REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIV. APPLN. NO. 24 Of 2019

BETWEEN

LEOPARD ROCK MICO LIMITED.....APPLICANT

AND

THE COUNTY GOVERNMENT OF MERU.....RESPONDENT

R U L I N G

1. In or about July, 1997, the applicant entered into a Lease Agreement with **Nyambene County Council** (the predecessor in title to the respondent). The lease was for all that premises known as **Leopard Rock Lodge** measuring 40 acres within the Meru National Park for 25 years. The monthly rent was agreed at KShs.30,000/- and a daily payment of 5% of the sum collected from bed occupancy.

2. That Lease was superseded with a Lease dated 30th October, 2008 (hereinafter "the said Lease") whereby, the parties agreed that the monthly rent was to be KShs.60,000/- increasable by 10% every two years and the daily payment of 10% of the total sum collected from the bed occupancy payable monthly in arrears.

3. In the said Lease, the parties agreed, *inter alia*, that the term was for 25 years but the same could be terminated by either a 6 month's notice to that effect or 6 month's rent in lieu thereof. That in the event of any dispute between the parties not mutually settled, the same shall be referred to arbitration.

4. In or about July, 2018, the respondent terminated the said Lease. Pursuant thereto, the applicant sought to be paid compensation which was not agreed upon. The applicant determined the compensation at KShs.525,881,985/- which the respondent declined to pay.

5. As a result of the foregoing, the applicant attempted to trigger the arbitral clause and approached the Chairman of the Chartered Institute of Arbitrators with the request that an arbitrator be appointed to determine the dispute. The Chair of the said institute advised the applicant, quite correctly, that the Lease did not specify who the appointing authority was.

6. The applicant then wrote to the respondent asking the respondent to concur on an arbitrator from a list of 7. The respondent declined informing the applicant that it had severally explained its position previously and it would not allow the applicant to jump the gun and create 'unnecessary disputes'.

7. On the background of the foregoing, the applicant lodged in this court a Motion on Notice dated 7th March, 2019 under ***section 12 of the Arbitration Act, 1997 and the inherent jurisdiction of the Court***, seeking two prayers:-

> a) that the court do direct either the Chairperson of, the Chartered Institute of Arbitrators or the Nairobi Centre for International Arbitration to appoint a single arbitrator to determine the dispute between the parties herein arising out of the said Lease, or
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> b) that pursuant to ***Rule 12 (a) of the Arbitration Rules, 1997,*** the court do appoint a single arbitrator from a list of 7 provided to determine the said dispute.

8. The application was supported by the affidavit of **Michel Dechauffour** sworn on 7th March, 2019 reiterating in detail what I have already stated above. The application was opposed through Grounds of Opposition dated 22nd March, 2019. In those Grounds, the respondent contended that; the application was frivolous, vexatious and an abuse of the process of the court; that it was misconceived and bad in law; devoid of merit and that the orders sought were untenable and incapable of being granted.

9. This being a business dispute where time is of essence, when the parties appeared before me on 8th April, 2019, I directed them to file and exchange written submissions within 3 days. The reason was that, the court was proceeding for 2019 Easter Vacation on 11th April, 2019

which would give the court the opportunity of writing the ruling during the said vacation.

10. As at the time of writing this ruling, the only submissions on record are those of the applicant which I have carefully considered. I have also considered the cases relied on of; **Zahra S. Mohamed & Another vs. Insurance Company of East Africa Ltd [2009] EKLR, Pan African Paper Mills (East Africa) Limited (In Receivership) vs. First Assurance Compny Limited [2015] eKLR** and **Stefa Trading Limited vs. Frigorex East Africa Ltd [2014] eKLR.**

11. Looking at the Grounds of opposition and without the benefit of the submissions of the respondent, it is difficult to determine how the application is frivolous, vexatious and an abuse of the process of the court or how it is misconceived or bad in law.

12. Be that as it may, I have looked at the supporting affidavit of **Michel Dechauffour.** It is contended that there was a Lease between the parties which stipulated certain rights and obligations for the parties. The said Lease was produced in evidence and was not denied by the respondent.

