



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 39 OF 2017

YUSUF ABDALLA IBRAHIM ABDIPLAINTIFF

VERSUS

IBRAHIM NOOR HILLOWLY.....DEFENDANT

RULING

1. The Defendant filed a Preliminary Objection dated 30th January 2017 against a Notice of Motion Application dated 26th January 2017, on the grounds that the parties entered into an Agreement on 5th December 2016, in which the parties agreed that in case of a dispute arising therefrom the mode of dispute resolution would be, Arbitration.
2. By reason of the said Arbitration, the High Court lacks the requisite jurisdiction to entertain this suit and resultant Application. The same are thus misconceived, and an abuse of the Court Process.
3. The parties disposed of the Preliminary Objection by written submissions. In the submissions dated 8th February 2017, the Applicant averred that Clause 8 of the Loan Agreement dated 5th December 2016 executed by both parties herein, mandates any aggrieved party to seek redress, through Arbitration. However, even without exhausting the said mechanism for dispute resolution, the Plaintiff/Respondent (as regards the Preliminary Objection) has prematurely moved to court.
4. The Defendant submitted that ***“Jurisdiction precedes powers or action that can be carried by any competent Court or Tribunal without which the Court must down it’s tools”*** The Court’s jurisdiction can only be derived from the contractual Agreement entered into by the parties. The Court’s jurisdiction cannot be involved when parties by their own contractual agreement and option contemplated a specific dispute resolution alternative. As such the Court lacks jurisdiction, legal, imagined or otherwise to determine the dispute if at all between parties. Reference was made to the case of ***Samuel Kamau Macharia and another VS Kenya Commercial Bank Ltd and two others (2012)***.
5. The Defendant submitted that, Parties are bound by the Agreements they enter into, reference was made to the case of ***Muwonge VS Musa HCCC No. 77 of 2001*** (Check Citation). That where the Parties agree on Arbitration the Court takes a back seat (Reference: ***Kenya Shell Ltd VS Kobil Petroleum Ltd, 2006 eKLR***).
6. Finally, the Defendant submitted that, the orders sought in the Notice of Motion Application cannot be granted in the manner canvassed in filing the suit. That, Section 7 of the Arbitration Act, provides that, when seeking for interim protection measures, the Applicant can only move the court vide a

miscellaneous Application and consequently refer the matter to Arbitration. Consequently, the suit and the Application herein must fail. Even if the Court had Jurisdiction, the orders sought for in the body of the Application cannot be granted, for it is seeking for reliefs against persons who are not parties in the proceedings.

7. The Application was opposed vide written submissions filed by the Plaintiff dated 14th February 2017, whereby it was submitted that, the Plaintiff's suit and Application are properly before the Court, and the Court has jurisdiction to entertain the same. Neither is the suit and Notice of Motion incompetent as filed or an abuse of the Court process. That, Section 7 of the Arbitration Act, gives the High Court jurisdiction to entertain matters that are a subject of Arbitration in relation to **"Interim measures by the Court"**. Further Section 6 of the said Act, requires a Party who is determined to refer the matter to Arbitration in case an opposing party has filed the suit before the High Court, to apply for stay of the legal proceedings pending referral thereof to Arbitration. The Plaintiff submitted that, when a dispute arose between the Parties, the Defendant did not refer the matter to Arbitration, and instead made false reports to the Flying Squad Police Department. Amicable settlement in the matter also failed. Finally, the Plaintiff submitted that, An Arbitration Clause, or Agreement is not an impediment to resolving disputes in Court. Reference was made to the cases of **Rawal VS the Mombasa Hardware Ltd (1968) E.A. 398**.

8. Upon consideration of the rival arguments as submitted by the respective Parties, I draw the following issues for determination.

(i) Whether the Court has jurisdiction to entertain the suit and Application herein.

(ii) Whether the suit and the Application are incompetent and otherwise an abuse of the Court's process.

