



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO.20 OF 2018

NANCY MAKOKHA.....1ST PLAINTIFF

MIYUNA ENTERPRISES LIMITED.....2ND PLAINTIFF

VERSUS

WANAMBISI BUSOLO.....1ST DEFENDANT

FUIKO ENTERPRISES LIMITED.....2ND DEFENDANT

RULING

By application dated 22.11.2018 the defendant filed a notice of preliminary objection to the filing of this suit seeking the following orders;

- i. That the suit is premature as the plaintiff did not exhaust the provisions 7 of the agreement dated 19th March 2013 on dispute resolution.*
- ii. That the suit filed is a misjoinder as the 1st defendant has wrongly been enjoined when the borrower was a limited company with rights to sue and be sued hence need to strike out his name with costs*
- iii. That the 1st Plaintiff in this case does not have capacity to sue since the lender was a 2nd Plaintiff hence the name of the 1st plaintiff ought to be struck out with costs.*

By plaint dated 26th October 2018, the plaintiffs have sued defendants that in March 2013, the 1st Defendant through his family company, FUIKTO ENTERPRISES LIMITED the 2nd Defendant herein, borrowed the sum of Kshs.10,000,000/= from the 1st Plaintiff for purposes of trading with the same as his family company has purportedly secured a trading business which needed finance.

That the said amount was credited to 2nd Defendant account on 19th March 2013. That it was term of contract between parties that the amount be refunded together with profit and the defendants defaulted on all terms of the agreement leading to this suit. The plaintiffs 'basically prayed for judgement against the Defendants jointly and severally for Kshs.10,000,000/= lent to defendants, projected profits at 1,580,000/= per month for 5 years=Kshs.94,800,000/= totaling to Kshs.104,000,000/=and costs and interest at court rates.

The Preliminary objection herein was canvassed by way of written submissions. Mr. Situma counsel for the defendants submitted that the plaintiff did not exhaust provision 7 of the agreement dated 19th March 2013 on dispute resolution before seeking redress to court. He submitted that the plaintiff is seeking redress from court instead of adhering to the provisions of the agreement of appointing an arbitrator.

Ms. Baraza submitted that the defendant has come to this court with clean hands and is pleading technicalities to delay the course of justice and this matter has been pending for five years since 2013 and efforts to agree on an arbitrator per the agreement have failed.

From the pleadings and submissions, it is clear that the matter for determination is whether this suit is prematurely before this honorable court.

To determine issue at hand I wish to state that the basis and essence of a preliminary objection is as stated in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696*. The facts of this case are not relevant here but the principle enunciated there regarding a preliminary objection, is this:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an

objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration “(Law J.A pp. 700, E)

In the instant suit parties entered into an agreement dated 19th March 2013 and clause 7 of the said agreement provides;

7. That any dispute arising from the conduct of business under this agreement shall be resolved by a mutually appointed arbitrator and shall be resolved under the laws of Kenya.

The plaintiff submitted that attempt have been made to appoint a mutual arbitrator but the defendant has been evasive. The plaintiff having been unable to secure a mutual arbitrator with defendant wrote to the chairman, chartered institute of Arbitrators requesting for appointment of an arbitrator. The Chief Executive Officer of chartered institute of Arbitrators replied through a letter dated 29th July 2016 as follows;

“For the chairman of the Chartered Institute of Arbitrators to make the appointment, the parties through their representatives should mutually sign a letter vesting authority on the chairman to CIArbs to make the appointment and make payment of Kshs.15,000/= (Kenya Shillings Fifteen Thousand) being the appointment fee. The Cheque should be made payable to the Chartered Institute of Arbitrators (Kenya Branch)

In default of the above, the parties may apply to the High Court for appointment of the arbitrator”.

Having considered the above letter it appears to me that efforts by the plaintiff to engage the Defendants for appointment of an arbitrator per provision 7 of the agreement has not born an fruits due to non-corporation by the defendant and he cannot therefore turn back and say that this matter should have gone through arbitration when he knows he has not been supportive to the process. When a party is frustrating the process of appointing or arbitration and the chairperson Institute of Arbitrations declines to appoint one in my view the only remaining avenue for redress will be the courts which will make appropriate orders for disposal of the claim.

I therefore find no merit in the preliminary objection and the same is dismissed with costs.

Dated and Delivered at BUNGOMA this 22nd day of October, 2019.

S.N.RIECHI

JUDGE