**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 627 OF 2012**

**ANTHONY RAYMOND CORDEIRO.....1STPLAINTIFF**

**ELAINE DESA CORDIERO.....2ND PLAINTIFF**

**TECHNOLOGY TODAY LTD.....3RD PLAINTIFF**

**- VERSUS -**

**ADRIAN NOEL CARVALHO.....1ST DEFENDANT**

**ARLET DOMINICA CAEVALHO.....2ND DEFENDANT**

**I&M BANK LIMITED.....3RD DEFENDANT**

**JAYANTLAL JIVAJ MEPAL SHAH.....4TH DEFENDANT**

**MANSUKHLAL JIVAJ MEPAL SHAH.....5TH DEFENDANT**

**DILIPKUMAR JIVAJ MEPAL SHAH.....6TH DEFENDANT**

**RULING**

1. There is as stated by the parties before court, three pending applications in this matter dated ***12th January 2017***, ***2nd October 2017*** and ***17th October 2017***. With that information, the court on ***6th June 2018*** ordered the 3 applications be heard together. When parties appeared before court on ***26th July 2018***, the court gave the date of ***27th September 2018*** as the date for ruling of the three applications. On my perusal of the court file while preparing the said ruling, I was unable to trace the application dated ***17th October 2017***. In this ruling therefore, I will not consider that application and if the parties so wish they will be at liberty to fix for hearing that application.

2. This ruling therefore addresses two applications dated ***12th January*** and ***2nd October 2017***.

3. In this cause, the 1st and 2nd plaintiffs pleaded that they were the majority share holders of the 3rd plaintiff company. It is further pleaded that by an oral agreement the 1st and 2nd plaintiffs agreed to transfer their said shares in the 3rd plaintiff company to the 1st and 2nd defendants for Australian dollars 500,000. The plaintiffs pleaded in this cause that the 1st and 2nd defendants fraudulently registered themselves as directors and shareholders of the entire shareholding of the 3rd plaintiff company. That following the registration of the 1st and 2nd defendants as the sole share holders, they entered into a contract of sale of the suit property, owned and registered in 3rd plaintiff, to the 4th, 5th and 6th defendants.

**NOTICE OF MOTION DATED 12TH JANUARY 2017**

4. This notice of motion was filed by the 2nd defendant for the following order:

> ***"that the 1st and 2nd plaintiff be ordered to deposit the sum of Ksh 10 million (or such other sum as the court may direct) as security for the 2nd defendant's costs pending the hearing of the suit".***

5. The 2nd defendant by her affidavit sworn on ***12th January 2017*** in support of the application deponed that the 1st and 2nd plaintiffs were not Kenyan citizens and if this suit was unsuccessful the 2nd defendant may fail to recover her costs. She further deponed that the costs of this suit will be determined on the value of the property, the subject of this suit, which is valued at ksh 140million; and on the amount in the

pleadings which exceeds Ksh 430 million; and the alleged oral agreement for the 3rd plaintiff's company shares valued at Australian dollar 500,000.

6. The deponent further stated that the order for the plaintiffs to provide security for costs will ensure that the 2nd defendant will be compensated for any costs. That in the interest of Justice, the 1st and 2nd plaintiff should be ordered to deposit security of costs of approximately Ksh 10 million or any such money as the court may find reasonable.

7. The application was opposed by the 1st and 2nd plaintiffs on the grounds that the 2nd defendant failed to demonstrate by evidence that the plaintiffs will be unable to pay costs of this suit; that the application for security for costs is discriminatory against the 1st and 2nd plaintiff who are being discriminated on the ground that they are not Kenyan citizens; that the plaintiffs deposited Ksh 5 million in a joint account of the counsel in this matter; and that the plaintiff filed an undertaking to damages as ordered by the court.

**ANALYSIS**

8. Order 26 of the Civil Procedure Rules is the order under which a court can order a party to a suit to provide security of costs. That order affords this court to exercise its discretion in considering to order or not to order security of costs to be provided. Order 26 rule 1 is the one that provides that discretion. That rule is in part in the following terms:

> ***"in any suit the court may order security for the whole or any part of the costs.....be given ...".***

9. That discretion was the subject of discussion by ***Justice J. Kamau*** in the case **Jaribu Credit Traders Limited vs CFC Stanbic Bank Ltd (2014) eKLR** where it was stated:

