



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL CASE NO 204 OF 2013

DIOCES OF MARSABIT REGISTERED TRUSTEES.....PLAINTIFF

Versus

TECHNOTRADE PAVILION LTD.....DEFENDANT

RULING

Stay of proceedings and Referral to Arbitration

[1] The Defendant applied through the Chamber Summons dated 24th June, 2013 for two orders, namely:

- a) That these proceedings be stayed; and**
- b) The subject matter herein to be referred to arbitration.**

[2] The said application is expressed to be brought under Section 6(1) of the Arbitration Act, 1995, and is based on the affidavit of JOHN NJUGUNA and other grounds on the face of the application and in the submissions of the Defendant. For purposes of this Ruling the Applicant and the Respondent shall refer to the Defendant and the Plaintiff, respectively. I will state the Applicant's gravamen and analyse the submissions of the parties in making my decision.

The Applicant's gravamen

[3] The Applicant contends that the lease agreement giving rise to the cause of action herein contains an arbitration clause that all disputes arising therein should be referred to arbitration. On that basis, these proceedings should be stayed under Section 6(1) of the Arbitration Act 1995 and the matter be referred to arbitration. The agreement is annexed to the Affidavit of John Njuguna. According to the Applicant, the dispute arises out of Respondent's refusal to renew the lease herein, and that refusal really aggrieved the Applicant who has effected some developments on the property at a substantial cost. Clause 5 of the lease agreement provides that all questions not mutually settled and agreed upon shall be referred to arbitration which covers the scenario arising hereto. The clause for arbitration is very broad as anything not agreed upon shall be referred to arbitration.

[4] An issue has arisen as to whether the lease should be renewed or not which is a matter for arbitration. The Applicant relied on the following cases:- 1) **HCCC NO 451 OF 2002 BAYO LTD v PLASTIC PRODUCTS (K) LTD**; 2) **HCCC NO 128 OF 1999 DE CHAZAL DV**

MEE & CO v NDUNGU GITHINJI; 3) MILIMANI BANKRUPTCY CASE NO. 533 OF 2002 RENZO DALLA ‘GNESE v GIAN FRANCO GUERATTO & 2 OTHERS; 4) MILIMANI HCCC NO. 521 OF 2008 ZAHRA S. MOHAMED & ANOTHER v ICEA LTD; 5) MILIMANI HCCC NO 514 OF 2009; and 6) CARZAN FLOWERS (KENYA) LTD AND ANOTHER –VS- TARSAL KWS MINSK B.V & OTHERS

[5] The Applicant states that the application has been brought without delay because only two weeks lapsed and which were necessary to obtain instructions. In any event, even if the application was to have been filed on the day of entering appearance, the Applicant submitted that section 159 of Constitution sufficiently addresses such a lapse when it decreed that; ‘Justice shall be administered without undue regard to procedural technicalities.’ Any PROVISION of the Arbitration Act that may have the effect of being construed to mean that the application should be filed at the time of entering an appearance must thus be read in light of section 159 of the Constitution. Further, when the Act was being passed, the Constitution of Kenya 2010, being the supreme law has not been passed. The court should, therefore, find that this application is properly before it and further find that the proceedings herein should be stayed so that the matter should be referred to arbitration.

Application was opposed

[6] The Respondent opposed the application and relied on; 1) The Grounds of Opposition dated the 18th day of July and filed on the 19th day of July 2013; 2) The Replying Affidavit of Mr. Juvanjee Hassanali Jivanjee (Property Manager/Accountant) sworn on the 18th day of July and filed in this Honourable Court on the 19th day of July 2013; 3) The Complaint, filed on behalf of the plaintiff/respondent dated the 22nd day of May and filed on the 23rd of May 2013; 4) Submissions; and 5) Case law cited therein.

