



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.533 OF 2014

OFFSHORE TRADING COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

THE KENYA DEPOSIT INSURANCE CORPORATION

AS LIQUIDATOR OF POSTBANK CREDIT LIMITED

(IN LIQUIDATION).....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant through a Notice of Motion dated 1/10/2018 brought pursuant to section 1A, 1B and 3A of Civil Procedure Act; order 25 Rule 5; order 46 and order Rule 1 of Civil Procedure Rules seek the following orders:-

a) The Honourable Court be pleased to direct that this application be heard on priority basis.

b) This Honourable Court be pleased to enter judgment marking this suit as settled in terms of the Deed of Settlement entered into on 10th February 2015 between the parties hereto as read together with the Addendum dated 4/11/2015 and the Sale Agreement dated 4/11/2015 between the defendant and WIPI Group USA incorporated.

c) The Honourable Court be pleased to hold that the balance due from the Plaintiff to the Defendant by dint of the Settlement Deed dated 10th February 2015 and the addendums thereto is the sum Kshs.304,000,000/-.

d) The Honourable Court do order the Plaintiff to pay to the Defendant the sum of Kshs.304,000,000/- against discharge of all the securities listed in the Deed of settlement dated 10th February 2015 within a period of 90 days from the issue date of the Order or such reasonable period as the court may determine in the circumstances.

e) In the alternative the Honourable Court do refer the parties to the arbitration for determination of any dispute arising one of the need of settlement dated 10th September 2015 as stipulated and do make such interim orders and directions as it may deem fit and in the interest of justice to preserve the status quo.

f) Costs of this application be provided for.

2. The application is supported by an affidavit of Shakhhalaga Khwa Jirongo sworn on 1st October and further premised on the grounds on the face of the application under (i) to (viii).

3. The application is opposed. The Respondent relies on Replying affidavit by Jane Komita sworn on 30th October 2018 and a supplementary affidavit by Jane Komita, sworn on the same date.

4. That the Applicant filed written submissions dated 5th December 2018 and list of authorities dated 11th December 2018 whereas the Respondent filed written submissions dated 10th December 2018. The Advocates for both parties highlighted on their written submissions on 30/1/2019.

5. Having carefully considered the application, affidavits in support, the Replying affidavit and supplementary affidavit as well as counsel rival submissions and their oral submissions, the issues arising thereto for consideration can be reduced to the following:-

a) Whether the court should enter judgment marking this suit as settled in terms of the Deed of Settlement entered into on 10th February 2015 between the parties hereto as read together with Addendum dated 4/11/2015 and the sale agreement dated 4/11/2015 between the defendant and WIFI Group USA incorporated?

b) Whether the balance due from the plaintiff to the defendant by dint of the settlement Deed dated 10th February 2015 and the addendums thereto is Kshs.304,000,000/- only and

Whether the Honourable Court should order the plaintiff to pay to the defendant the sum of Kshs.304, 000,000/- against the discharge of all the securities listed in the Deed of Settlement dated 10th February 2015 within a period of 90 days from the date of issue of the order or such other reasonable period as the court may determine in the circumstances?

c) Whether in the alternative, the court should refer the parties to the arbitration for determination of any disputes arising on one of the Deed of Settlement dated 10/9/2015 as stipulated and do make such interim orders and directions as it may deem fit and in the interest of justice to preserve the status quo?

A) Whether the court should enter judgment marking this suit as settled in terms of the Deed of Settlement entered into on 10th February 2015 between the parties hereto as read together with Addendum dated 4/11/2015 and the sale agreement dated 4/11/2015 between the defendant and WIFI Group USA incorporated?

6. From Deed of Settlement "SKJ-1" annexure to the affidavit of Shakhhalaga Khwa Jirongo, dated 1st October 2018 clause (d) and (e) of the said Deed of settlement is clear that it contemplated settlement of this suit upon the plaintiff and the principal debtor fulfilling their obligations by payment contemplated under the terms and conditions of the Deed of Settlement. The Deed of settlement provided in unambiguous terms what would follow in case of non-compliance with the terms and conditions set out thereto. Under clause 4 of the Deed of Settlement it is provided if any of the said payments are not paid in full on the due dates, the agreement shall at the option of the liquidator automatically lapse entitling the liquidator to immediately exercise all the rights and powers vested upon it by the irrevocable Bank guarantee to recover the debts.

7. In the instant matter, the Applicant with the principal debtor defaulted in discharging their obligations under the Deed of Settlement provoking the defendant to issue demand through a letter dated 13th May 2015 to both the plaintiff and the principal debtor. The principal debtor and the plaintiff did not comply with the Defendant's request but instead forwarded to the defendant a discharge of charge over **L.R No.12979/3 Ruai** as a pre-condition for their offering a bank guarantee to payment of sums contemplated under the Deed of Settlement. The action resulted into defendant Advocate through a letter dated 9th June 2015 to advise the plaintiff of the termination of the settlement Deed between the parties herein. That notwithstanding default on part of the plaintiff, the defendant extended the time within which the plaintiff was to discharge its obligations under the settlement agreement as per a letter of 10th August 2018 through which the principle debtor was granted 30 day to settle the matter.

8. The principal debtor has since the execution of Deed of Settlement not bothered to honour the same following which by a letter dated 13th September 2016, the defendant advised the principal debtor of the repudiation of the agreement contained in the letter of 10th August 2018. I therefore find the agreement sought to be enforced and recorded as a judgment of this court has been terminated and by such reason, I find there is no basis for this court to enter judgment marking the suit as settled in terms of the Deed Settlement entered into on 10th February 2015 as read together with Addendum dated 4th November 2015 and the sale agreement dated 4th November 2015. I find the parties are bound by their agreement and court cannot rewrite a contract for the parties nor change the terms and conditions of the parties' contract.

