



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 669 OF 2017

DR ONSOMU ONCHONGA.....PLAINTIFF

=VERSUS=

FORTY PLACE LIMITED.....DEFENDANT

RULING

1. On 24/11/2012, the defendant brought a chamber summons application dated 23/11/2017 under Section 6(1) of the Arbitration Act seeking an order staying these proceedings and referring the dispute herein to arbitration. The application was supported by the affidavit of John Mburu, sworn on 23/11/2017. That application is the subject of this ruling.
2. The case of the applicant is that the dispute in this suit is one of those disputes that are governed by an arbitration agreement between the parties herein. That arbitration agreement is contained in Clause 4.2 of the standard lease between the parties to this suit. Annexed to the affidavit in support of the application is a copy of a lease dated 10/6/2004 between: (i) Mwafa Court Limited; (ii) Gititha Management Company Limited (now known as Forty Place Limited; and (iii) Mr. Peter Wathingira Douglas Ngumi and Mrs Zipporah Wangui Wathingira Ngumi, registered on 21/7/2004 in respect of Apartment Number D7.
3. The plaintiff filed a notice of preliminary objection dated 27/10/2018. It was subsequently agreed that the grounds set out in the notice of preliminary objection would be treated as the plaintiff's grounds of opposition. The plaintiff contended that the application for referral to arbitration was time barred under Section 6(1) of the Arbitration Act. Secondly, he contended that there was no arbitration agreement between him and the defendant in the manner and form prescribed by Section 4 of the Arbitration Act.
4. In written submissions dated 15/11/2018, the defendant submitted that it entered appearance on 9/11/2017 and soon thereafter filed the present application. It contended that it did not submit to the jurisdiction of this court because it never filed a defence. It relied on **Mills Electrical Company Limited v Mitsubishi Electric Corporation (2018)**. The defendant further relied on Article 159(2) which enjoins the court to promote alternative forms of dispute resolution including arbitration. Further, the defendant relied on **Family Bank Limited v Kennedy Moruri Molena t/a Moco Auctioneers (2017) eKLR**.
5. The defendant further submitted that Clause 4.2 of the lease contains the applicable arbitration agreement. It added that although the plaintiff had not signed a lease, he purchased an apartment in the court and was bound by the terms of the standard lease.
6. In response, the plaintiff submitted that the defendant entered appearance on 9/11/2017 and the present application was filed on 24/11/2017. He contended that the present application should have been filed on 9/11/2017 as required under Section 6 of the Arbitration Act. He further submitted that his lease was in the process of being registered and as such, there was no written arbitration agreement between him and the defendant. He urged the court to dismiss the application.
7. I have considered the application together with the affidavit and submissions in support of the application. I have similarly considered the grounds set out in the notice of preliminary objection. I have also considered the relevant constitutional and statutory framework on arbitration in Kenya's legal system. Equally I have considered the prevailing jurisprudence on the key issues in this application.
8. Two key issues fall for determination in this application. The first issue is whether there is an arbitration agreement between the parties to this suit. The second issue is whether the application herein is statute barred by dint of the fact that it was brought 15 days after the applicant filed a memorandum of appearance. I will make pronouncements on the two issues in that order.
9. The first is whether there is an arbitration agreement between the parties to this suit. The position of the applicant is that each of the forty owners of the residential flats (the lessees) has a standard lease containing similar covenants. Clause 4.2 of each of the leases contains an arbitration agreements which provides as follows:

"4.2 All disputes and questions whatsoever which shall arise between the parties hereto touching this lease or the constructions or application thereof or any clause or thing herein contained or to the rights or liabilities of any party under this lease shall be

referred to the decision of a single arbitrator to be approved in accordance with the provisions of the Arbitration Act Chapter 49 of the Laws of Kenya or any Act amending or replacing the same. The decision of such arbitrator of the Arbitrators (sic) shall be final conclusive and binding on the parties.

10. The applicant exhibited a copy of the lease in respect of Apartment Number D7. The respondents similarly exhibited a lease in respect of Apartment D10, with the name of the lessee erased in black and the execution page omitted. Clause 4.2 of both exhibits contain the above arbitration agreement. The respondent however contends that his lease is in the process of registration and therefore there is no written arbitration agreement between the parties to this suit.

