REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.6 OF 2019

BETWEEN

TRIDENT INSURANCE COMPANY LTD.....APPELLANT

AND

DR. VINCENT OGUTU

T/A VISION GATE CONSULTANT.....RESPONDENT

(Being an Appeal from the ruling and order in Busia Chief Magistrate's Court

Civil Case No.178 of 2018 by Hon. Maureen A. Odhiambo – Resident Magistrate).

JUDGMENT

1. By a ruling dated 14th February 2019 the learned trial magistrate dismissed an application by the appellant dated 2nd August 2018. It is this ruling that gave rise to this appeal.

2. In the application dated 2nd August 2018, the appellant was seeking the following orders:

a) That there be a stay of proceedings.

b) That all disputes and issues arising in the suit and the application be referred to arbitration in terms of clause 16 of the service level agreement entered into by the parties.

c) That the costs of the application be in the cause.

3. The appellant was aggrieved by the ruling and filed this appeal. The appellant was represented by the firm of Muma Nyagaka & Company Advocates. The appellant raised the following six grounds of appeal:

a) The learned trial magistrate erred in law and in fact in law in failing to appreciate the legal principle that arbitration issues are essentially contractual matters within the Arbitration Act.

b) That the learned trial magistrate erred in law by importing the provisions of Order 6 Rule 1 Order 7 Rule 1, Order 10 Rule 3, Order 10 Rule 9 and Order 10 Rule 11 of the Civil Procedure Rules into a matter which has restrictive provisions under the Arbitration Act.

c) That the learned trial magistrate erred in fact and in law in finding and holding that:

(i) The appellant/defendant ought to have sought leave of the Court to file a defence out of time.

(ii) The appellant/defendant ought to have raised a preliminary Objection challenging the jurisdiction of the Court.

d) That the learned trial magistrate erred in fact and in law in failing to find and hold that the cause of action having been founded on an Arbitration Agreement, the Arbitration Act did not require the Appellant to file defence upon entering appearance but rather, apply for a stay of the proceedings for purposes of paving way for arbitration.

e) That the entry of interlocutory judgment against the appellant/defendant was unlawful in view of the express terms of the Standard Service Agreement.

f) That the learned trial magistrate erred in fact and in law in declining to grant a stay of proceedings pending referral to arbitration.

4. The respondent was represented by the firm of J.P Makokha & Company Advocates. He opposed the appeal on grounds that the appellant did not file defence in the suit.

5. The learned trial magistrate in her ruling captured important dates in the suit before her as follows:

> **Summons to enter appearance were served upon the appellant on 13th April 2018. By 4th September 2018 when interlocutory judgment was entered, the appellant had not entered appearance. It was during the formal proof on 18th September 2018 when the court was informed that the appellant had entered appearance on 2nd August 2018.**

6. In order to determine the application by the appellant dated 2nd August 2018, the learned trial magistrate had to address the issue of failure to enter appearance and file defence within the stipulated time. Order 6 Rule 1 provides:

> **Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.**

In the case of the appellant, appearance was required to be entered within 15 days of service. Service having been effected on the appellant on 13th April 2018, she was expected to enter appearance by 29th April 2018 unless leave of court was sought and granted. In this case no leave of court was sought. The purported memorandum of appearance entered on 2nd August 2018 was therefore irregular. The decisions in **Niazons (K) Ltd. vs. China Road & Bridges Construction (K) [2001] 2 EA** and in **Westmont Power (K) Ltd. vs. Kenya Oil Company Ltd. (2011) eKLR** could be applicable if the appellant had entered appearance.

7. At the time of the hearing of the application dated 2nd August 2018, there was no defence on the basis of which the learned trial magistrate could have addressed her mind to the issue of jurisdiction and the arbitration issues raised by the appellant. The appellant cannot blame anybody. They squandered their chance by failure to adhere to rules of procedure.

8. The appellant/applicant did not file and serve the defence at the appointed time. The consequences of such a failure are provided for under Order 10 Rule 3 as follows:

> **Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances.**

In the instant case there was no defence. The ruling of the learned trial magistrate was based on the law which she correctly interpreted.

9. I therefore find that the appeal lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT BUSIA THIS 20TH DAY OF NOVEMBER, 2019

KIARIE WAWERU KIARIE

JUDGE