



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 353 OF 2017

AFVEST LIMITED.....PLAINTIFF

VERSUS

MICRO MOBILE LIMITED.....DEFENDANT

RULING

1. Before the court is an application by the Defendant, **MICRO MOBILE LIMITED**, seeking a stay of these proceedings, so that the matter could be referred to Arbitration.
2. It is the defendant's case that there was an arbitration clause in the Loan Agreement which was executed by the two parties to these proceedings. In the light of the said arbitration clause, the defendant insists that it would be improper for the plaintiff to ignore a provision which it was bound comply with.
3. When canvassing the application, Mr. Mbaluto advocate submitted that the plaintiff had tried to compel the defendant to accede to the conversion of a debt into Equity.
4. The defendant said that the plaintiff, **AFVEST LIMITED**, did not have the right to compel the defendant to convert the debt into equity.
5. The plaintiff conceded that pursuant to clause 24 of the Agreement in issue, disputes between the parties ought to be resolved by way of Arbitration.
6. Mr. Mueke advocate told the court that his client was not ignoring clause 24.
7. However, he submitted that in this case, there was no dispute between the parties.
8. As far as the plaintiff was concerned, it was clear that the defendant had written to the plaintiff, seeking a deferral of interest on the Loan facility. By the said letter, the defendant had, (*according to the plaintiff*), stated that the date of Conversion was 30th November 2016.
9. It was submitted by the plaintiff that by setting a date for Conversion, the defendant had admitted that the plaintiff had already exercised its right of conversion.
10. My attention was drawn to a letter dated 7th August 2017, from Wamae & Allen Advocates. The plaintiff's position is that pursuant to that letter, the date of conversion was set as the 30th of November 2017.
11. Furthermore, the plaintiff drew my attention to the letter dated 23rd August 2017, from Oraro & Company Advocates. According to the plaintiff, that letter set out the terms of the conversion which the defendant had accepted.
12. But the defendant's position is that there had been no conversion.
13. I have read the letters in question. I find that by its letter dated 7th August 2017, the plaintiff's advocates had asserted that because the plaintiff had duly supplied the documents which the defendant had requested for, the plaintiff was of the firm view that the defendant;

“.....is estopped from denying its agreement to effect the conversion herein”.

14. By the same letter, the plaintiff observed that the defendant had purported to resile from the agreement;

“...and stated its intention to act in breach by refusing to proceed with the debt to equity conversion”.

15. In the light of what the defendant is said to have done, the plaintiff demanded from the defendant, the;

“...immediate completion of the conversion as per the terms of the agreement dated 11th April 2017, and specifically to provide ours with the necessary completion documents and official confirmation from the Companies Registry that the conversion had been effected”.

16. The plaintiff's advocates concluded the letter by notifying the defendant that unless the defendant completed the conversion by 31st August 2017, the plaintiff would institute proceedings seeking specific performance of the Agreement.

17. On 23rd August 2017 the advocates for the defendant responded to the demand notice, stating, *inter alia* that;

“Clause 10 of the Agreement did not therefore confer any right on your client to issue (a)

‘Notice of Conversion’ ”

18. The defendant added that neither its Board of Directors nor any other person had communicated any offer of conversion.

19. The defendant concluded its response by stating that no conversion had taken place.

20. In the circumstances, the situation, as I see it is as follows;

a) The plaintiff asserted that the parties had an agreement pursuant to which the debt would be converted into equity.

b) The defendant denied the existence of any Agreement pursuant to which the debt would be converted to equity.

21. Therefore, in my considered opinion, there is in fact a dispute between the parties concerning whether or not there was an Agreement pursuant to which the debt would be converted to equity.

22. The said dispute is real.

23. It will therefore be necessary to determine whether or not there was an Agreement pursuant to which the debt could be converted into equity.

24. The said issue cannot be wished away, especially considering that by its demand notice, the plaintiff based its assertion concerning the alleged Agreement, upon an estoppel. In other words, it was not simply a situation in which the terms of an agreement were explicit, yet one party to the said agreement was denying the terms which were obvious.

25. In this case, clause 24 in the Loan Agreement provides as follows;

“All disputes or difference which at any time arise between the parties whether during the Term or afterwards touching or concerning this Agreement or its construction or effect or the rights, duties or liabilities of the parties under or by virtue of its or otherwise or any other matter in any way connected with or arising out of the subject matter of this Agreement shall be referred to arbitration....”

26. It is my understanding that there has arisen some dispute or differences between the parties concerning the construction and effect of their respective written communications on the subject matter of conversion.

27. Indeed, if there had been no differences in the opinions of the parties to the Loan Agreement, the plaintiff would not have instituted these court proceedings, which are intended to be a means through which to compel the defendant to give effect to the conversion of the debt to equity.

28. In the circumstances, I allow the application, and direct that these proceedings be stayed forthwith.

29. I further order that the dispute be referred to Arbitration, by a single Arbitrator, to be agreed upon by the parties. If within the next 30 days the parties fail to agree on an Arbitrator, the Chairman of the Chartered Institute of Arbitrators shall appoint the Arbitrator.

30. The costs of the application dated 23rd August 2017 are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of February 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mwenda for Mueke for the Plaintiff

Miss Barasa for Mbaluto for the Defendant

Collins Odhiambo – Court clerk.