[7] According to the Respondent, issues raised are;

1. **Whether these proceedings should be stayed; and**
2. **Whether the matter herein be referred to Arbitration.**

[8] The Respondent is of the view that this suit filed is properly before this Court and the Court is seized with the requisite jurisdiction to hear, adjudicate and determine the issues as between the parties herein. To that extent, the Application is misconceived, frivolous, vexatious, incurably defective and incompetent. Most importantly, the said Application is ultra vires Section 6(1) of the Arbitration Act (1995) (hereinafter referred to as “the Act”) and should fail at the very first instance, as the Application was **not** brought to Court within the time frame as set out in Section 6(1) of the Act which states;

“A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to the arbitration unless it finds”

[9] This suit was filed on the 23rd day of May, 2013. Summons and a copy of the Complaint were served upon the Applicant on the 5th June, 2013. The Firm of Maina Makome & Co Advocates entered appearance on behalf of the Applicant on the 10th June 2013. Instead of filing its defence to the suit, the Applicant filed the present Application on the 24th June 2013. The Application was, therefore, filed Fourteen (14) days after the filing of the Memorandum of Appearance. Section 6(1) of the Act is clear, unambiguous and unequivocal, in that a party applying for a stay of proceedings, shall apply **not later** than the time when that party enters appearance or files any pleadings. This Application should have been filed on the **10th June, 2013** together with the Memorandum of Appearance and **not** Fourteen (14) days later.

[10] This Application was a mere afterthought on the part of the Applicant and should be dismissed. The Respondent's position is buttressed by these two authorities namely; 1) **LOFTY v BEDOUIN ENTERPRISES LTD – EALR (2005) 2 EA pages 122-127; and 2) TM AM CONSTRUCTION GROUP (AFRICA) v ATTORNEY GENERAL EALR (2001) EA pages 291-295.**

In the **Lofty** Case, which is the leading authority on the issue of stay of proceedings, the Court of Appeal Judges stated;

“We respectfully agree with these vies, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings.

Further at page 294 of the **TM AM Construction Group** case, Judge Mbaluto (as he then was) stated;

“Applying the decision of the Court of Appeal as stated above to the circumstances of this case, I find that the Attorney General was obliged to apply for a stay not later than the time when he entered appearance. Accordingly, by filing appearance on 15th March, 2001 and waiting for some 41 days before applying for stay of the proceedings, the Attorney General lost his right to rely on the Arbitration Clause for that reason; the application is clearly untenable and cannot possibly succeed.”

[11] By filing Appearance on the 10th June, 2013 and waiting for some 14 days before applying for stay of the proceedings, the Applicant lost its right to rely on the “Arbitration Clause and for that reason, the application is clearly untenable and cannot possibly succeed. The Application should be dismissed. The Respondent took great exception to the submissions by the Applicant that the non-adherence with section 6(1) of the Arbitration Act should be cured by Article 159(2) (d) of the Constitution. To the Respondent that is not a mere technicality. They cited the Lofty case where the learned judges of Appeal went to great lengths to quote Githinji J. (as he then was) in HCCC 1756 of 2000, where he stated in part;

“... it seems that the object of Section 6(1) of the Arbitration Act of 1995, was inter alia to ensure that applications for stay of proceedings are made at the earliest state of the proceedings.

Section 6(1) of the Arbitration Act, Chapter 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance.

Section 6(1) of the Arbitration Act of 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance.”

[12] Further arguments by the Respondent were that the Applicant's Counsel's submission that a **Fourteen (14) days** delay in filing the Application for stay is **not** unreasonable is a frivolous submission and ultra vires **Section 6(1)** of the Act. Legal practitioners are invoking Article 159(2) (d) to cover up for their shortcomings and failing in following statutory and procedural provisions provided for in statutes and procedural rules. The Court of Appeal in the Lofty case unequivocally and unambiguously laid down the law in regard to the application of Section 6(1) of the Act, more so on the issue of the filing of the application for stay of proceedings. The **Supreme Court Election Petition No. 5 – RAILA ODINGA v IEBC AND 3 OTHERS** at held in part;

“This principle of merit, however, in our opinion, bears no meaning case-in-store and

which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”

Therefore, Article 159(2) (d) of the Constitution is not a blanket relief or a panacea for the failure on the part of a legal practitioner to adhere to statutory provisions. The framers of the Act in their wisdom felt that the issue of stay of proceedings had to be dealt with as a matter of urgency and that has been accepted in our Court as a matter of course. See the case of **Raila Odinga** where the **Supreme Court** held that, a Court would have to appreciate all the relevant circumstances and the requirements of a particular case.

