



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.135 OF 2016

1. PRESBETA INVESTMENT LTD

2. MILELE BEACH HOTEL COMPLEX LIMITED.....PLAINTIFFS

.-VS-

1. NATIONAL BANK OF KENYA LIMITED

2. THE PRESBYTERIAN FOUNDATION

3. SPOTLIGHT INTERCEPTS AUCTIONEERS.....DEFENDANTS

RULING

1. By a Notice of Motion dated 14th March 2017 and brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 2 Rule 15 (1)(c) of the Civil Procedure Rules, the 1st and 3rd defendants are seeking for orders:

1. THAT the Plaint dated 30th May 2016 and filed in Court on the same date be struck out for being an abuse of the process of the Court as against the 1st and 3rd Defendants.

2. THAT the costs of the entire Suit and of the application be provided for.

2. The Application is based on the following grounds:

a) THAT the 3rd Defendant is the agent of a disclosed principal and as such is not liable to be sued in this matter.

b) THAT the purpose of this Suit is already spent.

c) THAT there is no further dispute, issue or matter to be properly determined and resolved as between the parties by this Honourable Court.

d) The Plaintiffs have admitted and rightly claimed that any dispute arising out of the agreement dated 22nd December 2015 should be referred to arbitration. Consequently, the purpose of this Suit was to seek preservative orders so that the parties may proceed to arbitration. It is not envisaged that this Honourable Court will take further proceedings in this Suit.

e) THAT continued entertainment of the Suit by this Honourable Court beyond the Notice of Motion dated 30th May 2016 will result in the usurpation of the arbitrator's jurisdiction.

f) THAT continued entertainment of the Suit by this Honourable Court will result in the improper use of Court resources, make the parties incur costs and unnecessary delays contrary to the overriding objectives enumerated by the law.

g) The Plaintiffs have never commenced arbitration and have since vacated and ceased to occupy the Suit property out of their own volition.

h) It is in the interests of justice and fairness that the Suit filed herein be struck out.

3. The Application is also supported by the affidavit of Musa Dumbuya, Head of the Collections and Remedial Department of the 1st Defendant sworn on 14th March 2017. Relying on legal advice, the deponent states that the Suit brought against the 3rd Defendant is incompetent, bad in law and incurably defective as the 3rd Defendant was at all material times acting as an agent of the 1st Defendant having been instructed by the latter and that the jurisdiction of this Court to entertain further proceedings in this Suit lapsed after the Court gave its ruling on 30th August 2016 in line with the letter and spirit of the provisions of Section 7 of the Arbitration Act. That any further proceedings regarding the dispute herein are the purview of the Arbitrator and this Court ought not usurp the jurisdiction of the Arbitrator by taking up further proceedings in this matter. He depones that the Plaintiffs do not seem interested in the resolution of the dispute as they have not commenced the arbitration proceedings as stipulated by the Asset Purchase Agreement and as claimed in the pleadings herein, and that the Plaintiffs have since vacated the Suit Property and ceased their occupation of the property out of their own volition.

4. The Plaintiffs were duly served but did not file any response to the Application and neither did they attend Court during the hearing. The Application is therefore not opposed.

5. I have carefully considered the Application, the Affidavit in support and the pleadings on record. By a Plaint dated 30th May 2016 and filed on even date, the Plaintiffs instituted this Suit against the Defendants seeking a permanent order restraining the Defendants by themselves, their servants, agents and/or any other person/body claiming under them from selling, trespassing evicting, interrupting, interfering or in any other manner depriving the Plaintiffs their right of quiet enjoyment of the Suit properties known as **LR NOS.MAINLAND NORTH/1/11474, 11477, 11478, 15518, 2528 AND 2536** pending the commencement, hearing and determination of the Arbitration proceeding between the Plaintiffs and the Defendants arising from the tripartite Asset Purchase Agreement of 22nd December 2015. These prayers were repeated in the Plaintiffs' Notice of Motion lodged in the Court on the same date of filing Suit under Section 7 of the Arbitration Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Articles 40, 50 and 159 (2)(d) of the Constitution. Omollo J heard the Motion and by her order dated and signed on 30th August 2016, the learned Judge rejected the Motion with costs.

6. Section 7 of the Arbitration Act provides as follows:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

It is clear from the above provision that the letter and spirit of the provisions of Section 7 of the Arbitration Act that the jurisdiction of this Court in a matter that is to be referred to arbitration is limited to the hearing and determination of the Application praying for conservatory order pending arbitration. The Court has already determined the Notice of Motion dated 30th May 2016 seeking preservative order. I agree with the Defendants averment that any further proceedings regarding the dispute herein are the purview of the Arbitrator and that this Court ought not to usurp the jurisdiction of the Arbitrator by taking any further proceedings in the matter. The Plaintiffs moved to Court seeking a conservatory order and their Application has already been heard and determined by the Court. It was incumbent upon the Plaintiffs to commence the arbitration proceedings as stipulated by the Asset Purchase Agreement and as claimed in the pleadings herein. It appears they have not done so. Instead, the Court has been told that the Plaintiffs have since vacated the Suit property and ceased their occupation of the property out of their own volition. The plaintiffs have not opposed the Application herein and therefore the averments by the 1st and 3rd Defendants remain uncontroverted.

7. Considering the circumstances of the matter before the Court, it is quite clear that this Court has discharged its mandate in the matter. In my view, this Court should only confine itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits of the case. The Court has already exercised its jurisdiction through the ruling dated 30th August 2016.

8. In the case of **Safaricom Limited –v- Ocean View Beach Hotel Limited and 2 others (2010) eKLR**, the Court of Appeal stated:

“In the circumstances of the matter before the Court, it is quite clear that the superior Court has stepped out of its jurisdiction and unless such step is stopped, this Court’s process is likely to be bogged down with matters which ought not to have come to it in the first place under any of the Court Rules.... In my view, the High Court should have confined itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits. The usurpation of the arbitrators’ jurisdiction by the superior Court also contravened Section 17 of the Arbitration Act....in arbitration matters all Courts including this Court’s intervention is restricted to a facilitative role as specifically provided under the Act. Any other intervention outside the provisions of the Act is with respect, unnecessary baggage on this Court as well and for this reason, this Court has the inherent power to reject the extra baggage and re-order things as provided in the applicable law.... By dealing with the matter contrary to Section 7 and 17 of the Arbitration Act the superior Court clearly lacked jurisdiction and therefore its decision constituted a nullity.”

9. In the matter before Court, it is clear that the Court has already done that which the law permits it to do. In my view, the Court cannot entertain the matter any further. To do so would amount to usurpation of the arbitrator’s jurisdiction. Moreover, it is apparent that the purpose of the Suit is already spent. Sustaining the proceedings any further would, in my view, serve no useful purpose. This Court is alive to the principle that the power to strike out pleadings must be sparingly exercised and can only be exercised in clearest of cases. However where the Suit is without substance or groundless or fanciful or spent as in the present case, the Court will not hesitate to strike it out. Sustaining the Suit any further would cause the Defendants unnecessary anxiety, trouble and expense. It would also go against the spirit of the overriding objective whose aim is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. From the facts herein, there is no dispute that is still pending before this Court. It would be futile to await the determination of this Suit which does not and would not lie to this Court either now or in the future.

10. In the result, the Notice of Motion dated 14th March 2017 is merited and is allowed. The Plaintiffs’ Suit is struck out with costs to the 1st and 3rd defendants.

Dated, signed and delivered at Mombasa this 31st day of May 2018.

C. YANO

JUDGE