11. I do not agree with the respondent on that contention. Clause 4.7.1 of the two leases exhibited by the parties to this suit defines “lessor, manager and lessee” as follows:

“4.7.1 The expression “the lessor” “the manager” and “the lessee” shall include persons deriving title under or through the lessor, the manager or the lessee respectively”

12. The respondent came to this court as a person deriving title from Pipeline Realtors Company Limited are the lessees who sold to him the suit property. He annexed a copy of the sale agreement. For reasons that the respondent knows, he concealed the part of the exhibited lease which contains the name and address of his predecessor in title. He also omitted the execution page of the lease. The respondent has not exhibited a copy of his own lease which he alleges is still undergoing registration. He has nonetheless exhibited a copy of the lease of his predecessor which contains the arbitration clause.

13. In my view, until the respondent’s lease is registered, the respondent is by dint of clause 4.7.1 bound by each and every term of the lease executed by his predecessor. He is therefore bound by the arbitration agreement contained in Clause 4.2 of his predecessor’s lease. Consequently, my finding is that there is a binding arbitration agreement between the parties to this suit.

14. The second issue is whether the application for stay of proceedings and referral of this dispute to arbitration is statute-barred. The constitutional framework on the place of arbitration in Kenya’s legal system is contained in Article 159(2) of the Constitution which provides as follows:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

a) Justice shall be done to all, irrespective of status;

b) Justice shall not be delayed;

c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to Clause (3);

d) Justice shall be administered without undue regard to procedural technicalities; and

e) The purpose and principles of this Constitution shall be protected and promoted.

15. The statutory framework on stay of legal proceedings and referral of disputes to arbitration is contained in Section 6 of the Arbitration Act which provides as follows:

6 Stay of Legal proceedings

1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when the 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 matters agreed to be referred to arbitration

2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

16. The tenor and import of Article 159(2) (c) of the Constitution as read together with Section 6 (1) of the Arbitration Act is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance. Indeed a myriad of decisions abound on this legal stand point. The Court of Appeal held in **Mt Kenya University v Step Up Holding (K) Limited [2010] eKLR upheld the ruling of W Ouko J.** where he dismissed the appellants’ application for stay of proceedings pending Arbitration. The appellant in this particular case entered appearance and responded to the respondent’s application for injunction before filing the application

seeking an order for reference to arbitration. The court considered Section 6(1) of the Arbitration Act and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application is not made prior to or at the time of entering appearance or if the application is made after filing of the defence.

17. Similarly, in **Eunice Soko Mlagui v Sursh Parmar & 4 others [2011]eKLR**, Kamau J had dismissed an application by the appellant for stay of proceedings and referral of the dispute between the parties to arbitration in **HCC No 304 of 2010**. The Court of Appeal, guided by the decision in **Charles Njogu Lofty v Bedain Enterprises Limited CA Number 253 of 2003**, held that the court would still be entitled to reject an application for stay of proceedings and referral to arbitration if the application to do so is not made within the time frame set out in Section 6(1) of the Act.

18. In the present matter, the defendant entered appearance through its previous advocates, M/s Muciimi Mbaka & Co. Advocates, on 9/11/2017. The memorandum of appearance was served on the plaintiff's advocates on the same day. Fifteen days later, the defendant brought the present application.

19. The applicant has urged the court to be guided by Article 159 of the Constitution and to ignore the statutory timelines set out in Section 6 of the Arbitration Act. I do not agree with that contention. In my view, the statutory time lines in Section 6 of the Arbitration Act was informed by the need to avoid parallel or duplicated proceedings and remedies. It serves to divest the courts jurisdiction in disputes which are subjects of arbitration agreements. In the present suit, owing to the defendant's failure to invoke the arbitration agreement at the time of entering appearance and or acknowledging the suit, the court heard the interlocutory application and granted interim injunctive orders pending the hearing and determination of this suit by this court. The application for stay of proceedings and referral of the dispute is therefore belated and cannot be allowed at this point and in the circumstances of this case where there are injunctive orders pegged on the hearing and determination of this suit. My finding on the second issue therefore is that the present application is belated and cannot be allowed unless the stay and referral is by consent of the parties.

20. The upshot is that the chamber summons application dated 23/11/2017 and filed on 24/11/2017 is dismissed for lack of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

June Nafula - Court Clerk