



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 146 OF 2014

RUGSAN LAND DEVELOPMENT LTD.....PLAINTIFF

VERSUS

FAITH AGNES MAUMOH.....DEFENDANT

RULING

1. This is a consolidated ruling in respect of the Plaintiff's Notice of Motion application dated 30th July 2014 and filed on 31st July 2014 that was brought under the provisions of Sections 3 A and 63 of the Civil Procedure Act, Order 39 Rules 1 (b) and 2(1), Order 51 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law and the Defendant's Chamber Summons application dated 31st July 2014 and filed on 6th August 2014 that was brought pursuant to the provisions of Section 6 of the Arbitration Act, Rule 3 of the Arbitration Rules, 1997, Section 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya, Order 51 (sic) Civil Procedure rules (sic) and all other enabling provisions of the law.

2. Both parties indicated that they wished to have both applications heard together. Though filed after the Plaintiff's said application, the court deemed it prudent to deal with the Defendant's said application first as the same went to the root of the jurisdiction of this court.

i. DEFENDANT'S CHAMBER SUMMONS APPLICATION DATED 31ST JULY 2014 AND FILED ON 6TH AUGUST 2014

3. The Defendant sought the following prayers:-

- a. **THAT there be a stay of proceedings herein pending arbitration.**
- b. **THAT the dispute between the Plaintiff and the Defendant be referred to arbitration.**
- c. **THAT the Defendant/Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit to grant.**
- d. **THAT the costs of this application be awarded to the Defendant/Applicant against the Plaintiff/Respondent.**

THE DEFENDANT'S CASE

4. In the Supporting Affidavit and grounds on the face of the application, the Defendant confirmed that she had entered into the Agreement for Sale dated 29th December 2011 and Deed of Variation dated 15th May 2012, which deed had an arbitration clause. It was her averment that the present suit was therefore premature.

5. She pointed out that she had previously made an application to refer the matter to arbitration in **HCCC No 117 of 2014 (formerly HCCC No 294 of 2013)** but that the Plaintiff withdrew the same. On 26th May 2014, she filed a Notice of Preliminary Objection of even date protesting the filing of the present and the fact that the suit herein had been overtaken by events. The same was, however, not subject of the Ruling herein.

6. She therefore urged the court to allow her application. Her Written Submissions were dated 24th December 2014 and filed on 29th December 2014.

THE PLAINTIFF'S CASE

7. In opposition to the Defendant's application, Abdulkadir Salad, a Director of the Plaintiff company swore a Replying Affidavit on 26th August 2014 on behalf of the Plaintiff herein. The same was filed on 28th August 2014. The Plaintiff's Written Submissions were dated 17th December 2014 and filed on 18th December 2014. Its response to the Defendant's Written Submissions were dated 30th January 2015 and filed on 4th February 2015.

8. The Plaintiff contended that there was no dispute to be referred to arbitration as all that parcel of land known as House No 2 in Tamarind Gardens on L.R. 5/37 Westlands (hereinafter referred to as "the subject property") had since been sold to a third party and that the Defendant had in fact admitted to having received a sum of Kshs 31,000,000/=.

9. It urged the court to dismiss the Defendant's application with costs to it as the said Agreement for Sale and Deed of Variation were incapable of being performed and that in any event, the Defendant's application could only be allowed if it was filed not later than when she entered an appearance.

LEGAL ANALYSIS

10. Clause 4.4 of the said Deed of Variation stipulated as follows:-

"In the event of any dispute arising between the parties hereto the dispute shall be referred to an arbitrator appointed by both parties in accordance with the Arbitration Act 1995."

11. It was the Defendant's submissions that the Plaintiff had sought for special damages, punitive damages and general damages on the ground that there had been a breach of contract. She contended that the Plaintiff had admitted the existence of the contract which bound them and consequently, it could not now aver that there was no dispute for resolution.

12. She argued that the arbitration agreement was operative and that she filed her application at the most appropriate time and without undue delay considering the circumstances of the case.