B) Whether the balance due from the plaintiff to the defendant by dint of the settlement Deed dated 10th February 2015 and the addendums thereto is Kshs.304,000,000/- only and whether the Honourable Court should order the plaintiff to pay to the defendant the sum of Kshs.304, 000,000/- against the discharge of all the securities listed in the Deed of Settlement dated 10th February 2015 within a period of 90 days from the date of issue of the order or such other reasonable period as the court may determine in the circumstances?

9. The Deed of settlement dated 10th February 2015 obligated the plaintiff to comply with the terms of the Deed of Settlement. The Deed of Settlement was terminated following the plaintiff and principal debtor, failure to honour the terms and conditions of the agreement despite several extensions of indulgences to them by the defendant. By a letter of 10th August 2018 the defendant extended time within which the plaintiff was to discharge its obligations under the Deed of settlement by 30 days by settling the debt amount owed but the plaintiff failed to settle the outstanding amount within the given period. I note it was a term of the letter of 10th August 2018 that the plaintiff's failure to pay, the defendant was to rescind the offer and debt would revert back to the book balance. It is further noted the plaintiff through a letter of 5th September 2016 acknowledged the debt owing and due and offered to pay the outstanding amount without challenging the defendant's letter. That again by letter of 10th September 2018, the principal debtor confirmed all conditions set out in the defendant's letter of 10th August 2018 were acceptable to them other than the timelines which were two short. By the plaintiff's conduct I find the plaintiff accepted the terms set out in the defendant's letter thus to pay the outstanding amount within 30 days; in default the defendant would rescind the offer and debt would revert back to book value. The plaintiff had the opportunity to comply with terms and conditions set out in the Deed of Settlement. He had been indulged severally by the defendant by being given extension of time to pay which he did not. I find having not honoured the Deed of Settlement, the plaintiff is wrong and unjustified to ask this court to hold that the debt owing from the plaintiff to the defendant is Kshs.304, 000,000. This court has found no basis to order so nor order it to pay the defendant Kshs.304, 000,000 against the discharge of all the securities listed in the Deed of Settlement following the termination of the deed of settlement and debt reverting to the book value due to the plaintiff's failure to comply with the set out terms in the Deed of Settlement. I find that this prayer is without basis and merit.

C) Whether in the alternative, the court should refer the parties to the arbitration for determination of any disputes arising on one as stipulated of the Deed of Settlement dated 10/9/2015 and do make such interim orders and directions as it may deem fit and in the

interest of justice to preserve the status quo?

10. The Deed of Settlement under clause 16 provides how a dispute arising or relating to the deed or in relation to exercise of any right should be resolved.

It provides as follows:-

"Any dispute arising in relation to this deed or in relation to the exercise of any right provided by it shall be referred to arbitration by a single arbitrator appointed mutually by the parties hereto failing which after 14 days of a dispute being declared by the Chairman for the time being of the Law Society of Kenya and the award or any finding of such arbitrator shall be final and not subject to challenge in any court of law."

11. This suit was filed on 17/11/2014 simultaneously with the Notice of Motion seeking several prayers. The same was followed by attempts to reach settlement out of court leading to the Deed of Settlement. However the applicant filed the present application seeking orders listed thereto including referral of this suit to arbitrator as per terms of the Deed of Settlement.

12. Section 6(1) of the Arbitration Act, 1995 provides:-

"(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— "

13. The above-mentioned section envisages that a party seeking to take advantage of arbitration clause must apply to the court not later than the time of entering appearance or filing any pleadings or taking any other steps in the suit.

14. In the case of **Timothy M. Rintari vs Madison Insurance Co. Ltd [2005] eKLR**, the Court held as follows with respect to section 6(1) of the Arbitration Act:

"The applicant submitted that no other step was taken in the proceedings – in that no defence was filed, and no application of any sort except this one under Section 6(1) of the 1995 Arbitration Act. In my view, the words not later than the time when that party enters appearance... or files any pleadings or takes any other step in the proceedings ... mean simply what they say; and that is that if a party wants to apply for Stay of proceedings, as in this case, such an application must be made concurrently with any of the three steps first taken by the party applying for the stay. Failing that, the party loses the right to subsequently make the application for stay of proceedings.

The above was the holding in VICTORIA FURNITURES LTD. vs AFRICAN HERITAGE LTD AND ANOTHER, Civil Case No.904 of 2001, where, in the course of his Ruling, at page 5, Mbaluto J. said, and I am happy to borrow his words: "if the section were to be interpreted to mean that a party could file an appearance or take the two other steps mentioned above and then wait for sometime before applying for stay of proceedings, the phrase not later than the time he entered appearance or etc, etc. would be not only superfluous but also meaningless.""

15. In the instant suit, the plaintiff filed the suit on 17th November 2014 and did not until 1st October 2018, a period of 4 years' since the suit was filed, both to have the matter referred to arbitration, notwithstanding availability of arbitration as per clause 16 of the Deed of Settlement, it further delayed this matter by taking other steps including filing of other applications. I find that the plaintiff was interested in buying time and did indeed squander or forfeited its right to rely on arbitration. I therefore find no merits or reasons to refer the parties to arbitration as sought by the plaintiff. I therefore decline to grant interim orders nor order status quo as sought by the plaintiff.

16. The upshot is that the application dated 1st October 2018 is without merit and is dismissed with costs.

Dated, signed and delivered at Nairobi this 7th day of March, 2019.

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J .A. MAKAU

JUDGE