



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 39 OF 2013**

**NEW KENYA CO-OPERATIVE**

**CREAMERIES LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SAVE THE GENSET**

**INTERNATIONAL LTD.....DEFENDANT/APPLICANT**

**RULING**

1. This ruling relates to a notice of motion application dated 10<sup>th</sup> April, 2014, brought under the provisions of Rule 3(i) and 2 of the High Court Practice and Procedure Rules and supported by the grounds on the face of it and an affidavit of the even date, sworn by the applicant's managing director John Maina Githaiga.

2. The applicant is seeking for orders that;

*a) spent*

*b) the ex-parte judgment entered against in default of defence together with all consequential orders made subsequent thereto be set aside;*

*c) the defendant be granted leave to file its defence out of time and the same be admitted in the pleadings;*

*d) the defendant be granted leave to defend the suit unconditionally;*

*e) the costs of the application be in the cause.*

3. The applicant aver that on the 14<sup>th</sup> August 2009, parties entered into an agreement quotation number NKCC/037/2009 for the defendant to supply the plaintiff with a generator for their milk Plant at Kitale. The applicant thereafter supplied the generator, installed it at the plant, whereby the respondent's officers verified the same and signed the handover and/or takeover form.

4. That the contract sum for the goods was Kshs. 9,250,000. The respondents were to pay Kshs. 4,625,000, upon the signing of the contract but paid Kshs. 3,300,000 only at the execution of the contract which was less 50% of the contract. However, despite the breach, the applicant financed the purchase and installation of the generator in an operational state.

5. However, upon demand of the payment of the balance of the contract sum, the respondent informed the applicant that the generator had stalled on the 21<sup>st</sup> June 2010, after running for thirty six (36) hours from the date of installation. The respondent claimed that the generator did not have a guarantee, and unilaterally took it to; Mantruck (K) Limited where it was stripped in the absence of any of the applicant's officials or engineers.

6. On 22<sup>nd</sup> June 2011, the applicant made a demand for the balance of Kshs. 5,950,000 and gave the respondent notice that failure to comply with the said notice, it would invoke clause 10 of the agreement to move the dispute to arbitration and/or sort out the issue amicably. However, the respondent prior to taking the generator for repair invited the applicant to a meeting for amicable settlement of the matter but the applicant refused demanding payment first.

8. The applicant argues that the Honourable court has no jurisdiction to hear this matter as clause 10 of the agreement herein provides that in the event that there is a dispute regarding the instrument between the parties herein, the same shall be referred to arbitration. However, for justice to be done and be seen to be done, the Applicant should be allowed to defend this matter unconditionally.

9. The application was opposed by the respondent based on grounds of opposition dated 29<sup>th</sup> April 2014 to the effect that, it is an abuse of the court process, has no merit and is solely aimed at delaying justice and preventing the respondent from enjoying the fruits of the Judgment. That it does not satisfy the requirements of setting aside a Judgment.

10. The respondent also filed a Replying affidavit dated 14<sup>th</sup> May 2014, sworn by its company secretary Peter Kennedy Ombati who averred that the applicants were duly served with summons to enter appearance and entered appearance on 13<sup>th</sup> March 2013. However, they did not serve the respondent's Advocates with memorandum of appearance. The respondent only learnt of the appearance after perusing the Court file on 2<sup>nd</sup> April 2013. Even then the respondent's Advocates advised the applicant that they had applied for judgment on 4<sup>th</sup> April 2013 and forwarded the copy of the request for judgment; vide a letter dated 15<sup>th</sup> April, 2013. No action was taken with on 13<sup>th</sup> June 2013, when judgment was entered.

13. The respondent argues that the applicant has no defence. The claim for Kshs. 3,300,000 on merit for which judgment has been entered is over money received and whose consideration failed completely. That due to the breach of contract by the applicant, the respondent is not entitled to a refund of the advance payment of Kshs. 3,300,000. Further the applicant has no fixed abode and/or known assets.

