



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.308 OF 2018

MARTHA NYAMBURA WAGICIENGO.....PLAINTIFF

VERSUS

SAMUEL WARUGU KIMOTHO.....1ST DEFENDANT

HILDA WANJIKU MUYA.....2ND DEFENDANT

LAKE NAIVASHA CRESCENT CAMP LIMITED.....3RD DEFENDANT

REGISTRAR OF COMPANIES.....4TH DEFENDANT

RULING

1. Before me are two applications; one dated 14th September 2018 seeking an order of stay of proceedings herein and referring the parties for arbitration; whereas the second application dated 19th September 2018 seeks reinstatement of orders issued on 1st August 2018 pending the hearing and determination of the application dated 21st July 2018; it further seeks orders restraining the 1st and 2nd Respondents, the workers, agents or anyone acting on their behalf from transferring, withdrawing or any other way deals with the 3rd Respondent's funds held in Account No.0010297034718 domiciled at Equity Bank or any other accounts operated by the said Respondents on behalf of the 3rd Respondent pending the hearing and determination of this application and the application dated 31st July 2018.

2. At the hearing of the two applications, the same was directed to be heard together and parties directed to file written submissions in support and in opposition of the aforesaid applications.

3. The counsel for Defendants/Applicants in the Application dated 14th August 2018 filed their submissions on 27th September 2018, whereas the Plaintiff/Applicant's counsel filed their submissions on 16th October 2018.

A) Application dated 14th August 2018

4. In the application dated 14th August 2018 the Defendants/Applicants' application is brought pursuant to section 6(1) of the Arbitration Act, 1995 and Article 159(2) (c) of the Constitution of Kenya 2010. It mainly seeks the following orders:-

a) THAT, the Honourable Court may be pleased to issue an order of stay of proceedings herein and refer the parties to arbitration.

b) THAT, the costs of this application be provided for by the Plaintiff/Respondent.

5. The application is premised on the grounds; that the Plaintiff/Respondent is a director in the 3rd Respondent; that there exist an arbitration clause in the Articles of Association of the 3rd Respondent; that all disputes and differences relating to the 3rd Defendant/Applicant are to be referred to Arbitration pursuant to Article 33 of the Articles of Association; that the arbitration clause binds all members of the company including the Plaintiff/Respondent and that it is fair and just that the proceedings herein be stayed and the matter be referred to arbitrator.

6. The application is supported by affidavit in support by Samuel Warugu Kimotho sworn on 14th August 2014 and annexure "SWK-1" a copy of Memorandum of Articles of Association of the 3rd Defendant/Respondent.

7. The Plaintiff/Respondent through a Replying affidavit sworn by Martha Nyambura on 14th September 2018 is opposed to the application. It is contended that, there exists a clause to referral of the dispute to Arbitration, however she contends the current dispute do not fell within the confines of clause 33 of the 3rd Respondent's memorandum and Articles of Association.

8. Having considered the application and affidavits in support and Replying affidavit I find there arises only one issue for consideration being as follows:-

a) Whether these proceedings should be stayed and refer the matter to arbitration?

9. The Application is basically premised on Article 159 2(c) of the Constitution of Kenya 2010, section 6 of the Arbitration Act and clause 33 of the Memorandum and Articles of Association of the 3rd Respondent.

Article 159(2) (c) of the Constitution of Kenya 2010 provides follows:-

"Article 159(2) (c) - Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."

10. It is clear that Article 159(2) (c) of the Constitution encourages Judicial authority to promote arbitration as one of the forms of dispute resolution mechanism.

11. On the other hand, section 6 of the Arbitration Act, requires courts to be in the forefront in referring matters that parties have or had agreed that when disputes arise, to be referred to arbitration; this thereafter bars any proceedings being filed prematurely in court before parties to the disputes have fully exhausted their dispute resolution mechanisms.

12. Section 6 of the Arbitration Act provides:

"(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 or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

13. In the instant case, the Defendants/Applicants also relies on Clause 33 of the management of the 3rd Respondent/Applicant in its memorandum & Articles of Association. The said clause provides:-

Clause 33

"Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching on the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching on any breach, or alleged breach, of the Article 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 such differences shall be referred to an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator then to two arbitrators, of whom one shall be appointed by each of the parties in difference."

14. In order to determine, whether the issues raised in the suit fall within what was envisaged in Clause 33, I decided to consider what the Plaintiff/Respondent raises as an issue in the plaint under paragraph 25 of the plaint under (a) (b) (c) and (d). The issues raised are as follows:-

a) An order compelling the Defendants to reinstate the Plaintiff as a Director of the 3rd Defendant.

b) An order compelling the 1st and 2nd Defendant to furnish the Plaintiff with annual returns and financial reports of the 3rd Defendant for the years 2014 to 2018.

c) An order compelling the 1st, 2nd and 3rd Defendants to pay the Plaintiff dividends for her stake in the 3rd Defendant.

d) An order compelling the 1st, 2nd and 3rd Defendants to pay the Plaintiff Director's remuneration for the years 2012, 2013 and 2014.

e) The cost of the suit.

f) Interest on (c) and (d) above at Court rates.