13. It was not denied that the respondent did terminate the said Lease in or about July, 2018. Further, there is a plethora of correspondence exchanged between the parties which show that the parties are not in agreement on the way forward.

14. Something is considered to be *frivolous* when it lacks purpose or importance, or is unsuitable. In the same vein, something will be *vexatious* when it is made for purposes of annoying. Can the application before me be said to be lacking in purpose, or to be unsuitable or to have been made for purposes of annoying? In light of the respondent not only having terminated the Lease between itself and the applicant but is also said to have belligerently sought to take possession of the leased property, I do not think so.

15. To my mind, taking into consideration all the matters deposed to in the affidavit of **Michel Dechauffour,** that were not denied, I do not see anything frivolous or vexatious in the application before me. That objection is rejected.

16. The other objection was that the application was misconceived and does not lie in law. As already stated, all the averments made on oath in the supporting affidavit were not denied. **Clause 3 (c)** of the Lease dated 3rd October, 2008 provided as follows:-

> ***"c) Save as hereinbefore otherwise specifically provided all questions hereinafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1968 or any statutory enactment in that behalf for the time being in force".*** (Emphasis provided)

17. The Lease was for a term of 25 years from 1st January, 2009. It was terminated effectively as at 31st December, 2018. **Clause 2 (d)** of the Lease provide for payment of the cost of any facilities put up by the tenant at the expiry of the Lease.

18. The Lease expired due to termination by the respondent. Subsequently, the applicant raised a claim for KShs.525,881,985/- allegedly for compensation, which the respondent will hear none of. Is that not a scenario that may call for the invocation of the arbitral clause in the Lease? To my mind, seeking to invoke the application of the arbitral clause, in the circumstances of this case, cannot be said to be a misconception.

19. The respondent's position in this matter, as stated in the letter dated 21st February, 2019 by its Legal Officer, can be discerned from their letters of 22nd January, 2019 and 11th February, 2019, respectively. In those letters, the respondent contended that:-

> i) the applicant was in breach of the Lease;
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> ii) the applicant's claim for KShs.525,881,985/-, was grossly exaggerated;
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> ii) the applicant should detail the structures in place by October, 2008 and developed by the respondent and provide the Approved Plans for structures that might have been put up after October, 2008 after which the parties can concur on the Quantity Surveyor.

20. I think the respondent is in the position which pertained in the case of **Zahra S. Mohamed & Another vs. Insurance Company of East Africa Ltd (supra)** wherein Kimaru J. delivered himself as follows:-

> ***"It appears that the respondent is confusing the validity of the applicants' claim with the question whether there exists a dispute between itself and the applicants that is capable of being referred to determination by arbitration. It is trite that where parties have put in place a mechanism for resolving any dispute that may arise in the course of their business relationship, and which mechanism ousts the jurisdiction of the courts in the first instance, this court has no alternative or option but to give effect to the wishes of such parties".***

I fully associate myself with the said words and I reiterate them here in toto.

21. As already stated, the Lease between the parties contained an arbitral clause. ***Section 12 of the Arbitration Act, 1995*** provides for the appointment of arbitrators. It is clear from the Lease that it had an arbitral clause (arbitration agreement). The only thing the clause did not specify is the appointing authority. Since a dispute has arisen, I hold that the arbitral clause has kicked in. That since the parties did not concur on the appointment of a single arbitrator, the application is meritorious.

22. Accordingly, I allow the application. I direct the Chairperson of the Chartered Institute of Arbitrators of Kenya to appoint a single arbitrator within 14 days of this order, to determine the dispute between the applicant and respondent arising from the Lease dated 3rd October, 2008 between the applicant and Nyambene County Council.

23. Because of the recalcitrant conduct of the respondent, I will award the costs of this application to the applicant.

It is so ordered.

DATED and DELIVERED at Meru this 2nd day of May, 2019.

A. MABEYA

JUDGE