



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 456 OF 2017

RACHAEL WAMBUI KIONGO & 900 OTHERS.....PLAINTIFFS

VERSUS

KINANGOP WINDPARK LIMITED.....1ST DEFENDANT

AFRICA INVESTMENT INFRASTRUCTURE MANAGERS....2ND DEFENDANT

NORFUND3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL..... 4TH DEFENDANT

RULING

1. This ruling is in respect of Plaintiffs' Notice of Motion dated 7th December 2017 and 1st defendant's Notice of Preliminary Objection dated 17th January 2018. The following orders are sought in the Notice of Motion:

i. Spent.

ii. Spent.

iii. That pending hearing and determination of this suit the 1st, 2nd, 3rd and 4th defendants/respondents be restrained by way of temporary injunction by themselves, their servants, agents, contractors or employees from proceeding with the foregoing arbitration suit in London or even executing/implementing the decisions of the said arbitration suit in London.

iv. That the cost of this application be provided for.

2. The preliminary objection is that "the court lacks jurisdiction to hear this suit as it has no authority over proceedings in another jurisdiction."

3. So as to put matters in perspective it is important to review the plaintiffs' case as pleaded in the plaint, the accompanying documents and the affidavit in support of the Notice of Motion. The parties to this case are stated in the plaint to be "Rachael Wambui Kiongo and 900 others" as plaintiffs versus the 4 named defendants. There is no list of plaintiffs to enable the court or the defendants determine the identity of the "900 others". The verifying affidavit in respect of the plaint is sworn by one Njoroge Kahama Njoroge. In the absence of a list of plaintiffs, one does not know what Njoroge Kahama Njoroge's role in the matter is. He deposed thus at paragraph 1 of the affidavit: "I am the plaintiff herein and hence competent to swear this affidavit." He does not refer to any co-plaintiffs and does not state that he has authority to swear the affidavit on behalf of any other person. Obviously, this is contrary to Order 4 rule 1 which provides:

1(1) The plaint shall contain the following particulars—

(a)

(b) the name, description and place of residence of the plaintiff, and an address for service;

...

(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the

plaintiff named in *the* *plaint*.

(2) The *plaint* shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

....

(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any *plaint* or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule. [Emphasis supplied]

4. The issue of the deficiencies in the *plaint* and verifying affidavit were not raised before me. I will therefore not go further into the matter.

5. It is averred in the *plaint* that the 1st, 2nd and 3rd defendants teamed up to develop a Wind Power Project on the plaintiffs' parcels of land in Nyandarua and Nakuru Counties. The 1st defendant registered a subsidiary known as Kinangop Windpark Leases Limited. The subsidiary entered into various lease agreements with the plaintiffs. The defendants used the lease agreements to secure a loan of USD 108 million to be used to develop the project. The 1st, 2nd and 3rd defendants have vacated the project area and refused to pay the plaintiffs in terms of the agreements. Additionally, the 1st, 2nd and 3rd defendants have commenced proceedings in International Courts and arbitration in London with a view to arm twisting the plaintiffs. The plaintiffs further aver that the international case and arbitration have been filed fraudulently with a view to impoverishing the plaintiffs and Kenyan tax payers. Accordingly, the plaintiffs seek judgment in the *plaint* against the defendants for:

a. A declaration that the amount of money claimed in the arbitration suit in London by the defendants has a component amounting to Kenya shillings 1.2 billion or any other amount to be decided by this Honourable Court belongs to the plaintiffs herein and he said money should be paid to the plaintiffs through their advocates on record.

b. An injunction be issued restraining the defendants, their agents, servants, employees or any persons directed from them from spending, distributing or dealing with the money claimed or awarded at the arbitration suit filed by the defendants.

c. Any other order the court may deem fit so to give.

d. Cost of this suit.

6. The foregoing is generally reiterated in the affidavit in support of the Notice of Motion. The affidavit is sworn by Laban Muremi Njuguna who describes himself therein as "the applicant." The plaintiffs therefore seek an injunction to restrain the defendants from proceeding with the international case and arbitration and from executing or implementing the decisions emerging from the arbitration and suit.