15. Having considered clause 33 of the Memorandum and Articles of Association and issues raised in the plaint as stated herein above, I do not agree with the Plaintiff/Respondent assertion that the issues do not fall within the ambits of clause 33 but found that the issues are squarely falling within the ambits of clause 33.

16. I am of the view, that at this stage, my duty is to make an inquiry whether the reservations as pointed out under section 6(1) (a) and (b) of the Arbitration Act exist for the application of stay to be dismissed; absent of these handles, the court should forthwith refer the matter to arbitration (see the case of **Adrec Limited Vs. Nation Media Group Limited (2017) eKLR** where the Court of Appeal stated:-

"Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment or entering of appearance file an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6 (1) of the arbitration Act."

17. In the instant case, the Plaintiff/Respondent has not demonstrated to the satisfaction of this court, that the arbitral agreement is in breach of section 6(1) (a) (b) of the Arbitration Act, thus it is null and void, in operative or incapable of being performed.

18. The Plaintiff/Respondent urged, that in fact there is no dispute between the parties with regard to the matters agreed to be referred to the arbitration or the disputes that arose are not as envisaged under Clause 33. I have considered the Plaintiff/Respondent argument and also perused the plaint as well as clause 33. I note that all matters raised turn on the Articles of Association and which are expressly reserved for exclusive determination by an Arbitration on the first instance. The issues cannot in view be resolved without involvement of the 3rd Respondent contrary to the Plaintiff/Respondent assertion.

19. The Applicants under section 6(2) of the Arbitration Act are not obliged to file any response to the Application herein nor any defence to the main suit, simply to maintain their right to seek and obtain stay of the proceedings pursuant to section 6(1). It is for that reason the Applicant have declined to file a Reply to the Plaintiff's application or defence to the plaintiff's claim.

20. In view of the above, I am satisfied that the Defendants/Applicants application dated 14th August 2018 is meritorious. This matter in my view, is for arbitration as that will affirm both the constitutional principle of promoting alternative dispute resolution mechanism and uphold the parties freedom to contract and resolve their dispute in a stress free and acceptable environment away from court subject to supportive court intervention in specific areas of law and ensure fairness in the arbitral process as envisaged in the parties contract.

B) Notice of motion dated 19th September 2018.

21. The application dated 19th September 2018 is brought pursuant to Article 159(2) of the Constitution of Kenya 2010, order 10 Rule 11 of Civil Procedure Rules 2010, section 3A of Civil Procedure Act seeking the following orders:-

a) THAT this application be certified urgent and in view of the urgency thereof service in the first instance be dispensed with.

b) THAT this Honourable Court be pleased to reinstate the orders issued on the 1st day of August 2018 pending hearing and determination of this Application and the Application dated the 31st day of July 2018.

c) THAT this Honourable Court be pleased to issue orders restraining the 1st and 2nd Respondents, their workers, agents or anyone acting on their behalf from transferring, withdrawing or any other way dealing with the 3rd Respondent's funds held in Account No.0010297034718 domiciled at Equity Bank or any other accounts operated by the said Respondents on behalf of the 3rd Respondent pending the hearing and determination of this Application dated the 31st day of July 2018.

d) THAT this Honourable Court do award any other orders it may deem just, fit and expedient to award in the interests of justice.

e) THAT the cost of this Application be provided for.

22. The order sought to be reinstated was issued on 1st August 2018 pending *inter-partes* hearing and determination of the application dated 31st July 2018 and which order lapsed by operation of law and none service within the time provided by law.

23. I have in this matter, come to the conclusion that the issues raised in the plaintiff's suit fall within the ambits of clause 33 of the Memorandum and Articles of Association of the 3rd Respondent. That this suit is premature and as such the prudent way to go is to stay the proceedings herein and refer the parties to arbitration. I have therefore downed the tools for want of jurisdiction as far as this court is concerned on other matters, other than staying the proceedings and refer the parties to arbitration.

24. The upshot is that the Defendants/Applicants application dated 14th August 2018 is allowed. The Plaintiff/Respondent application dated

19th September 2018 is dismissed. I proceed to make the following further orders:-

a) The proceedings in this matter be and are HEREBY stayed and parties herein referred to arbitration.

b) Each party to bear its own costs.

Dated, signed and delivered at Nairobi this 13th day of December, 2018.

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J .A. MAKAU

JUDGE