



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Potter JJA & Simpson Ag JA)

CIVIL APPEAL NO. 43 OF 1981

BETWEEN

AGIP(K) LIMITED.....APPELLANT

AND

KIBUTU.....RESPONDENT

JUDGMENT

On May 1, 1980, the appellant Agip (Kenya) Ltd who was the plaintiff in the court below and to whom for convenience we shall hereinafter refer as “the plaintiff” entered into an agreement with the respondent/ defendant (hereinafter referred to as “the defendant”) whereby the defendant was permitted as a licensee to enter and operate the plaintiff’s petrol filling and service station on Park Road, Nairobi. Alleging failure on the part of the defendant to comply with the terms of the agreement, the plaintiff terminated it with effect from April 1, 1981. The defendant having failed to deliver up possession the plaintiff sued him in Civil Suit No 1121 of 1981 for possession, mesne profits, general damages for loss of goodwill and an injunction restraining the defendant his servants or agents from carrying on business in the premises. In paragraph 6 of his defence and counterclaim claiming damages for negligence and breaches of the agreement by the plaintiff the defendant states that he will crave leave of the court

“to refer to clause 14 of the Operator Agreement that this suit is improper before this Court as it has not been referred to an arbitrator.”

No reference to this paragraph is made by the plaintiff in its reply and defence to counterclaim. Clause 14 of the Operator Agreement reads as follows:

“14. Any dispute or difference between the parties hereto touching the construction meaning or effect of any matter arising therefrom shall be referred to the arbitration of two persons one to be appointed by each party to the reference and an umpire to be appointed by the arbitrators in writing before entering upon the reference and any such arbitration shall be subject to the enactments governing arbitrations in Kenya.”

On July 10, 1981, the plaintiff applied by chamber summons for a temporary injunction restraining the defendant from carrying on business in the premises pending the hearing and determination of the suit. According to the brief record of the proceedings counsel for the plaintiff pointed out that the defendant had failed to apply for a stay of proceedings. In reply the defendant’s counsel referred to paragraph 6 of the defence. There is no record of any submissions on the merits of the application and in his Ruling the learned judge noted that the parties had agreed that before hearing the merits of the application he should

determine whether or not the suit should be referred forthwith to arbitration without granting a temporary injunction.

For the plaintiff it was argued that because the defendant had put in a counterclaim he had waived his right to go to arbitration. The plaintiff's advocate relied on the decision of the East African Court of Appeal in *Maluki v Oriental Fire and General Insurance* [1973] EA 162 which the learned judge held was not applicable because whereas in that case there had been an application for a stay of proceedings in the present case there had been no such application.

The judge held that clause 14 of the Operator Agreement required all disputes between the parties to be referred to arbitration, that the defendant had raised clause 14 as a preliminary issue in his defence and it was clear that what he was saying was that the dispute should go to arbitration but that if he was wrong in that then he had a counterclaim on the merits. The judge then proceeded without hearing further submissions to dismiss the application for a temporary injunction. It is against this ruling that the plaintiff now appeals on the following four grounds:

1. The learned judge erred in finding that this dispute be referred to arbitration because:
 - a) there was no application before the Court for stay of proceedings pending arbitration,
 - b) by filing a defence and counterclaim in the suit, the defendant was disqualified from relying on and/or waived the operation of the arbitration clause in the agreement under dispute.
2. The learned judge erred in failing to make a ruling on his finding on the preliminary issue raised by consent of the parties for determination by the court before the hearing of the main application for the issue of a temporary injunction.
3. The learned judge misread, misunderstood, and misapplied the decision in *Maluki v Oriental Fire & General Insurance* [1973] EA 1962.
4. The learned judge erred in dismissing the application for a temporary injunction without giving the parties the opportunity to address the Court on the merits and demerits of the said application.