7. The Notice of Motion and preliminary objection were heard together. At the hearing, counsel for the plaintiffs submitted that even if the plaintiffs are not parties to the international arbitration and suit, they are affected by it. He added that the proceeds of the arbitration or payments from the arbitration should be withheld so that the plaintiffs' interests are protected.

8. Counsel for the 1st defendant urged the court to uphold the preliminary objection or dismiss the Notice of Motion since the plaintiffs are not parties to the arbitration in London and since there is no privity of contract between the plaintiffs and the parties to the London arbitration.

9. I have considered the preliminary objection. A valid preliminary objection must be on a pure point of law. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

10. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In view of the foregoing, while considering the preliminary objection I have assumed that all the facts pleaded by the plaintiffs are correct. For the same reasons, I have not considered the replying affidavit filed by the 1st defendant.

11. Looked at from any angle, the plaintiffs' case revolves around the arbitration that is ongoing in London. The plaintiffs have not told the court who the parties to the arbitration are, the scope of the claim therein and the relief sought therein. The plaintiffs however readily concede that they are not parties to the said arbitral proceedings. The prayers sought in this suit have a direct bearing on the arbitral proceedings.

12. Arbitral proceedings are by nature private and exclusive to the parties to those proceedings. Save for the right of parties in the arbitration to have recourse to a court for interim measure of protection or enforcement of awards as may be provided in the relevant arbitration rules, interference by a court of law is not allowed. For example section 10 of our Arbitration Act, 1995 provides:

Except as provided in this Act, no court shall intervene in matters governed by this Act.

13. W. Karanja J.A. stated as follows in a majority ruling of the court of Appeal in Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR:

... it is important to rehash the evolution of arbitration law in this country in order to put this matter in its proper perspective, and particularly on the concept of “finality” which is an important precept in the law of arbitration.

Arbitration is one of the dispute resolution mechanisms recognised under Article 33 of the United Nations Charter. It is an internationally recognised form of dispute resolution particularly in the area of trade and commerce. It is a private consensual process which though adversarial in nature has been for many years a preferred mode of settling of international and commercial trade disputes. It is preferred by many parties who usually agree on the mode of appointment of the arbitrator long before a dispute arises. It is also meant to be cheaper, faster and more confidential as compared to ordinary litigation. ...

One important feature of arbitration which is internationally accepted and which is meant to make arbitration more attractive as opposed to litigation is the concept of finality. Article 5 of the UNICITRAL Model Law on international commercial arbitration provides that;

“no court shall intervene except where so provided in law”

This provision is expressly mirrored in Section 10 of our Arbitration Act, 1995.

Almost all the other provisions are replicated. The setting aside of an arbitral award is provided for under Article 34 and the grounds for setting aside are similar to those encapsulated in Section 35 of our Act.

These two provisions are meant to ensure finality in arbitral proceedings, and forestall situations where parties who initially opted for arbitration to settle their disputes find themselves entangled in the quagmire of protracted endless litigation which they were trying to avoid in the first place.

14. The plaintiffs herein have clearly invited the court to interfere with arbitration proceedings which they admit is ongoing and to which they are not parties. The court cannot do so. Looking at the prayers in the plaint herein, the case revolves exclusively around the arbitration. Section 10 of our Arbitration Act, 1995 bars this court from interfering with the arbitration. It is therefore pointless to keep the litigation herein alive. Despite the drastic nature of striking out, the court should not be hesitant to terminate pointless proceedings through striking out.

15. The preliminary objection raised by the 1st defendant has merit. It is upheld. The plaintiffs’ suit is struck out with costs to the 1st defendant. I do not award any costs to the rest of the defendants since they did not participate in the proceedings.

Dated, signed and delivered in open court at Nakuru this 27th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

No appearance for the defendants/respondents

Court Assistants: Gichaba & Lotkomo