



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 176 OF 2017

CHRISTOPHER WAINAINA MBURU.....PLAINTIFF/RESPONDENT

-VERSUS-

CONSUMATE COURT LIMITED.....1ST DEFENDANT/APPLICANT

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This court is presently dealing with the Notice of Motion dated 3rd December, 2018 brought by the 1st defendant. The Motion is supported by the grounds laid out on its face and the facts deponed in the affidavit sworn by *Rebman Ambalo Malala*. The 1st defendant is seeking the following orders:

(i) *Spent.*

(ii) *Spent.*

(iii) *THAT this Honourable Court be pleased to set aside the orders granted on 5th November, 2018.*

(iv) *THAT this Honourable Court be pleased to stay the suit pending arbitration.*

(v) *THAT this Honourable Court be pleased to refer the dispute in the suit to arbitration by a single arbitrator to be agreed upon by the parties or to be appointed by the court.*

(vi) *THAT the costs of the application be provided for.*

2. *Rebman Ambalo Malala*, being one of the Directors of the 1st defendant, deponed in his affidavit inter alia, that pursuant to Clause 4.2 of the lease agreement entered into between the plaintiff and the 1st defendant in respect to Apartment Block Number B1 situated on L.R. NO. 330/315, Kilimani ("*the subject premises*"), any dispute arising between the parties touching on the lease or the construction/application of any clause in the lease agreement shall be referred to arbitration, hence this court is obligated to make an order to that effect.

3. On the same note, the deponent asserted that Section 6(1) of the Arbitration Act stipulates that the court shall stay any legal proceedings before it on an application filed by a party invoking the arbitration clause in the agreement.

4. Furthermore, it was the deponent's averment that the plaintiff vide his notice of motion dated 8th August, 2018 sought for order (c) which contradicts the orders being sought in his plaint; adding that the 1st defendant was not heard on the aforesaid Motion by virtue of the fact that the same was not served upon it, and that the alleged service was in no way proper; hence it would be in the interest of justice that it be granted an opportunity to respond to the said Motion. Consequently, the deponent urged this court to set aside the orders it made on 5th November, 2018 in respect to the Plaintiff's Motion dated 8th August, 2018 and the suit be stayed and the matter be referred to arbitration.

5. In opposing the Motion, the plaintiff swore the replying affidavit on 11th December, 2018 essentially stating that the 1st defendant was properly served with the summons to enter appearance since the relevant process server had in fact visited the 1st defendant's management

company offices at Ole Dume Road only to be directed to drop the summons at NHIF Car Park Offices, which he did, and that the summons were received by the Secretary of Ujenzi Consultancy upon the assurance that all documents being served upon the 1st defendant were received using the stamp for Ujenzi Consultancy.

6. In the same light, the plaintiff asserted that the deponent who swore the supporting affidavit to the application as a Director of the 1st defendant-Rebman Ambalo Malala-admitted in his affidavit that he equally serves as a registered quantity surveyor under the name Ujenzi Consultancy. The plaintiff went on to aver that in any event, the court eventually directed that service of the summons be effected by way of registered post and that this was done in line with the postal address provided in the lease agreement. In the plaintiff's view, none of the parties stands to be prejudiced if the court order of 5th November, 2018 is not stayed but should the same be stayed, then the plaintiff will be prejudiced since his constitutional right to clean and safe water will be impeded.

7. As regards the arbitration clause, the plaintiff denied its applicability in the matter on the basis that having been served with summons but choosing to ignore them or approach the court at the earliest opportunity, the 1st defendant should now be estopped from invoking the arbitration clause. The plaintiff included the averment that in any event, the suit involves the 2nd defendant who was not a party to the lease agreement.

8. On behalf of the 2nd defendant, *Ephraim Kinuthia* swore the replying affidavit on 31st December, 2018 stating that the 1st defendant's attempts to have order 2) issued by the court on 5th November, 2018 set aside has since been overtaken by events since sometime on or about 19th December, 2018 the 2nd defendant connected water directly to the plaintiff in compliance with the abovementioned court order.

9. In addressing the subject of arbitration, the deponent restated the assertions of the plaintiff that the matter should not be referred to arbitration since the 2nd defendant is not a party to the lease agreement hence the arbitration clause cannot apply to it.

10. The Motion was disposed of through written submissions which were then highlighted orally before this court. On its part, the 1st defendant maintained that there was no proper service of the summons, pleadings or the Motion dated 8th August, 2018 by the plaintiff, adding that it only came to learn of the existence of the suit upon execution of the court order made on 5th November, 2018. On this note, the 1st defendant argued that the plaintiff did not avail a certificate of posting as proof that service was effected upon it by way of registered post, citing the case of *Michael Gitere & another v Kenya Commercial Bank Limited [2018] eKLR* where the court appreciated that service by way of posting ought to be proved.

11. The 1st defendant submitted in the alternative that supposing the summons and relevant documents had been posted, the same were posted to an incomplete address since the same did not include an address code. In support of its position, the 1st defendant placed reliance on *Moses Kibiego Yator v Eco Bank Kenya Limited [2014] eKLR* where the court held that in the absence of an indicated address code, it was not possible to ascertain that the relevant document had been sent to the correct address.

12. On a similar note, the 1st defendant challenged the contents of the affidavit of service of the process server in respect to the pleadings, summons and application dated 8th August, 2018 on the premise that the same was not corroborated, further submitting that since the 1st defendant is a body corporate, it follows that service ought to have been effected on its known or designated officer; this was not done in the present instance.

13. Further to the above, the 1st defendant stood its ground that in promoting alternative dispute resolution mechanisms, this court is obligated to stay the suit and have the dispute referred to arbitration pursuant to Section 6(1) and (2) of the Arbitration Act. It is equally the 1st defendant's contention that the arbitration clause incorporated in the lease agreement constitutes a distinct agreement independent of other agreements and hence it lies with the arbitrator to determine the validity of the arbitration agreement, citing the case of *Titus Kitonga & another v Total Kenya Limited & another [2018] eKLR* where it was held that the court cannot consider issues to do with the merits of a dispute where jurisdiction lies squarely with the arbitrator.

14. Ultimately, the 1st defendant maintained that having not filed a statement of defence, it has shown that it is not conceding to the jurisdiction of this court to entertain the dispute, hence it would be necessary for this court to have the dispute referred to arbitration and grant the order for stay of the suit in the meantime.

15. The 1st defendant's submissions were by and large echoed in the oral highlights by its advocate, *Mr. Lubullelah* who added that in his affidavit of service, the process server (Adrian Mwiti) did not disclose the documents purported to have been served upon the 1st defendant, neither did he annex copies of the purported documents.

16. The plaintiff through his submissions was steadfast in his position that the 1st defendant should have raised the issue of the arbitration clause upon being served with summons. The plaintiff further maintained that the 1st defendant had on previous occasions been served with various documents but chose to ignore them.

17. It was also the plaintiff's argument that the court order of 5th November, 2018 which the 1st defendant is seeking to be set aside has already been overtaken by events, the 2nd defendant having complied with the same.

18. On the arbitration clause, the plaintiff contended that since the 2nd defendant was not a party to the lease agreement, there is no basis for the dispute to be referred to arbitration, citing *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR* where the Court of Appeal rendered *inter alia*, that a contract cannot be enforced against a person who is not a party to it.

19. The submissions by the plaintiff were restated by *Mrs. Mbugua*, his learned counsel save to add that the pleadings and application dated 8th August, 2018 was correctly served through the 1st defendant's last known postal address and upon diligently undertaking a search with the Registrar of Companies.

20. The 2nd defendant's submissions were a reiteration of the averments made in the replying affidavit of Ephraim Kinuthia, save to emphasize that the doctrine of privity of contract is alive in arbitration clauses featured in agreements between parties, relying on the respective courts' holdings in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR* and *Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR* that a contract cannot be enforced against a third party. The above sentiments were reaffirmed by *Mr. Wanjeri*, advocate for the 2nd defendant.

21. I have cautiously considered the grounds set out in the Motion; the facts deponed to in the affidavits supporting and opposing the same; and the submissions, both oral and written, coupled with the various authorities cited.

22. It is well noted that the orders being sought are of a three (3)-fold nature and I will address them as such, beginning with the limb concerning referral of the matter to arbitration followed by the limb on stay of the suit; and lastly, the limb to do with the setting aside of the orders issued by this court on 5th November, 2018.

23. I will address the first and second limbs of the application contemporaneously. It is not disputed that the lease agreement entered into between the plaintiff and 1st defendant featured an arbitration clause under Clause 4.2 of the same; the plaintiff has made no indication that he did not agree to be bound by the agreement. It is equally not in dispute that the 2nd defendant was not a party to the lease agreement.

24. In that case, the arbitration agreement would not be enforceable against the 2nd defendant, being a third party. This position was taken in two (2) Court of Appeal decisions: firstly, in *Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR* the court rendered the following:

“The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms.”

The above was reaffirmed in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR* it was held that:

“...the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party.”

25. It therefore follows that the arbitration clause cannot be enforced against the 2nd defendant. However, this is not to say that the arbitration clause cannot be invoked, since the arbitral clause is in itself a distinct agreement/contract between the plaintiff and the 1st defendant, and it is not disputed that the dispute relates to the lease agreement. Besides, it would appear a dispute continues to subsist between the parties and in my opinion, the 2nd defendant's enjoinder in the suit rides majorly on the fact that it is the water service provider mandated to provide water to Nairobi County. For this reason, this court's only reasonable option would be to respect and uphold the terms of the clause as is by referring the matter to arbitration. In so finding, I am persuaded by a similar reasoning assumed in *Titus Kitonga & another v Total Kenya Limited & another [2018] eKLR*.

26. Having determined so, I will now delve into addressing the order for a stay of the suit. **Section 6(1)** of the **Arbitration Act, Cap. 49** empowers the courts to stay legal proceedings at the application of a party to an arbitration agreement. The provision stipulates that the applying party may move the court at any time after entering appearance and before taking any further steps in the proceedings.

27. In the present instance, at the time of bringing the present application, the 1st defendant had not filed any pleadings or participated in the court proceedings. Seeing as the dispute now before the courts arises out of the lease agreement, it would do no good to have it proceed concurrently with any dispute referred to arbitration. **Section 6(2)** of the **Arbitration Act** requires this court to stay the court proceedings in such an instance. To my mind and in view of my resolution to refer the matter to arbitration, I see no reason as to why there should not be a stay of the suit in the meantime.

28. This now brings me to the final limb on whether there is basis for me to set aside the orders made by this court on 5th November, 2018 in respect to the application dated 8th August, 2018.

29. The 1st defendant's ground for seeking to have the same set aside is that it was not served with the plaintiff's application dated 8th August, 2018 thus denying it the opportunity of being heard on the same. Briefly, the plaintiff through the said application sought a variety of orders; of interest, however, is order c) seeking that: *“the 2nd defendant, its agents or servants do hereby dispense with the consent of the 1st defendant forthwith and directly supply water to the plaintiff's apartment pending the hearing and determination of the suit.”*

30. The plaintiff averred that the 1st defendant was served with the application as well as the pleadings and summons to enter appearance. Various affidavits of service sworn by process server *Adrian Mwiti* were filed as evidence of the same. However, when the plaintiff appeared before this court on 26th September, 2018 it was noted that service had been effected on Ujenzi Consultants, purported to be the same company as the 1st defendant. However, this court; not being satisfied with the nature of service effected, directed that the 1st defendant be served with the application by way of registered post. It is therefore for me to determine whether service was properly effected.

31. The High Court in the case of *Michael Gitere & another v Kenya Commercial Bank Limited [2018] eKLR* cited by the 1st defendant

rendered that there must be proof of service effected by way of post. I have looked at the affidavit of service sworn by Adrian Mwiti on 7th October, 2018 stating that service of a bundle of documents given to him was effected by way of registered post.

32. The courts have previously reasoned that a party claiming proper service by way of registered post ought to avail evidence by way of a certificate of posting. Take for example the case of *Moses Kibiego Yator v Eco Bank Kenya Limited [2014] eKLR* where the court made the following analysis:

“But I am unable to see in the certificate of postage the postal code via which the letter was sent. It could very well be that it was sent to the wrong postal code. There is therefore some doubt as to whether the statutory notice was sent to the correct address and the benefit of such doubt must be given to the plaintiff.”

The court went on to reason that:

“If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.”

33. In the present instance, it is apparent the plaintiff did not avail the certificate of posting. However, attached to the affidavit of service is an original payment receipt issued by the Postal Corporation of Kenya and indicating the 1st defendant as the addressee. Similarly attached to the affidavit of service is the letter dated 27th September, 2018 addressed to the 1st defendant by the plaintiff’s advocates and listing the documents being forwarded, including the application of 8th August, 2018. The 1st defendant’s address (P.O. BOX 50972) as indicated in the said letter matches the address borne in the lease agreement dated 16th May, 2008 entered into between the plaintiff and 1st defendant. In both instances, the postal address for the 1st defendant bears no code.

34. Moreover, the plaintiff annexed to his replying affidavit a copy of the search records from the Registrar of Companies as concerns the 1st defendant; the same confirms that the postal address for the 1st defendant is consistent with that indicated both in the letter and lease agreement mentioned above. In any event, the 1st defendant has not disputed that the postal address is accurate. In the premises, I am satisfied that the plaintiff offered sufficient proof to support his position that service was properly effected upon the 1st defendant through its last known address.

35. Be that as it may, upon hearing the application, I allowed the various prayers sought therein, including prayer c) whose contents I have already set out hereinabove. I noted that both the plaintiff and 2nd defendant inferred that my said order 2) relating to prayer c) of the application has since been overtaken by events; the 2nd defendant went a step further to avail documentation to that effect.

36. However, in view of my decision to refer the matter to arbitration, I am convinced that the circumstances require me to set aside my earlier orders of 5th November, 2018. Nevertheless, **Section 7** of the **Arbitration Act** enables me to issue interim reliefs/protection deemed necessary to safeguard the plaintiff’s right to water supply and also protect the subject of the arbitral proceedings, and I shall exercise my discretion in doing so.

37. The upshot is that I will allow orders (iii), (iv) and (v) of the Motion and make the following consequent orders:

a) The dispute between the plaintiff and the 1st defendant is hereby referred to arbitration, to be determined by a single arbitrator to be agreed upon between the parties, failing which an arbitrator shall be appointed by the court.

b) There shall be a stay of the suit proceedings pending the arbitration process.

c) The 1st defendant shall not interfere with the plaintiff’s supply of water to Apartment Block Number B1 situated on L.R. NO. 330/315 Kilimani as already connected by the 2nd defendant pending the appointment of an arbitrator by the parties or by the court, whichever the case may be.

d) The 1st defendant to bear the costs of the application assessed at Kshs.10,000/ to be paid within 14 days from the date of this ruling.

Dated, Signed and Delivered at Nairobi this 7th day of November, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st Defendant/Applicant

..... for the 2nd Defendant/Respondent