Mr AA Lakha for the plaintiff, the appellant in this appeal, submitted before us that the only issue before the learned judge was whether the dispute should be referred to arbitration, but the judge did not decide this issue. What he did do was to dismiss the plaintiff's application for a temporary injunction, which was not an issue before him. As the judge said in his ruling —

“The parties have agreed that I should determine this matter (meaning whether the dispute should be referred to arbitration) before hearing the merits of this application for the temporary injunction.”

He never heard any argument on those merits, and we have no doubt that his dismissal of the plaintiff's application, which was not in issue before him, and as to which he heard no argument, was wrong. The appeal must succeed in this respect.

As regards the appeal against the dispute being referred to arbitration, the learned judge made no such order, nor did he order the suit to be stayed, which is by Section 6(1)(b) of the Arbitration Act (Cap 49) an essential prerequisite before a matter can be referred to arbitration in accordance with an agreement to that effect. Mr Kirundi for the defendant, the respondent in this appeal, submitted that it must be implied from the general tenor of his ruling, that the learned judge did make such an order. We do not see how such an implication can possibly be justified. The formal order drawn up in this case merely says

“That the plaintiff's application be and is hereby dismissed.”

Nothing is said about staying the suit, or referring the dispute to arbitration. There is no room for implying the making of any such orders.

A strange feature of this appeal is that there has never been an application by the defendant for the suit to be stayed. The existence of an arbitration clause in the agreement between the parties was referred to in the defence as a point of law affecting the court's jurisdiction to entertain the suit, and appears to have been treated by consent of the parties as equivalent to an application for a stay under Section 6(1) of the Arbitration Act. But such an application must be made "before delivering any pleadings or taking any other steps in the proceedings". To make the existence of an arbitration agreement a ground of defence is, as was said by Sir Newham Worley Ag P in *Purshottam v Keshavlal* (21 EACA) 111 "selfdestructive", because it involves the delivery of a pleading before the application for a stay is heard. The only way in which an application for stay to enforce an arbitration clause in an agreement can be made is by notice of motion supported by affidavit; it cannot be disguised as a point of law contained in a pleading. As the application must be made before any step is taken in the suit, it cannot be incorporated in a pleading, delivery of which constitutes a step in the proceedings. In the instant case, not only was a defence delivered, but it included a counterclaim, which is a crosssuit, and which invokes the court's jurisdiction to deal with the dispute. Furthermore, there is no affidavit by the defendant on record to the effect that he is, and was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration. The court must be satisfied as to this, and unless so satisfied the application to stay must be dismissed. As to this, see Halsbury's Laws of England, 4th Ed, Vol II, paragraph 564, and the judgment of Madan JA in *Kenya Oil Co Ltd v Rajwani and Rajwani* (Civil Appeal No 50 of 1977, unreported). There is no holding in this case by the judge that he was so satisfied. Assuming that the learned judge did treat the point of law raised in paragraph 6 of the defence as being an application for a stay, we consider that it should have been dismissed under paragraphs (a) and (b) of Section 6(1) of the Arbitration Act for two reasons -

1. because the application to stay was not made before delivering a pleading, and
2. because there was no material before the judge to satisfy him that the defendant was at the time the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration.

For these reasons, we are of the opinion that this appeal must be allowed, with costs, and we so order. It was not open, and is not now open, to the defendant to apply for the suit to be stayed, as he has taken a step in the proceedings by delivering a defence and counterclaim before making any such application. The plaintiff's application for a temporary injunction was prematurely dismissed, as it was not an issue before the court and no argument on its merits was heard. We set aside the ruling and formal order, the subject of this appeal, and direct that the plaintiff's application dated June 11, 1981, for a temporary injunction, be remitted to the High Court to be heard and determined by another judge. The costs of the abortive hearing in the High Court will be in the discretion of the judge who hears and determines the application dated June 11, 1981.

Dated and Delivered at Nairobi this 21st day of December 1981.

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

A.H.SIMPSON

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AG.JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR