REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Case 2819 of 1991

DINERS CLUB AFRICA LIMITED..... PLAINTIFF

VERSUS

SHIRAZ MALIK NOOR ..... 1ST DEFENDANT

THE DA GAMA ROSE GROUP OF COMPANIES LIMITED..... 2ND DEFENDANT

ORDER:

This suit brought by Originating Summons was filed byDINERS CLUB AFRICA LTD, against two parties. The first of those is SHIRAZ MALIK NOOR, a lawyer based in Britain. The second one is The DA GAMA ROSE GROUP OF COMPANIES LTD. I shall thereafter refer to, them, as the context permits, as 1st and 2nd defendants respectively.

This action concerns an agreement dated 3rd February, 1990. It was entered into between the Plaintiff herein and the 2nd defendant. By that agreement the 1st defendant herein wasappointed arbitrator in a dispute between the parties to theagreement Over land known as L.R.No.209/1069, Nairobi. Thedispute came about this way.Umoja Enterprises Ltd, a private Ltd Company, had 14 shareholders. The company owned parcel No.209/1069, above, as the only major asset. The 14 shareholders agreed to sell all their shares to the 2nd defendant herein. Soon thereafter the same shareholders agreed to sell the same shares to a nomineeof the plaintiff herein, viz a Limited Liability Company known as X2IT LTD. That fact came to the notice of the 2nd defendant which then took steps to protect their interest over the assets of Umoja Enterprises Ltd. The major asset of that company having been parcel (No L.R. 209/1069 Nairobi, the 2nd defendant brought action to wit NAI HCCC No. 4101 of 1986 against the shareholders of the company seeking, inter alia specific performance of the agreement respecting the sale to it of the shares of that company, and at the same time lodged a caveatagainst the title of the property. It also applied in the suit for and obtained an interlocutory injunction against the 14 shareholders restraining them from selling or transfering their shares in their company. The court suo motu, and in exercise of its inherent jurisdiction joined XZIT LTD as a party in the suit and extended the injunction to cover it.

In the meantime the life of the caveat the 2nd Defendant lodged against title No. L.R.209/1069, Nairobi hadexpired. The 2nd defendant was duly served by the Registrar ofTitles, with a notice of intention to discharge it. That notice provoked the 2nd defendant's second suit, to wit NAI

HCCC No. 5517 of 1989 (OS). That was in effect an applicationfor the extension of the life of the caveat. Although thatsuit was heard no ruling was given.

The defendants in the first suit were disatisfied withthe order of court granting the injunction. They

appealed to the Court of Appeal. The appeal was given a number to wit Court of Appeal Civil Appeal No.92 of 1988.

The three suits I have alluded to, above, were thesubject matter of the agreement respecting which this actionrelates to. There are salient aspects of the agreement I wish tospecifically refer to.

Under the agreement the parties to it agreed to refertheir dispute over land No. L.R. 209/1069 to the 1st defendantherein as an arbitrator. By Clause (V) the 2nd defendantherein relinquished its claim over the land and agreed toconfine its claim to damages. The maximum of the damages wasto be the valuation amount of the land, above. Under Clause(VII) the 2nd defendant herein agreed to withdraw the caveatagainst L.R. No.209/1069, Nairobi, on designated conditions.The award of the arbitrator would be filed in each of the threecases and be binding on the parties as a consent order. Thereare other clauses setting out other terms but I do not considerit necessary to set them out here.

The 2nd defendant herein did relinquish its claim overparcel No. L. R. 209/1.069, Nairobi, and at the same time causedthe caveat against the said property to be withdrawn. ThePlaintiff herein, however, later changed his mind and declinedto submit to arbitration. The arbitration remains inchoate.The plaintiff now applies:

(a) That the appointment of the 1st defendant asarbitrator be declared invalid and of no effect, theagreement appointing him having not been signed by allthe defendants in NAI HCCC No.4101 of 1986.

(b) In the alternative that the first defendant be removedas arbitrator without fee for having failed to holdthe arbitration or to make an award within the timelimit set by the agreement of 3rd February, 1990.

(c) That the parties to the three suits covered by thearbitration agreement be at liberty to proceed with those suits.

(d) That costs be provided for.

Mr. Hewett with Mr. Onyango prosecuted this suit onbehalf of the plaintiff. The action is expressed to be broughtunder the Arbitration Act, Cap 49 Laws of Kenya. Submissionsby learned Counsels for the plaintiff were accordingly based onthe Provisions of that Act, and decided cases interpretingProvisions of the Act or similar provisions in otherjurisdictions. The authorities they cited were, as I willlater show, of no assistance to their client's case.

Mr Oyatsi appeared for the 2nd defendant. His submission was based' on the Provisions of 0.45 Civil Procedure Rules With due respect to him that order is of no assistance to either party's case. The reference of the dispute to arbitration having not been by order of Court.

The agreement to submit to arbitration was enteredinto while the three suits were pending. All the defendants incivil Suit No. 4101 of 1986 did not sign the agreement. Failureto sign the agreement by some parties, per se, would notinvalidate the agreement as Mr Hewett would have me hold. Itmust be drawn that the agreement would be prejudicial to theinterests of the parties not joined or that the interests ofthe several parties to a suit are inseparable. I say so advisedly.

The parties who were not joined in the arbitrationagreement were the 14 shareholders of Umoja Enterprises Ltd.they were the sellers of their shares to both the 2nd defendantherein and a nominee, of the plaintiff. Upon the withdrawal ofthe caveat against L.R.No.209/1069, the plaintiff moved ontothe land and has since erected premises on it. The 14shareholders have to date not complained. They had been paid.The dispute over the ownership of the subject property was asat the date of the agreement under attack essentially betweenthe plaintiff and the 2nd defendant herein. Accordingly thefailure to join the 14 shareholders of Umoja Enterprises Ltd,did not of itself without more, render the agreement invalid.They had in effect ceased to have interest in the property indispute upon receiving payment for their shares.

The agreement to refer the dispute overL. R. No. 209/1069 to 'arbitration was not and is not subject to the Arbitration Act. The Act is concerned with pre-suitagreements. Agreements to refer disputes to arbitrationentered into after a suit or suits have been filed are governed either by 0.45, Civil Procedure Rules, if references are made by order of court or under 0.24 rule 6 Civil Procedure Rules. The agreement under considerations to my mind, fails in the last category. It is noted that the arbitration never took off. That does not take the matter out of 0.24 rule 6 Civil Procedure Rules. The parties contracted between themselves to adopt a particular course of action in all the three suits. The agreement binds both of them. It can only be set aside on grounds which will justify the vitiation of any contract, like fraud, mistake, misrepresentation or illegality. Such grounds have not been shown to be present here.

Moreover the agreement cannot be superseded, as MrHewett urged. His submission was that the time for presentingan award having expired the agreement should be set aside. Itwas his submission further, that delay in filing the award or even of commencing the arbitration was an act of misconduct on the part of the arbitrator. As was rightly pointed out by Mr Oyatsi for the 2nd defendant, lapse or time does not, per se, amount- to supersession of the arbitration. Nor can thearbitration of the nature under consideration be supersededmerely because the time for returning an award has expired.The court has power to enlarge time for returning an award,Yes. However the subject arbitration having been to my mind, compromise of suits is not subject to enlargement of time by the court at least as of now. The parties, inter se, agreed to adjust their suits on designated terms. They can and are at liberty to extend the time for returning an award by consent. The Provisions of *0.24* rule 6 Civil Procedure Rules, governs the relationship between them. Consequently lapse of time, per se, will not operate as a basis of supersession.

Our 0.24 rule 6 Civil Procedure Rules, is almost identically worded as 0.23 rule 3 of the Indian Civil Procedure Code as it was in 1957. The authors of the book; A. I . R.Commentaries on Civil Procedure Code, Vol.3 6th Ed.; Messrs.Chitaley and Rao, have extensively dealt with different circumstances under which suits may be compromised or adjusted under 0.23 rule 3. Because the Indian Provision is, in effect, the same as our 0.24 rule 6 Civil Procedure Rules, the author's comments are invaluable. Their comments on the rule start from. Their view which I share, is that the agreement of the nature as the one under consideration amounts to a compromise or an adjustment of a suit or suits. It binds the parties to it. The failure of one or more of the parties to a suit to sign it does not necessarily invalidate the agreement.

Evidence is essential to show that the agreement would be invalid without the participation of the omitted party.

Moreover under ordinary rules of contract the agreement will not bind those who did not subscribe to it. Where a party to the agreement has acted on the agreement the other party or parties are estopped from turning his or their backs on it.

In our case, the 2nd defendant acting on the suitagreement relinquished its claim for specific performance against the original owners of parcel No. L.R.209/1069. It withdrew a caveat against its title. Consequently it changed its position with regard to the claims it had in the three suits. True, it retains the right to claim damages. However, there are certain rights it has lost. It cannot be restored toposition it was in before the suit agreement. Estoppel is available against the plaintiff. The plaintiff ought not and should not permitted to derive unmerited and unfair advantage arising from its own failings. It refused to submit to arbitration as had been agreed upon between the parties. It has now made an about face and uses the fact that the arbitration has not as yet taken off to found a basis for the setting aside of the agreement to submit to arbitration. This court being a court of equity will not permit it. The facts before me do not show a basis for suing the 1st defendant. He was willing and ready to conduct the arbitration. He was not granted the opportunity to do so. Even if he had failed to take any step in the arbitration either party to the agreement would not have had the right tosue him. Their rights would only be limited to applying for supersession of the arbitration or to have him removed. His removal does not entail filing a suit against him. The parties *may by consent* remove him and appoint *another one, or* where applicable move the court in the suit in which he was appointedto remove him.

Finally I wish to state that there was no necessity of filing a separate suit for the reliefs sought herein. The

arbitration agreement concerns pending suits. The plaintiff had the liberty of bringing an application in any of the pending suits for a remedy.

Considering this matter in its entirety I am disinclined to grant the reliefs sought and will dismiss this case with costs. Order accordingly.

Dated at Nairobi this 29th day of July 1993.

S. E. O. BOSIRE

JUDGE

Delivered this 29th *day* of July 1993.

S.E.O. BOSIRE

JUDGE