13. While there may be an arbitration agreement, referral to arbitration is not automatic. Such referral must conform to the provisions of Section 6 (1) of the Arbitration Act Cap 49 (Laws of Kenya) that provides as follows:-

- 1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a 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 matter agreed to be referred to arbitration.**

14. The court has to consider whether the applicant has taken any steps in the proceedings other than the steps allowed by Section 6 (1) of the Arbitration Act- **See Niazsons (K) Ltd vs China Road & Bridge Corp [2001] 1 KLR 12.** The operative and key words are **“not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought...”**

15. In this regard, the court was in agreement with the holding of Havelock J in the case of **China Sichuan Corporation for International Techno-Economic Co-operative (SIETCO) vs Kigwe Complex Limited [2013] eKLR** that was relied upon by the Plaintiff in which he reiterated that a dispute will only be referred to arbitration 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...”**.

16. Bearing in mind the provisions of Section 6(1) of the Arbitration Act, the Defendant herein ought to have filed an application for stay of proceedings at the time she filed her Memorandum of Appearance on 14th May 2014 and before taking any other step in the proceedings herein.

17. The question of whether or not there was a dispute capable of being referred to arbitration or whether or not the arbitration agreement was null and void, inoperative or incapable of being performed was therefore rendered moot. This argument was immaterial and irrelevant the moment the Defendant filed her application on 6th August 2014 which was outside the time limit that was allowed under the provisions of Section 6(1) of the Arbitration Act. Her application could not therefore be sustained.

18. While the court noted the parties’ submissions regarding the restraining of the Defendant from leaving the jurisdiction of the court, it could not delve into the said issue as it was not one before the court for determination. All that this court could observe was that the Plaintiff’s prayer to restrain the Defendant from leaving the jurisdiction of the court and/or depositing her passport in court pending the determination of the said application was granted by Mwongo J on 1st August 2014. The Defendant complied with the said orders and deposited her Passport Number B009310 with the Executive Officer of the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division.

19. As an *obiter*, the Defendant’s prayer that she be at liberty to apply for such further or other orders and/or directions as this honourable court may deem fit to grant, was in the mind of this court, superfluous and unnecessary as she did not require leave of the court to seek such further orders/ and/or directions.

ii. THE PLAINTIFF’S NOTICE OF MOTION APPLICATION DATED 30TH JULY 2014 AND FILED ON 31ST JULY 2014

20. Prayer Nos (1), (2) and (3) of the said application were spent. The Plaintiff sought the following remaining prayers:-

1. Spent.

2. Spent.

Spent.

3. 4. THAT the Defendant do deposit in court the sum of Kshs 35,000,000/= or such sum as the court may in its sole direction consider adequate as the security for the amount claimed by the Plaintiff and the Plaintiff's costs in this matter.

5. THAT such security for the amount claimed and costs be deposited in court within thirty (30) days from the date of the Order and failure whereof any of the Defendant's property/properties be attached as security.

6. THAT costs of this application be in the cause.

THE PLAINTIFF'S CASE

21. On 30th July 2014, the aforesaid Abdulkadir Salad swore an Affidavit in support of the said application. The Plaintiff's Written Submissions were dated 17th December 2014 and filed on 18th December 2014.

22. The Plaintiff stated that the Defendant was the registered owner of the subject property. She entered into the aforesaid Agreement for Sale in which she agreed to sell to the Plaintiff and the Plaintiff agreed to purchase the said subject property for a consideration of Kshs 36,000,000/=. It said that it completed the payment in terms of varied agreements.

23. It was a term of the said Deed of Variation that the Defendant entered into with the Plaintiff that the Plaintiff would pay a monthly rent of Kshs 180,000/= from 1st May 2012 and Kshs 230,000/= beginning 1st July 2012 till the determination of the lease. However, the Defendant breached the terms of the Agreement for Sale and refused to pay the rent. She also refused to refund the sum of Kshs 31,000,000/= that had been paid to her. As a result, the Plaintiff suffered a loss of Kshs 31,000,000/= and Kshs 2,000,000/= being part of the purchase price and rental arrears respectively.

