



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 48 OF 2014

THOMAS MUIMI MUTIE.....PLAINTIFF

VERSUS

PETER MUTUKU MAILU.....1ST DEFENDANT

MBOTE GITHINJI.....2ND DEFENDANT

P. NTHOKI MUSELA.....3RD DEFENDANT

MAVOKO DEVELOPMENT COMPANY LTD...4TH DEFENDANT

RULING OF THE COURT

The application

1. The Notice of Motion application before the court is dated **22nd December, 2014** filed by the plaintiff pursuant to **Section 6(1) of Arbitration Act, Rule 2 of the Arbitration Rules, Order 46 Rules 1,2, 3 and 20** and **Order 51 rule 1** of the **Civil Procedure Rules**. The application prays for the following orders;

- a. That the suit herein be stayed pursuant to **Section 6(1) of the Arbitration Act 1995** of the Laws of Kenya.
- b. That the dispute herein be referred to Arbitration in accordance with **Clause 46** of the **Articles of Association** of Mavoko Land Development Company the **4th** Defendant herein.
- c. The costs of this action and of the application be in the cause

2. The application is premised on the grounds that the plaintiff's cause of action in this suit arises out of breach of the Articles of Association of the **4th** defendant. Under the Articles of Association it is *inter alia* provided that in the event of disagreement of dispute arising out of breach of the Articles of Association the parties have to appoint an Arbitrator to decide on the dispute. The plaintiff prior to filing the suit herein made attempts to have the dispute referred to arbitration but his efforts were frustrated by the defendants hence the suit and the present application to have the matter referred to Arbitration. The suit herein ought to be stayed and the dispute referred to arbitration to await an award in line with the Articles of Association.

3. The application is supported by affidavit of the plaintiff sworn on 22nd December, 2014.

The Response

4. The application is opposed. The defendants/respondents filed a Notice of Preliminary Objection dated **10th November, 2014**. The Preliminary Objection raises two(2) points namely;

i. That the 1st to 3rd defendants are not proper parties to the suit and their names should be struck out.

ii. That the Articles of the Association the 4th defendant provides for arbitration so that suit herein should be struck out.

History of the applicant

5. The short history of the application is that the plaintiff/applicant is shareholder and Director of the 4th defendant/respondent, Mavoko Land Development Company Ltd. He was the director in charge of financial collection and accounting for the 4th defendant until a dispute arose between him and the defendants herein. The dispute concerned allegations by the defendants of financial impropriety on the part of the plaintiff. These allegations led the plaintiff to withhold all financial and account records of the 4th defendant thereby making it difficult for the 4th defendant to commence auditing the 4th defendant's accounts. There were negotiations under which the plaintiff promised to return the financial records, but nothing came out of the said negotiations. The plaintiff filed the suit claiming allowances and dues and certain orders to enable the company be run lawfully and procedurally.

Submissions

6. The respondents submitted on the Preliminary Objection, stating that the law is clear that one cannot sue the company and its directors since a company is a legal person with a separate identity from its shareholders and directors. The directors are its agents. The respondents cited the case of ***Garden Square Ltd v. Sammy Boit Kogo & Another (Nbi) High Court Civil Case No. 1266 of 2003*** where the court held that to enjoin a director in the suit against the company is a violation of the basic principles of the Company Law that a Limited Liability Company is a distinct and separate entity from its shareholders and the latter cannot be sued for alleged wrongs by the company.

7. In the opinion of this court, however, director as shareholders can be sued depending on the kind of orders and prayers the plaintiff seeks from the company. This however, is a substantive issue to be determined not by way of a Preliminary Objection but by way of a substantive application or by way of the hearing of the matter, for it is only under such a forum that the plaintiff would show and magnify the kind of prayers he seeks from the parties. This is not a matter that can be dealt with summarily through a Preliminary Objection. So the Preliminary Objection fails on this point.

8. The second issue in the Preliminary Objection is that the suit should be dismissed so that the parties can go to arbitration under **Clause 46** of the 4th defendant's Articles of Association. Both parties agree that the matter should go to arbitration, except that the respondents want the suit herein to be dismissed first before parties may go to arbitration. In the opinion of this court, there is no legal foundation that the suit herein should be dismissed first before the parties can go to arbitration. Under the Arbitration Act, this court has the power to stay the suit herein and refer the matter to arbitration pursuant to the said **Clause 46**. Further under **Order 46** of the **Civil Procedure Rules** the court has powers to refer the matter to arbitration.

9. It is the findings of this court that both parties are eager to go to the arbitration pursuant to the said **Clause 46** of the Articles of Association of 4th defendant.

10. In the result, the Preliminary Objection by the defendant/respondent lacks merit and is dismissed. The

Notice of Motion dated **22nd December, 2014** is allowed as prayed with the following further orders;

- i. The arbitrator to be appointed within thirty (30) days of this ruling.
- ii. If the parties fail to agree on an arbitrator each party shall submit three (3) names of arbitrators to the court and the court shall appoint one (1) of the six (6) names submitted.
- iii. The matter will be mentioned at the instance of any party for the purpose of order (ii) above

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF DECEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

Mr. Muthama holding brief for Mbindyo for applicant

No appearance for respondent

Court Assistant – Mr. Munyao