[13] The aforesaid notwithstanding, the Respondent is of the view that there is no dispute between the parties that should be referred to Arbitration. At paragraph 6 of the Supporting Affidavit sworn on the 24th June, 2013, Mr. John Njgunu (director) averred:-

“That a dispute has arisen between the parties in that the defendant herein is aggrieved by the plaintiff’s refusal to extend the lease after the defendant has done some developments on the premises at a substantial cost and the defendant contends that it is only fair that the lease be extended to recoup its investment.”

[14] The Complaint and the Replying Affidavit show there no dispute that exists between the parties which require going to Arbitration. That is borne out from the facts of the case. The Respondent is the registered Proprietor of the properties known as Land Reference Number 209/4865 (L.R No. 13998/1) and Land Reference Number 209/4865 (L.R No. 13875/1) commonly referred to as “Embassy House” and “St George’s House” respectively, situated in Nairobi along Harambee Avenue/Parliament Road. The Applicant was granted a lease to the premises located on the basement and ground floor of Embassy and St. George’s House containing by measurement 37,486 square feet (approximate) pursuant to a Lease Agreement (appearing at pages 6-21 of the bundle) dated the 4th July, 2007, for a term of six (6) years starting from 1st May 2007 to the 30th April, 2013. The lease was duly executed, sealed and registered at Ardhi House (Nairobi) on the 21st of September 2007.

[15] On the 16th March, 2012, the Respondent’s letting Agents, M/S Lustman & Co. (90) Ltd., informed the Applicant that its Lease would lapse on the 30th April, 2013 (see the notice at pages 23-25 of the Complaint). On the 30th April, 2013, the Applicant refused to vacate and on the 8th May, 2013, a letter was written to the Applicant, informing them of the Respondent’s intention to file suit seeking inter alia;

- i. Their eviction from the Premises.
- ii. Outstanding rent of Kshs.3,532,650/- for the months of March and April 2013 and,
- iii. Mesne profits at the rate of Kshs.1, 766,325/- per month with effect from 1st May, 2013 until vacant possession (The letter dated 8th May, 2013 appears at pages 22-23 of my reply bundle).

[16] According to the Respondent, the foregoing facts are manifestly clear that the Applicant’s Lease terminated on the 30th April, 2013, after notice had been given on the 16th March, 2012, signifying that the Lease would not be extended and that the Applicant should vacate. That was as per the terms of the Lease Agreement. There was no clause in the Lease which stated that the Applicant would only vacate the leased premises, at such time that it would have recouped its investment. The tenure of the Lease was quite clear, that is from the 1st day of May 2007 to 30th day of April 2013. Having refused to vacate, the Respondent filed this suit, seeking the eviction of the Applicant from its premises.

[17] Clause 5 on Arbitration reads partly as follows:-

“Save as maybe hereinbefore otherwise specifically provided all questions hereinafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed upon between the said parties shall be referred Arbitration.....”

But there is no dispute between the parties as the Lease expired, and the Applicant had been duly notified that its tenancy was coming to an end and was, therefore, required to vacate on or before the 30th April, 2013. The issue of the Applicant recouping its investment was not part of the Lease Agreement and hence cannot be a dispute to be referred to Arbitration. The Applicant is just attempting to create/manufacture a non-existent issue, so as to continue delaying the inevitable outcome of it having to vacate from the plaintiff/applicant’s premises. Apart from the casual averment in Clause 6 of the Supporting Affidavit, the Applicant has not tendered any evidence to show that a dispute in fact exists between the parties. See the case of **TM AM Construction** where Mbaluto J. (as he then was) at page 295 stated;

“Having referred to the provisions of the Sections 107(1) and 109 of Evidence Act, the failure by the Applicant to tender evidence showing that there is in fact any dispute between the parties means that no basis has been established to show that a dispute in fact exists to justify staying the proceedings and referring the parties to Arbitration.”

[18] The Respondent concluded by stating that there is **not** in fact any dispute between the parties with regard to matter agreed to be referred to Arbitration. The Applicant has failed miserably to prove and is just trying to create a dispute where in fact there is none between the parties. This suit is properly before the court and the Court has the jurisdiction to hear and determine the same conclusively. The Application dated the 24th June, 2013 is frivolous, misconceived and incurably defective and the same should be dismissed with costs.

COURT’S RENDITION

[19] The kind of application before me will require the Applicant to show two things; one; that it has complied with section 6(1) of the Arbitration Act; and the other; that there is in fact a dispute to be referred to arbitration. Section 6(1) of the Act states as follows;

“A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to the 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**

[20] I find great comfort in the case of **LOFTY v BEDOUIN ENTERPRISES LTD – EALR (2005) 2 EA**; first, because it is a decision of the Court of Appeal; and second, it is in a pointed manner to the issue herein, i.e. section 6(1) of the Arbitration Act. The Court of Appeal was categorical that:

“We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]

[21] The rationale of the decision in the Lofty case is expressed in the learned judges of Appeal approval of the statement by Githinji J. (as he then was) in HCCC 1756 of 2000, that;

“In my view, section 6(1) of the Arbitration Act of 1995 which the court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time of that the applicant enters appearance. It seems that the object of Section 6(1) of the Arbitration Act of 1995, was *inter alia*, to ensure that applications for stay of proceedings are made at the earliest state of the proceedings. Section 6(1) of the Arbitration Act, Chapter 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act of 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance.”

[22] The court too takes the same view but I should add that, the requirement in section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration. Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law. By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court. With that understanding, a delay of fourteen (4) days becomes unreasonable in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail. But, before I pronounce that penultimate demise of the application, let me examine the other ground urged in the matter.

Not in fact any dispute

[23] Section 6(1) (b) provides that the court shall refuse to refer a matter to arbitration if it finds:-

...that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration

The phraseology **not in fact any dispute** has been sufficiently addressed by the courts. See the cases of: 1) **ADDOCK INGRAM EAST AFRICA LIMITED v SURGILINKS LIMITED [2012] eKLR**; and 2) **UAP PROVINCIAL INSURANCE COMPANY LTD v MICHAEL JOHN BECKETT [2013] eKLR**. The dispute must, however, relate to matters agreed to be referred to arbitration. I agree with the Respondent that recouping of investment by the Applicant was never a term of the Lease Agreement between the parties dated the 4th July, 2007, which was for a defined term of six (6) years starting from 1st May 2007 to the 30th April, 2013. The Lease provided in Clause (bb) that the Applicant will yield up the demised premises at the expiration or sooner termination of the term of the lease. The lease expired as provided for and a notice that had been given on the 16th March, 2012 indicating that the Respondent would not renew the lease was not challenged. It is that challenge of the said Notice which could have constituted a dispute on the renewal of the Lease and perhaps could have been a basis for referral to arbitration. But the Applicant did not declare a dispute and requested for an arbitration proceeding as provided for in

the Arbitration Act. At the moment, as the Applicant still occupies the premises, its best position in law is holding over tenancy as no new lease that has been granted on the terms or some of the terms of the Lease dated 4th July, 2007 which then raises other pertinent question on the scope and the operative nature of the arbitration clause. The situation the Applicant has placed itself offends section 6(1) of the Arbitration Act in its entirety and cannot succeed in its quest for stay of proceedings and referral of the subject matter to arbitration. In spite the general arbitration clause, the circumstances of this case are that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration, and the arbitration agreement may be inoperative in relation to the issue being raised of renewal of lease based on the already expired lease agreement. On those grounds the court would still have refused to refer the matter to arbitration. Accordingly, matters of vacant possession or eviction or renewal and payment of rent against a tenant who is holding over fall within the province of this court and not arbitration.

[24] For all those reasons, I hereby dismiss the application dated 24th of June, 2013 with costs to the Respondent. I note, however, unless it has changed, the Applicant is still in occupation of the suit premises and by consent of the parties, the Applicant deposited the rent owing. If that position still obtains, there is need for the court to give further directions on that aspect while the case is pending hearing.

Dated, signed and delivered in open court at Nairobi this 6th day of June, 2014

F. GIKONYO

JUDGE