24. Subsequently, Paramount Universal Bank disposed of the subject property to a third party, which property had now been charged to Commercial Bank of Africa. It therefore urged the court to grant the remaining orders that it had sought.

THE DEFENDANT'S CASE

25. In opposition to the said application, on 11th August 2014, the Defendant filed Grounds of Opposition dated 7th August 2014. The grounds were as follows:-

1. That the Defendant's application herein offended provisions of Section 6 (1) of the Arbitration Act, 1995.

2. That the Defendant's application was in flagrant disregard of the express provisions of clause 45 of the agreement and conditions of contract for building works entered of the conditions and steps which had to be fulfilled prior to evoking of disputes to arbitration.

3. The Defendant (sic) application herein was an afterthought as clause 45 of the contract entered herein by the suit parties herein barred this court from assuming jurisdiction and referring the matter for arbitration.

26. Her Written Submissions were dated and filed on 23rd January 2015.

LEGAL ANALYSIS

27. The Plaintiff argued that the Defendant was not a person to be trusted because she breached the terms of the contract, she secretly moved out of the subject property after auctioneers proclaimed her goods for non-payment of rent and that she never appeared in court despite there being several orders requiring her

personal attendance in court.

28. It was its argument that the court ought to order that the Defendant deposit the said sum of Kshs 35,000,000/= or such other the court would consider adequate as security as failure to order such security would render its suit nugatory. It referred the court to the case of **Nancy Wanjiru Mwaura vs John Njoroge & Another [2005] eKLR** in which Ojwang J (as he then was) ordered that the defendant therein deposit a sum of Kshs 50,000/= as security for costs.

29. On the other hand, the Defendant urged the court to look at the Plaintiff's conduct of having filing two (2) court cases and withdrawing one case and that it was always rushing into actions prematurely without first exhausting all avenues that were available to them. Appreciably, the court was unable to see the relevance of the Grounds of Opposition the Defendant was relying upon in opposition of the Plaintiff's application. In any event, the same were considered when dealing with her application hereinabove.

30. Having said so, the holding in the case of **Nancy Wanjiru Mwaura vs John Njoroge & Another** (Supra) was distinguishable from the circumstances of this case as the same dealt with the issue of security for costs. Notably, the Plaintiff's prayer was for the deposit of the sum of Kshs 35,000,000/= as security for the amount claimed in the Plaint. There is no provision in law that can be invoked to order that a sum claimed in a plaint be deposited before a matter is heard and determined.

31. Further, the court can only make an order for **security for costs in favour of a defendant and not for a plaintiff** (emphasis court) and only if certain circumstances exist as could be evidenced in the case of **Shah vs Shah [1982] KLR 95** where the Court of Appeal held as follows:-

“the general test in an application of this nature is not whether the Plaintiff has a *prima facie* case with a probability of success but whether the Defendant has shown that it has a *bona fide* defence.”

32. Accordingly, having considered the pleadings, affidavit evidence, the written submissions and the case law that was relied upon by the parties herein, the court found and held that the Plaintiff had not demonstrated that it was justified to apply and be entitled to the orders it had sought.

33. Indeed, making such an order could be interpreted to mean that the court had been satisfied that the Plaintiff had made out a good case to be granted the prayers based on affidavit evidence, which would in itself have the effect of failing to afford the Defendant an opportunity to a fair trial contrary to the provisions of Article 50 of the Constitution of Kenya, 2010.

DISPOSITION

34. For the aforesaid reasons, the upshot of this court's ruling was that that the Plaintiff's Notice of Motion application dated 30th July 2014 and filed on 31st July 2014 and the Defendant's Chamber Summons application dated 31st July 2014 and filed on 6th August 2014 were both without merit. In the circumstances, the court hereby dismisses both applications. Each party shall bear its own costs.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 6th day of May 2015

J. KAMAU

JUDGE