14. I have considered the application, the grounds and the affidavit in support and the documents annexed thereto. I have also considered the grounds of opposition, the replying affidavit and the documents annexed to them. I find from the documents produced by the applicant, a document marked as "SG1" being the contract the parties herein entered on 14<sup>th</sup> April 2009 for the supply, installation and commissioning of 600 KVA power diesel generator set in KCC/037/2009.

15. Clause 10 of the contract stipulates that, the parties shall try to settle any dispute which may arise in connection with the agreement amicably. If the amicable negotiations fail, the dispute shall be referred to arbitration and that the decision of the arbitrator shall be final. It is therefore clear that this court does not have jurisdiction to entertain this matter. In that regard, the provision of Section 10 of the Arbitration Act No. 4 of 1993 clearly states that; "except as provided for, under the Act, no court shall intervene in matters governed by the Act."

15. I have noted from the plaint filed in this matter on 4<sup>th</sup> February 2013, of the even date that the plaintiff did not disclose the existence of an arbitral clause in the agreement executed by the parties. It therefore follows that any orders made herein are null and void for want of jurisdiction.

16. Be that as it were, it is clear that the defendants by conduct are acquiesced and/or, submitted to the jurisdiction of the court by entering and filing a memorandum of appearance on 8<sup>th</sup> March 2013 and thereafter failing to move the court appropriately to either strike the suit out for want of jurisdiction and/or stay of the same pending referral to arbitration as provided for under Section 6 of the Arbitration Act.

17. In that respect, the defendant is taken to have waived its rights to object as provided for under Section 5 of the Arbitration Act No. 4 of 1995. What is even more surprising is that, the defendant/applicant is seeking in this application for leave to file a defence out of time and defend the suit unconditionally, yet they allege that the court has no jurisdiction. It is therefore clear that both parties' hands are tainted and none of them can go to equity with unclean hands.

18. Further, this issue of jurisdiction was raised by the defendant/applicant in the application dated 25<sup>th</sup> October 2016. In the ruling delivered thereon dated 30<sup>th</sup> August 2018, the court clearly stated at paragraph 22 that, "though jurisdiction is everything, the court ought to be properly moved." The defendant has belatedly filed a notice of preliminary objection dated 18<sup>th</sup> May 2017, on the ground that the court has no jurisdiction. What is clear to the court is that, the parties herein are approbating and reprobating. They are both aware that this court has no jurisdiction yet they are actively involved in litigation before it.

18. The provisions of Article 159(2)(c) of the Constitution of Kenya, provides that the court shall in the exercise of judicial authority, promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. Further, the law is settled that, jurisdiction is everything. In the case of; Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited (1989 KLR 1 Justice Nyarangi (J) stated that,

*"jurisdiction is everything without it, a court has not power to make one more step."*

20. Thus a court of law downs its tools in respect of the matters before it the moment it holds the opinion that it is without jurisdiction. In the matter of; Advisory Opinions of the Supreme Court of the Constitutional Application No. 2 of 2011, the Supreme court stated:-

*"The Lillian "S" case (1989) KLR 1 establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."*

20. Finally in the case of; Samuel Kamau macharia & Another vs Kenya Commercial Bank & 2 others Supreme Court Civil Appeal NO. 2 of 2011, the Supreme Court stated; a court's jurisdiction flows from either the constitution or legislation or both.

21. Therefore, based on the above legal principles, it is clear that this court has no jurisdiction to entertain these matters and/or any of the

applications filed herein. I accordingly find the application herein is defective due to want of jurisdiction and strike it out with no orders as to costs.

22. Those are the orders of the court.

**Dated, delivered and signed in an open court this 4<sup>th</sup> day of November 2019.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Githui holding brief for Mr. Njuguna for the Plaintiff/Respondent

Ms. Nderitu holding brief for Mr. Gichuki for the Defendant/Applicant

Dennis -----Court Assistant