



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 90 OF 2017

WALLACE NJOROGE MWARERI PLAINTIFF/RESPONDENT

VERSUS

RUNDA WATER LTDDEFENDANT/APPLICANT

RULING

The defendant/applicant has moved this court by way of summons under **section 6 (1) of the Arbitration Act, Rule 2 of the Arbitration Rules** and **Article 159 2 (c) of the Constitution**. The following orders have been sought by the applicant:

- a. That this suit be stayed and the dispute referred to arbitration in accordance with the contract made by the parties dated 8th September, 2015.*
- b. That the costs of this action and of the application be borne by the plaintiff.*

The application is premised on the grounds set out on the body of the same and it is supported by the annexed affidavit sworn by Daniel Methu on 26th April, 2017.

It the said affidavit, it is deponed that, the plaintiff's cause of action arises from alleged breach of terms of the agreement for supply of water and other services, which agreement is annexed to the affidavit and marked annexure DM1.

That under clause 25 of the said agreement, it was mutually agreed that all claims and disputes whatsoever arising under the agreement "*shall be referred to arbitration*" and by filing the suit herein the plaintiff has failed to abide by the dispute dissolution mechanism as provided for in the agreement aforesaid.

The deponent further avers that under clause 18.3 of the agreement, the plaintiff agreed not to interfere with the water main or other pipe or apparatus that could lead to waste, damage or contamination of the water supplied. That contrary to the agreement, on 13th December, 2016, unknown persons acting at the behest of the plaintiff, vandalized the water infrastructure providing water to the plaintiff's property as a consequence of which, the plaintiff has not received water since December 2016.

It is further averred that the plaintiff has been in breach of the agreement by interfering with the water pipes and other apparatus supplying water. The applicant has thus asked the court to stay the proceedings herein and the dispute between the parties be referred to arbitration in accordance with the terms of the agreement.

When the application came up for hearing, counsel for the plaintiff/Respondent relied on the application dated the 20th April, 2016 as his response to the application herein. Counsels argued the application orally in court.

In his submissions, counsel for the defendant argued that there was no dispute between the parties that the plaintiff had a water agreement with the defendant and that the same has an arbitration clause, Clause 25 in the agreement. He further submitted that it has not been contraverted that the plaintiff is in breach of that agreement and clearly there exists a dispute as to whether the plaintiff is entitled to be supplied with water by the defendant.

He averred that the plaintiff has not denied that there is a dispute between himself and the defendant as there is no replying affidavit to the application. Submitting on **section 6 (2) of the Arbitration Act**, he told the court that the same bars this court from proceeding with the matter after an application for stay of proceedings has been made. Consequently, this court has no jurisdiction to entertain the plaintiff's application dated 20th April, 2017 or any other matter attached to the plaint. It is important for this court to point out that the plaintiff's application dated 20th April, 2017 was filed under certificate of urgency, together with the plaint, wherein the plaintiff has sought a mandatory order of injunction against the defendant to immediately reconnect the water supply to his property known as **L.R. NO. 14274/23** situated in Runda Estate, Nairobi County.

On his part, counsel for the plaintiff/respondent started by admitting the existence of the agreement between the parties herein and the existence of the arbitration clause as contained in clause 25 therein but denied that there was a dispute. He gave the following reasons:

1. *The plaintiff is a customer of the defendant in respect to supply of water to LR No. 14274/23.*
2. *It is the duty of defendant to supply the plaintiff with water and the Plaintiff is under duty to pay for the water.*
3. *The plaintiff is not in arrears.*
4. *The water has been disconnected.*

He urged the court to find that there is no dispute to be referred to arbitration but should the court find any, then an interim relief should be granted to the plaintiff. He cited the provisions of **section 7 (1) of the Arbitration Act** which gives the court powers to grant an injunctive relief before arbitral proceedings. He prayed for interim relief on behalf of the plaintiff in the form of reconnection of the water supply.

In his response, counsel for the defendant submitted that, if indeed there was no dispute, the suit should not have been filed in the first instance. That the plaintiff does not dispute that he is in breach of clause 18.3 of the agreement which breach has its consequences which is that, the defendant is not under obligation to supply the plaintiff with the water. According to him, those are the issues to go for arbitration.

The court has considered the application and the material before it. **Section 6 of the Arbitration Act** deals with stay of proceedings. If an application is made under that section, as it's the case herein, the court shall 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.*

Under that section, it is clear to the court that referral of proceedings to arbitration is not automatic upon prove by a party that there exists an arbitration clause in the agreement, but the agreement has to be valid in law and a dispute has to exist between the parties to the agreement/dispute.

The defendant has sought stay of proceedings and the referral of the suit to arbitration in accordance with the agreement which application has been opposed by the plaintiff on the ground that there is a dispute. The Plaintiff in his submissions in reply to the Defendant's application sought an interim relief in the nature of a mandatory injunction for reconnection of the water supply to his property and has relied on **section 7 of the Arbitration Act**.

I wish to note that the plaintiff did not file a response to the application herein. In opposing the same, he purported to rely on his earlier application filed on 20th April, 2017. In my view, that is unprocedural and contrary to the provisions of **order 51 rule 14 of the CPA**, which provides that any party wishing to oppose any application may file any one or a combination of the following documents:

a. A notice of preliminary objection; and/or

b. A statement of grounds of opposition.

Further, **order 51 (4)** provides:

“If a respondent fails to comply with sub-rule (1) and (2), the application may be heard ex parte.”

In this case, counsel for the plaintiff did not file any of the above documents as required under that sub-section. He purported to argue his application while responding to the submissions by the counsel for the defendant and he even sought orders in the process which in my view, is untenable.

I find and hold that the application dated 26th April, 2017 has merits and the same is granted as prayed. Costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 11th day of May, 2017.

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L. NJUGUNA

JUDGE