitration Act are also relevant. They state as follows:

> "*7. Interim measures by court*
>
> *(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.*
>
> *(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."*
>
> "*10. Extent of court intervention*
>
> *Except as provided in this Act, no court shall intervene in matters governed by this Act."*
>
> "*22. Commencement of arbitral proceedings*
>
> *Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent."*

13. The takeaway from these provisions is this, that under section 10 of the Arbitration Act, the court has no jurisdiction to intervene in a matter that is subject to arbitration except in such manner as is provided for under the Arbitration Act. It is with respect to that the court, in ***Monique Oraro vs. AAR Insurance Co. Ltd*** **[2019] eKLR**, said:

> "*… with regard to the claim that the arbitration clause does not oust jurisdiction of the Court to hear and determine the matter is not true and not the legal position. By entering into an arbitration agreement, parties express their intention that all disputes between them be referred to and settled by arbitration. This choice of forum manifests the parties dispute resolution mechanism. With respect to the parties' agreement, court proceedings cannot be brought to Court on merits of the disputes governed by the Arbitration clause."*

14. The words by the court, in ***David Mututo Mumo vs. South Eastern Kenya University (formerly known as South Eastern University College)*** **[2016] eKLR**, are in similar vein. The court said:

> "*… None of the parties has sought to effect the arbitration clause. Indeed, it is the finding of the court that the plaintiff prematurely moved the court without effecting clause 6 on arbitration."*

15. The same theme was addressed by the Court of Appeal, in ***Niazsons (K) Ltd vs. China Road & Bridge Corporation Kenya*** **[2001] eKLR**, in the following terms:

> "*… the appellant seems to suggest that section 6(1) of the Arbitration Act, 1995, permits parallel proceedings both before ordinary courts and a domestic tribunal. The policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved … it is therefore my view, and I so hold, that section 6(2) of the Arbitration Act, 1995, does not permit parallel proceedings to be handled simultaneously."*

16. Where it transpires that arbitration proceedings are underway then the court ought not handle the dispute, instead it should stay the same in terms of section 6 of the Arbitration Act. See *Standard Group PLC vs. Wesley Kiptoo Yegon & another* [2019] eKLR and *Muslims for Human Rights (Muhuri) vs. Municipal Council of Mombasa & another* [2018] eKLR**.**

17. Would a suit be *sub judice* if it is commenced during pendency of arbitration proceedings? Case law appears to hold that it would be *sub judice* to have parallel proceedings where a suit is initiated in court when arbitration proceedings are pending. It is for that precise reason that such suit would have to be stayed to await conclusion of the arbitral proceedings. See *Niazsons (K) Ltd vs. China Road & Bridge Corporation Kenya* (supra) and *MITS Electrical Company Limited vs. Mitsubishi Electric Corporation* [2018] eKLR.

18. Are arbitration proceedings pending in the instant matter? According to sections 22 and 42(3) of the Arbitration Act, arbitration proceedings are deemed to be commenced the moment the other side receives a request for the dispute to be referred to arbitration. In the instant case, the plaintiff has placed on record a notice, dated 10th March 2020, in which he invoked the arbitration clause in his dealership agreement with the defendant. To a copy of that notice, the defendant embossed its official stamp as evidence of receipt, and affixed the signature of the person who received it on 10th March 2020. Consequently, in terms of sections 22 and 42(3) of the Arbitration Act, there are pending arbitration proceedings.

19. Never mind that the plaintiff did not follow through his notice by appointing an arbitrator. He appeared, in that notice of 10th March 2020, to be of the mistaken view, in the event the defendant failed to respond to the same, the option open to him was to move the court. That is not what section 12(3)(4) of the Arbitration Act envisages, that once the other side fails to harken to the request to refer the matter to

arbitration, then the party making the request goes to court. Section 12(3)(4) of the Arbitration Act contemplates that even with such failure the party making the request ought to plough through with the process, so long as there is evidence that that the request had been properly served and received by the defaulting party. What the plaintiff should have done, upon default by the defendant, was to give the notices contemplated in section 12(3)(4) of the Arbitration Act, and let the arbitrator that he had appointed, to proceed, as sole arbitrator, in terms of 12(4) of the Arbitration Act, and determine the dispute, and the award of such sole arbitrator would have been binding on both sides.

20. In the instant case, it has not been controverted that arbitration proceedings are pending between the parties. It has also not been disputed that the arbitration clause was operational, neither has it been disputed that there is a dispute in terms of the arbitration clause. I find that the applicant's preliminary objection is timely, and in accord with the strictures of section 6 of the Arbitration Act, as it was filed on the same day the defendant entered appearance, which was done in protest. I find that it would be prejudicial to allow parallel proceedings to take place, by proceeding with this matter when the parties have already instituted arbitration proceedings, which are still pending. Consequently, I shall stay the proceedings herein and refer the dispute, disclosed in the plaint filed herein, to arbitration.

21. So what is the fate of the application dated 15th June 2020? Section 7 of the Arbitration Act allows the High Court, both before or during arbitral proceedings, to intervene on an interim basis for the purpose of protection of the subject matter. By dint of section 7(2) of the Arbitration Act, it would appear that the arbitrator or arbitrators can address and determine some of the issues that may be raised at the High Court. The short of it is that the High Court does have jurisdiction to grant temporary reliefs pending the arbitration. That then would mean the plaintiff should be at liberty to pursue the prosecution of the application for such interim measures of protection are still relevant and pursuable. see *Kabew Kenya Limited vs. Inabensa - Kenya* [2016] eKLR. In that behalf, let the plaintiff be at liberty to have the matter mentioned for the purpose taking directions on disposal of the said application with respect to interim reliefs. Otherwise, the preliminary objection is hereby upheld, and disposed of in terms of paragraph 20 here above. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 16th DAY OF October, 2020

W MUSYOKA

JUDGE