REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Miscellaneous Civil Application 27 of 2007

KIBIRU EMPORIUM LTD.

GLADWELL WANGECI KIBIRU ..... APPLICANTS.

LURO MELVYN BLACKBURN

VERSUS

LADY KATHLEEN BLACKBURN ..... RESPONDENT.

R U L I N G.

By an application Notice of Motion dated 15th May, 2007 pursuant to the provisions of Section 35 (2) (iii) and (iv), Section 37 (1) (a) (iii) and (iv) of the Arbitration Act No. 4 of 1995, Rule 7 of the Arbitration Rules 1997 and section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, the applicant seeks orders:

(1) That the arbitration award that was made in the Arbitration Cause No. 4/2006 (Mombasa) on the 30th Day of March, 2007 be set aside, and the applicants thereby be at liberty to deliberate on whether the matters sought to be arbitrated upon are indeed capable of being referred to the arbitration.

(2)Costs of the application be provided for.

The application is based on the grounds:

(i)The matters referred to arbitration do not fall within the purview of the arbitral agreement pursuant to which they were so referred.

(ii)In the alternative, even if such matters fell within the purview of the said agreement, clause No. 31 thereof was not followed in the mode or manner in which the arbitrator was chosen.

(iii)The said proceedings have been conducted in a manner wholly detrimental to the applicants.

The application is predicated upon the annexed affidavit of Gladwell Wangechi Kibiru sworn on the 15th day of May, 2007.

On behalf of the applicant it was urged that the 2nd applicant is one of the directors of the 1st applicant company and hence authorized to swear the affidavit on his own behalf and on behalf of the 1st applicant.

It was contended, on behalf of the applicant, that up to August, 2005 the 2nd applicant and Gibson

Kibiru were the only shareholders and directors of the 1st applicant, a private limited liability company.

The 3rd applicant approached 2nd applicant to join him (2nd applicant) in another business venture. Later on he wanted to locate a business wherein, his wife, the respondent, would be engaged.

Consequently, it was agreed between Gibson Kibiru and the applicant (2nd), on the one hand, and the 3rd applicant and the respondent, on the other hand:

(a) that the 3rd applicant and the respondent would collectively buy 50% of the share holding of the 1st applicant with each holding 25% of the shareholding;

(b)Gibson Kibiru would surrender his shareholding in the company and that he would be paid for it;

(c)The only shareholders and directors of the 1st applicant would be the 3rd applicant, 2nd applicant and the respondent. This was accomplished in September, 2005;

It is common ground that the 3rd applicant and the respondent were then husband and wife respectively and were living together as such at that point in time.

After joining the 1st applicant company there arose misunderstanding, purely of a matrimonial nature, between the 3rd applicant and the respondent.

The said matrimonial differences led to the 3rd applicant and the respondent parting ways.

The consequence of the disagreement spilled into the business affairs of the 1st applicant as can be discerned from exhibit "GWK" at pages 1-10 thereof.

At an extra-ordinary meeting of the 1st applicant, it was resolved that the 3rd respondent cease to be involved in the day-to-day running of the business of the 1st applicant and accordingly cease to be a director.

Soon thereafter, Muranje and Co. Advocates wrote to the applicants on 21st March, 2006 claiming for salary due to the 3rd respondent at the rate of Ksh. 61,500 per month, as at March, 2006 amounting to Ksh. 690,096/14.

This was followed up by another letter of 4th April, 2006 from Madzayo, Mrima & Co. Advocates. From the said letter it was manifest that a dispute had arisen. That the said dispute had to be referred to an arbitration in line with Article 31 of the Memorandum of Articles of Association of the 1st applicant. The said advocates nominated Justus Mulwa Ndoya to be the sole arbitrator. The applicants were given 3 days to respond thereto as can be discerned from Exhibits on pages 12 and 13.

The second applicant responded through Muraya Wachira & Co. Advocates vide their letter of 12th April, 2006. It was pointed out in the said letter that the removal of the 3rd respondent was lawful, and in any event there was no monetary claim due to the 3rd respondent. Last but not least at page 14 that the services of Mulwa Ndoya were not required. By a letter dated 20th April, 2006 at page 15 and 16 the 3rd respondent's advocates reiterated that they were going on with the arbitration.

It was contended that the conduct of the respondent, as could be discerned from pages 15 and 16 were contrary to Article 31 of which reliance was based.

That a true interpretation of Article 31 is that matrimonial matters are not a dispute between 1st applicant company and the 3rd respondent that required arbitration.

By a letter dated 25th January, 2007, the respondent's advocate readily approved the date suggested by the respondent's advocate i.e 16th January, 2006 as a hearing date.

On 20th January, 2001 the applicant through Muraya Wachira & Co. Advocates, confirmed that the applicant had never previously submitted to arbitration in the matter.

The said advocates further clarified that the applicant had not instructed Muraya Wachira, & Co. Advocates to proceed to arbitration, there was no joint letter from the parties referring the dispute to arbitration and that the outstanding issues be attended to prior to engagement in arbitral steps.

On 22nd February, 2007 the applicants' advocate wrote to the respondent's advocate and the arbitrator asking for clarification. Instead the applicant advocates got a letter dated 2nd March, 2007 stating that the award would be delivered on 30th March, 2007. This is embodied at page 55-65 of the respondent's statement of claim.