9. I wish to make preliminary observation in this matter before I commence on the determination of the issues raised above. First, in the Notice of Preliminary Objections filed in Court on 30/01/17, the Defendant raises only two issues:

Lack of jurisdiction by the Court and the suit and Application being misconceived and an abuse of the Court's process. It therefore follows that, any other issue raised through submissions will not be considered in this ruling. In that regard I refer to the issue raised by the defendant in their submissions that, the prayers sought for in the body of the Application cannot be granted, due to non-founder of the Parties who will be affected by the same. Secondly, this being a Preliminary Objection, the Court can only consider issues of Law. Any factual matters attended to, or canvassed in the submissions will not be considered. In this respect, the issues raised concerning the content of the agreement between the parties in relation to the Loan advanced and the security offered, and/or subject disputes thereof, and subsequent reports to the CID, will be left to lie, where they belong.

10. I shall now consider the issue of jurisdiction. This is a settled issue in Law. As far back as Madarif, (as he then was) clearly stated that jurisdiction is everything. Without it the Court cannot do anything. Equally, jurisdiction flows from either the Constitution or legislation or both. A Court cannot arrogate itself jurisdiction exceeding that conferred (See: **in the matter of IEBC (full citation) Constitutional Application No. 2 of 2011**).

11. In regard to the subject matter herein, I find that Section 7 clearly conferred on the High Court, the jurisdiction to entertain a matter which is a subject of Arbitration for the purposes of grant of Interim Measure of Protection. In that regard, the submissions of the Defendants that:-

"The Court has no jurisdiction, legal, imagined or otherwise to determine the dispute if at all between the parties"

is not wholly correct. The jurisdiction is conferred under Section 7 of the Arbitration Act, for the limited purpose. It is not imagined it is real. It's Statutory. It is legally conferred as such.

12. The question, then is;

- *Is the Plaintiff/Applicant seeking for such protective measures?*
- *Is the Plaintiff alleging that, the matter is a subject of Arbitration. Does the Plaintiff intend to refer the matter to Arbitration?*

These are factual issues I have no doubt in mind that, the Agreement entered into by the parties on 5th December 2016, under Clause 8, provides for Arbitration as the mechanism of Dispute resolution. I therefore agree with the Respondent's submissions that the matter then should have the first stop at the door of Arbitral Tribunal.

13. However, the provisions of Section 6 of the Arbitration Act, are clear. If a party feels aggrieved by the fact that a matter which is a subject of Arbitration has been brought to Court, that party shall apply to stay the proceedings, and the court shall order accordingly and refer the parties to Arbitration, unless the agreement is null and void, inoperative or incapable of being performed or there is not a dispute between the Parties in regard to the matters agreed to be referred to Arbitration.

14. In my considered opinion, the party seeking to stay the proceedings can only have an opportunity to advance the reasons thereof through such as Application. The same will give that Party an opportunity to advance both factual and legal arguments or evidence. These issues cannot be raised purely as a Preliminary Objection. As already stated I am hesitant to descend into the arena of factual matter including the competence of the suit and the Application.

15. The upshot of all this is that; I dismiss the Preliminary Objection and direct that if the Defendant so wishes to move the Court in an appropriate manner or proceed to deal with the issues raised during the hearing of the suit or the Application. The costs relating to this Preliminary Objection shall abide the outcome of the main suit if it proceeds to final conclusion or the Application or Arbitral proceedings if any. Orders accordingly.

Dated, Signed and delivered on this 24th March 2017 at Nairobi.

G. L. NZIOKA

JUDGE

24/03/2017

IN THE PRESENCE OF

Mr. Jelani for the Plaintiff/Respondent

Mr. Amira for Mr. Anyona for the Defendant/Applicant

Teresia – Court Assistant.

G. L. NZIOKA

JUDGE

24/03/2017

Mr. Jelani

I pray for a hearing date for the Notice of Application dated 26th January 2017.

Mr. Amira for Anyoka

I have no further instructions

Mr. Anyika

I request for 14 days to file the Replying Affidavit.

Mr. Jelani

I request for 7 days to respond

Court

By consent of the Parties, the Respondent to file a response to the Application dated 26/01/2017 and the Applicant to respond in 7 days. Further mention on 10/04/2017 for confirmation of compliance.

G. L. NZIOKA

JUDGE