> *"9.Under Order 26 of the Civil Procedure Rules, 2010 under which the present application was also premised, there is no particular ground given under which a court can grant an order for security of costs. The basis under which the said order is to be granted can be derived from several principles espoused in numerous cases that were relied upon by both the plaintiff and the defendant herein- see **Pearson & Another vs Naydler & Others [1977] 3 AII ER 531,Northampton Coal, Iron and Waggon Company Limited vs Midland Wagon Company (1878)Ch.D (Vol VII)500, Keary Developments Ltd vs Tarmac Construction Ltd & Another [1995] 3AII ER 534, Sir Lindsay Parkinson & Co. Ltd vs Triplan Ltd [1973] 2AII ER 273, Wetfarm Ltd vs Amro Bank** (Unreported) amongst other cases.*
>
> *10. The common thread in the cases cited hereinabove and those that were relied upon by the Defendant was that the plaintiff must have been shown to have been unable to pay a defendant's costs in the event such a defendant was successful at the conclusion of the case as it would suffer a great deal in defending the plaintiff's case.*
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> *11. In the case of **Shah vs Shah [1982] KLR 95** the Court of Appeal considered the principle of the presence of a bona fide defence when it held as follows:-*
>
> ***"the general test in an application of this nature is not whether the Plaintiff has a prima facie case with a probability of success but whether the Defendant has shown that it has a bona fide defence."***

10. The 2nd defendant has sought the provision of security of costs by the plaintiffs on the sole ground that the said plaintiffs are citizens of Australia.

11. It is important to note that this court by its ruling on ***16th July 2014*** ordered the plaintiff to provide security of costs in the amount of ***ksh 5 million***. The plaintiffs through their learned counsel's submission stated, and it was not disputed by the defendants, that the said amount was deposited as ordered in that ruling.

12. Further the plaintiffs as ordered by the court on ***27th September 2012***, the plaintiff did file an undertaking as to costs.

13. Bearing in mind the above discussion, and considering that the 2nd defendant did not prove, other than stating that the plaintiffs were residents out of Kenya, that there was any other basis of granting an order for security of costs, the notice of motion dated 12th January 2017, must and does fail.

**CHAMBER SUMMONS DATED 2ND OCTOBER 2017**

14. This is an application filed by the 1st defendant. The 1st defendant seeks by that application that there be stay of this suit pending referral of this dispute to arbitration and that the dispute between the 1st and 2nd plaintiff and the 1st and 2nd defendant be referred for arbitration.

15. That application is supported by the 1st defendants affidavit sworn on ***2nd October 2017***. By that affidavit the 1st defendant raises only one ground upon which this court should refer the dispute to arbitration, which is Article 31 of the Memorandum and Articles of Association of the 3rd plaintiff company. That Article is in the following terms:

> *"Whenever any differences arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these articles, or any claim on*

*account of any such breach or alleged breach, or otherwise relating to the premises, or to these Articles or to any statutes affecting the company, or to any of the affairs of the company, every difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, or whom one shall be appointed by each of the parties in difference."*

16. The 1st defendant relied on section 2 of the arbitration act cap 49 which provides:

> ***"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a signed relationship, whether contractual or not."***

17. The application was opposed by the 3rd defendant on the ground that the 1st defendant filed his statement of defence on ***17th October 2012***, and filed list of witness statement and bundle of documents on teh same date. That in filing those documents, the 1st defendant submitted himself to the jurisdiction of this court and that by operation of Section 6 of Cap 49 the 1st defendant was barred from seeking referal of this matter to arbitration unless the parties consent.

18. The plaintiffs oppose the application on the ground that the 1st and 2nd defendants filed joint statement of defence and thereafter they participated in the interlocutory applications, that they filed a preliminary objection on jurisdiction, arguing that the Environment and Land Court (ELC) of the High Court and not this court had jurisdiction to hear this matter; and that the application was filed 5 years after this matter was instituted.

**ANALYSIS**

19. I have considered the affidavit evidence and the submissions filed by the parties in this matter. Section 6 of Cap 49 is relevant to the present application. It provides:

> ***"6.(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance of otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds..."***

20. The 1st defendant filed the application 5 years after filing his defence. It will clearly be seen that the application runs foul of the provisions of Section 6 reproduced above. The Court of Appeal in the case of Charles Njogu Lofty vs Bedouin Enterprises Ltd [2005]eKLR in discussing the provisions of Section 6 had this to say:

> ***"the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings."***

21. There is no doubt that the 1st defendant having filed his defence and having fully participated in the proceedings and more particularly having filed a preliminary objection arguing that it is the ELC Court and not this court that has jurisdiction to hear this dispute is barred from seeking stay of proceedings as sought. He is barred to seek to refer the dispute for arbitration having fully participated in the proceedings of this matter since the suit was filed. It is also doubtful if the arbitration clause is applicable to the plaintiffs since they are members of the 3rd plaintiff in as far as I can see in the evidence before me.

**CONCLUSION**

22. In the end the notice of motion dated ***12th January 2017*** and the chamber sumons dated ***2nd October 2017*** are hereby dismissed with costs.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** this **20th** day of **September,** 2018.

**MARY KASANGO**

**JUDGE**

***Ruling read and delivered in open court in the presence of***

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

**MARY KASANGO**

**JUDGE**