



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 29 OF 2014

RAZAK MAQBOOK AHMED.....1ST APPELLANT

SABIA KOSAR.....2ND APPELLANT

VERSUS

SHAHEEN KOSSAR.....RESPONDENT

RULING

1. On 2nd July 2015, this court granted the Applicants leave to file a further affidavit in response to the replying affidavit of Shaheen Kossar, the Respondent herein. The Respondent was thereafter granted leave to file if any a further replying affidavit in response to the further affidavit. The aforesaid affidavits were to be used to either support or resist the originating summons dated 17.12.2013 in which the Applicants sought for the following orders.

- 1. THAT the contract made on 1st September 2006, with the Respondent provide for arbitration upon any contractual dispute arising.***
- 2. THAT the Respondent has failed/neglected and refused to concur with the appointment of an arbitrator causing Applicants to apply for this Honourable Court to confirm the appointment of Mohamed Yunis Sroya.***
- 3. THAT the court do confirm the appointment of Mohamed Yunis Sroya as arbitrator of the dispute between the parties as defined in the Arbitration Act and as per the parties agreed.***
- 4. THAT the cost of this application be met by the Respondent.***

2. I have considered the grounds set out on the face of the originating summons plus the facts deponed in the affidavits filed in support and against of the summons. I have also taken into account the rival written submissions. Annexed to the affidavit of Razak Maqbook Ahmed is a copy of an agreement allegedly entered into between the Applicants and the Respondent. In the aforesaid agreement, it is alleged that the 1st Applicant advanced to the Respondent a sum of kshs.7 million and in return the Respondent would deposit as security title no. IR 97770. The Respondent was to within 3 months from the date of the agreement required to repay the same and the Applicants would then be released the title documents to the loanee. Part of the requirements also is that the amount would not attract interest at all. Clause 8 of the aforesaid expressly provides that should there be any dispute between the parties regarding the time and correct meaning of the agreement the same shall be referred to the arbitration of Mohammed Yunis

Sroya whose decision shall be binding on the parties. The Respondent has disputed the agreement claiming that the same was drawn and attested by a person who was not an advocate of the High Court at the material time.

3. In short, the Respondent is of the view that the agreement having been drawn up by a person who was not a qualified advocate was rendered invalid, null and void.

4. In the further replying affidavit the Applicant averred that the Respondent is estopped by the doctrine of Equity from denying the existence of the agreement having enjoyed the full benefits of the same.

5. Having set out the brief facts giving rise to the motion, I now turn my attention the substance of the motion. Though the Respondent disputes the validity of the agreement, it is not in dispute that the parties transacted business on the basis of the disputed agreement as earlier alluded hereinabove. There is also no dispute that the disputed agreement has a clause which provides that disputes between the parties should be referred to arbitration. The issue raised here clearly brings out the doctrine of separability which involves the question of what happens to an arbitration clause if the contract in which it is contained is brought to an end.

6. In other words, does the arbitration clause survive or does it also come to an end? This question was answered by the House of Lord in **Heyman =vs= Darwins (1942)A.C 356** in which it firmly settled the point that an arbitration clause in a contract may be wide enough to cover a dispute as to whether the contract itself has been repudiated or frustrated.

7. The question as to whether or not the agreement is valid does not in any way impact on the arbitration clause. I therefore find no merit in the objection raised by the Respondent. Consequently the originating summons dated 17.3.2013 is found to be meritorious. It is allowed in the following terms:

i. The contract dated 1.9.2006 provided for any dispute between the parties to be referred to arbitration in clause 8.

ii. Mohammed Yunis Sroya was specifically appointed as the sole arbitrator under clause 8 of the agreement mention in (i) above and there is no evidence that his appointment has been rescinded.

iii. None of the parties has raised issue regarding the competence nor suitability of Mohamed Yunis Sroya therefore his competence is not an issue at all.

For this reason, this court confirms his appointment as an arbitrator.

iv. Costs of the summons is awarded to the Applicants.

Dated, Signed and Delivered in open court this 3rd day of March, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent