REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 248 OF 2019

ASANO TATSUNORI.....1ST PLAINTIFF

WORLD GATEWAY JAPAN CO. LTD.....2ND PLAINTIFF

-VERSUS-

JOEL KIMUTAI BOSEK T/A

J. K. BOSEK & CO. ADVOCATE.....DEFENDANT

RULING

1) The subject matter of this ruling is the chamber summons dated 5th December 2019 taken out by the defendant/ applicant. In the aforesaid summons, the defendant sought for the following orders:

> ***i. The instant application be certified as urgent, service be dispensed with and the same be heard ex-parte in the first instance.***
>
> ***ii. There be a stay of all proceedings in the matter herein pending arbitration.***
>
> ***iii. The dispute herein be referred to arbitration in accordance with the provisions of Article 14.3 of the Tripartite Agreement between the plaintiff and the defendant/applicant.***
>
> ***iv. Any other or further order this Hon. Court deems fit, proper and just to grant.***
>
> ***v. Costs of this application be provided for.***

2) The summons is supported by the affidavit of Joel Kimutai Bosek. When served with the summons, the plaintiffs filed the replying affidavit of Asano Tatsunori to oppose the application. This court gave directions to have the application disposed of by written submissions.

3) I have considered the grounds stated on the summons and the facts deponed in the supporting and opposing affidavits. I have also taken into account the rival written submissions and the authorities cited by the parties.

4) The background of this suit is short and straightforward.

The plaintiffs filed this suit against the defendant in which they seek for damages for professional negligence out of a contract for legal services. The plaintiff retained the defendant as their lawyer who agreed to offer his professional legal services to the plaintiffs at a fee in drafting/handling three agreements relating to the sale/purchase of gold worth USD722,080 between the plaintiffs and M/s Custom Cargo Handlers.

5) The defendant is said to have handled the three agreements on behalf of the plaintiffs. The three agreements are namely; Master Sale and Purchase Agreement dated 27.02.2017, 12.09.2017 respectively and a Master Collateral Management Agreement dated 13.09.2017.

6) It is apparent that the plaintiffs paid the defendant a sum of ksh.5,498,000/= for the legal services he offered. The

plaintiffs are now before court claiming that the defendant failed to discharge his duty of care, diligence and skill of reasonably competent advocate in handling the said agreement. The plaintiffs have further alleged that the defendant failed to protect the interest of the plaintiff by fraudulently conspiring, collaborating and colluding with the sellers to defraud the plaintiffs and occasioning them a loss of USD722,080.

7) It is said that this suit is purely a dispute between a client and his advocate emanating from legal services rendered by the defendant to the plaintiff at a fee which services are said to occasioned huge financial loss to the client thus prompting the plaintiffs to file this suit.

8) Having given the background of this dispute, I now wish to consider the merits or otherwise of the defendants summons. It is the submission of the defendant that the proceedings in this suit should be stayed and referred to arbitration in terms of Article 14.3 of the Tripartite Agreement between the plaintiffs and the defendant.

9) The defendant averred that he had executed the aforesaid agreement on 13.09.2017 with the plaintiffs and custom Cargo Handlers Ltd where he was appointed as the collateral manager. The defendant stated that it is a term under the provisions of Article 14.3 of the master Collateral Management agreement (MCMA) that any dispute arising between the parties ought to be referred to arbitration and that is the reason why the defendant is before this court.

10) The plaintiffs have argued that the defendant's summons is ill conceived, frivolous, vexatious and deliberately intended to prejudice, embarrass and delay the fair hearing of this suit. It is argued that the defendant is trying to evade justice through the backdoor by relying on a clause he himself drafted with a clear intention to defraud his client.

11) They further argued that the clause is part of the evidence of gross negligence the plaintiff intends to adduce in proving their case against the defendant. The plaintiffs pointed out that the defendant's application is devoid of any merits.

12) The plaintiffs further submitted that a suit based on professional negligence was not one of the disputes envisaged under the three agreements relied upon by the plaintiffs in this suit. It is argued that Article 14.3 is quoted out of context to mislead this court by leaving out Article 14.2.

13) The plaintiffs also stated that the dispute envisaged by MCMA relates to a suit between the seller and the plaintiffs. It is pointed out that in this suit the plaintiffs raised serious issues including gross professional negligence, fraud, misappropriation of clients funds, conspiracy to defraud and breach of trust among other grounds which dispute can only be adjudicated by this court.

14) The final issue raised by the plaintiff is that the defendant, acknowledged the jurisdiction of this court by filing an unconditional memorandum of appearance. It is also pointed out that the instant summons was filed after an appearance was filed instead of the summons being filed together with the memorandum of appearance. The plaintiff cited the case of **Charles Njogu lofty =vs= Bedowin Enterprises Ltd (2005) eKLR** in which the Court of Appeal stated *inter alia* ***that there are two situations where an application under Section 6 of the Arbitration Act can be filed.***

> ***a) If the defendant enters appearance .. 'at the time of entering appearance'***
>
> ***b) If no appearance is entered is entered- 'at the time of filing any pleadings or at the time of taking any step in the proceeding.***

15) The plaintiffs further averred that in Kenya if the application for stay is not filed at the time of filing a memorandum of appearance, an order for stay of proceedings will not be granted under Section 6 of the Arbitration Act.