The respondent relied on the replying affidavit sworn on 26th September, 2006. on behalf of the respondents it was urged that there has been a dispute in the 1st applicant's company. The truth of the matter is that the Blackburns (3rd applicant and respondent) invested in the 1st applicant's company by buying shares. That she further loaned funds to the 1st applicant. The nature of her claim is marked Exhibit "WCBI"

The arbitration commenced by the arbitrator writing to all parties as is discernible from Exhibit "LKB3". The arbitrator thereafter called for a preliminary meeting on 8th July, 2006 in Mombasa as per exhibit "LKB – 5". The date for the preliminary meeting seemed inconvenient to M/s. Muraya & Wachira advocates. Adjournment was granted tot 28th July, 2006 as per Exhibit "LKB 7". On 28th July, 2006 an adjournment was occasioned by the absence of M/s. Muraya & Wachira Advocates. The matter was then adjourned to 4th August, 2006 as per exhibit "LKB 8".

On 4th August, 2006, all parties duly represented appeared before the arbitrator and directions were accordingly taken as per Exhibit "LKB 9" and "LKB 10".

The time within which to file statement of claim elapsed, in the meantime, and the respondent's advocate applied for extension as per Exhibits "LKB 11" and "LKB – 12".

After taking directions before the arbitrator on 4th day of August, 2006 the applicants withdrew instructions from their advocates as per exhibit "LKB – 13".

The applicants were then served with the statement of claim and chose not to file any defence thereto or at all;

The applicants herein proceeded to instruct M/s. Mogaka Omwenga & Mabeya Advocates to represent them in the dispute on whether or not there existed any dispute in terms of Article 31 of the 1st applicant's memorandum of Articles of Association. See Exhibit "LKB 14" in this regard.

It is clear to me that the applicant's line of approach was in consonance with the directions given by the arbitrator. The applicant was therefore consciously involved in the arbitral proceedings.

The hearing was scheduled for 22nd November, 2006 but was postponed to 1st December, 2006 at the instance and express request of the applicant's advocates.

Subsequently on 1st December, 2006 the applicants never made any appearance before the arbitrator and the matter proceeded ex-parte. The hearing was adjourned at the end of the day to 26th January, 2007.

In anticipation of the hearing of 26th January, 2007, various documents were forwarded to the applicants as evidenced by Exhibit "LKB 19". The applicants never attended and the matter proceed exparte. Thereafter the applicants were served with Hearing Notices for 16th day of February, 2007. On that day the matter was adjourned to 2nd day of March, as per Exhibit "LKB 21".

That vide Exhibit "LKB 22" the parties were requested to file written submissions as per Exhibit "LKB – 22".

Eventually, the award was delivered and transmitted to the parties vide the Arbitrator's letter of 30th March, 2007 marked as Exhibit "LKB – 24".

That only after the respondent were served with an application by the respondent in Miscellaneous Civil Application No. 19/2007 for leave to enforce the award as a decree of the court did the applicants file an application to set aside the award which was transferred to Malindi.

That having known and participated in the arbitral process the applicants are now estopped from challenging the award.

It is clear to me, on the evidence, that the arbitrator called for a preliminary meeting as per Exhibit "LKB – 5". The said meeting was adjourned to 28th July, 2006 as per exhibit "LKB – 7". Subsequently adjournments were again granted and the date extended to 4th August, 2006.

On 4th August, 2006, all the parties and their advocates duly appeared before the arbitrator whereupon directions were taken in accordance with exhibits "LKB 11" and "LKB 12".

It is further clear to me that after taking directions before the arbitrator as aforesaid the applicants then withdrew instructions from their advocates as embodied in Exhibit "LKB – 13". Subsequently, the applicants were served with the statement of claim but chose not to file defence thereto. The applicant then proceeded to instruct M/s. Mogaka Omwenga & Mabeya advocates to represent them in the dispute.

It is also clear to me that hearing was scheduled for 22nd November, 2006 but was postponed to 1st December, 2006 at the instance and express request of the applicant's advocates. However, on 1st December, 2006 the applicants notwithstanding the fact of having sought adjournment to that date failed to attend the hearing which then proceeded ex-parte and was adjourned to 21st November, 2006. Then to 1st December, 2006. Then to 26th January, 2007. On 26th January, 2007 the applicants' advocates asked for adjournment as per exhibit "LKB – 17" and "LKB – 18" to 16th February, 2007 when the matter again proceeded exparte. The same was adjourned to 2nd day of March, 2007 as per exhibit "LKB 21". The parties were requested to file written submissions. The applicants' response was per exhibit "LKB 24". Eventually the award was delivered and transmitted to the parties vide the arbitrator's letter of 30th march, 2007 marked as Exhibit "LKB 24".

It would appear that the applicants woke up from a deep slumber after being served with an application to enforce the award as a decree of the court.

By dint of the provision of section 35 of the Arbitration Act, No. 4 of 1995, an arbitral award can be set aside only if:

"***(a) the party making the application furnishes proof –***

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the alw to which the parties have subjected it or, failing any indication of that law, the law of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

There is no evidence before me to suggest that the applicant has made out a case for the setting aside of the arbitral award.

The arbitral award was delivered and transmitted to the parties on 30th March, 2007. The application was then made and filed on 15th May, 2007 in compliance with Section 35 (3) of the Arbitration Act.

In my judgment the applicants submitted themselves to the jurisdiction of the arbitrator by their conduct. The applicants are therefore estopped, in law, by their conduct from challenging the arbitral award. The application lacks merit. Accordingly, this application is for rejection.

The upshot is that the application fails and is dismissed with costs.

Dated and delivered at Malindi this 7th day of May, 2009.

N.R.O. OMBIJA.

JUDGE.

Mr. Machuka for Applicant.

Mr. Kinyanjui for Mr. Marina for Respondent.