16) The plaintiffs have stated that the defendant failed to file an appearance together with the instant application.

17) I feel obliged to begin by determining the preliminary objection raised and argued by the plaintiffs. It is argued that once the defendant filed the instant application after entering appearance he submitted himself to the

jurisdiction of this court hence rendering the application for stay and referral incompetent and not necessary.

18) I have carefully perused at the provisions of Section 6(1) of the Arbitration Act of 1995 which 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 the 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" (Emphasis added)**

19) In sum, the plaintiffs are of the submission that the defendant having failed to file an application for stay at the time of entering appearance loses his right to rely on the arbitration clause.

20) Having considered the rival submissions plus the material placed before this court, it is not in dispute that the defendant filed a memorandum of appearance on 28th November 2019.

21) It is also not in dispute that he proceeded to file the instant application on 5th December 2019. The provisions of Section 6(1) of the Arbitration Act of 1995 is quite explicit and 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.**
>
> b) **That there is not in fact any dispute the parties with regard to the matters agreed to be referred to arbitration.**

22) It is not contested that the instant application was filed 7 days after the defendant entered appearance. Under Order rule 1 of the Civil Procedure Rules, a party who had entered appearance is required to file a defence within 14 days from the date of filing appearance.

23) In my view the fact that a party failed to contemporaneously file the memorandum of appearance and the application for stay of proceedings is not fatal, so long as the application is filed before the lapse of 14 days the defendant is required to file a defence. I think the step envisaged to have been taken under Section 6 of the arbitration may include admission of the claim or the filing of a defence. Consequently, I am convinced that the current summons is competently and properly before this court.

24) The other serious issue which was raised by the plaintiffs is whether the advocate-client dispute is a dispute which was envisaged under the MCMA. I have already stated that the plaintiffs are of the submission that they did not envisage an advocate-client dispute to be one of the disputes identified to go to arbitration.

25) It is not in dispute that the three agreements relevant to this disputes are namely:

> i. The **Master Sale and Purchase Agreement** for gold bars dated 27th February 2017.
>
> ii. **Master Sale and Purchase Agreement** for gold bars dated 12th September 2017.
>
> iii. The **Master Collateral Management Agreement (MCMA)** dated 13th September 2017.

26) It is clear from the first two agreements that the defendant witnessed the signing of those agreements by the seller and the purchasers.

27) However, the third agreement, that is the **Master Collateral Management Agreement (MCMA)** is executed **Custom Cargo handlers** (seller), **World Gateway japan** (buyer), the plaintiff herein and **J. K Bosek & Co. Advocates** (collateral manager), the defendant herein.

28) The third agreement clearly refers to the first two agreements.

29) It is not in dispute that the plaintiffs' claim against the defendant is premised on the Master Collateral Management Agreement (MCMA) dated 13th September 2017. Article 10.1 of the MCMA states as follows:

> **"The Collateral Manager agrees to indemnify and keep indemnified, defend and hold harmless the SELLER and BUYER, their officers, directors, employees and agents from and against any and all losses, liabilities, claims, obligations, costs, expenses arising from during or after completion series, which result from, arise in connection with, or are related in any way to claims by third parties or regulatory authorities, and which directly arise due to the following reasons:**
>
> **i. The Collateral Manager breach of representations and warranties specified in this MCMA or**
>
> **ii. Negligence or misconduct by collateral manager.**
>
> iii. **The fault or negligence of collateral manager, its officers, employees, agents, subcontractors and or representatives …"**

30) The suit before this court is based on professional negligence which appears to be alluded in the above article. It is apparent that MCMA does not distinguish between professional negligence and the ordinary tort of negligence.

31) **Article XIV clause 14.3 of MCMA** provides as follows:

> **"14.3 In the event of any dispute arising out of or in connection with the present MCMA, the parties shall first refer the dispute to the proceedings under ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall prevent any party from commencing arbitration in accordance with sub-clause Y below. (Y) All disputes arising out of or in connection with the present MCMA shall be finally settled by the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."**

32) It is clear in my mind that the dispute before this court is subject to arbitration in terms of the MCMA the parties executed.

33) In the end, the defendant's summons dated 5th December 2019 is found to be meritorious. Consequently, the summons is allowed giving rise to issuance of the following orders:

> **i. There be a stay of all proceedings in this matter pending arbitration.**
>
> **ii. The dispute herein is hereby referred to arbitration in accordance with the provisions of Article 14.3 of the Master Collateral Management Agreement dated 13th September 2017 (MCMA) between the plaintiff and the defendant**
>
> iii. **Costs of the summons to abide the outcome the arbitral proceedings.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 11th day of December, 2020.

……..

J. K. SERGON

<u>JUDGE</u>

In the presence of:

…….….. for the Plaintiff

…….. for the Defendant