



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**CIVIL CASE NO. 138 OF 2013**

**MAHICAN INVESTMENTS LIMITED.....PLAINTIFF**

**=VERSUS=**

**MADDALENA STUCCI**

**FERRI MAURO.....DEFENDANTS**

**RULING**

**Introduction**

1. What are before me are two Applications dated 12<sup>th</sup> September 2013 and 19<sup>th</sup> September 2013.
2. The Application dated 12<sup>th</sup> September, 2013 was filed was by the Defendant and is seeking for the following reliefs:
  - a. **That there be a stay of all proceedings pending arbitration.**
  - b. **That the dispute between the parties be referred to arbitration.**
  - c. **That the costs of this Application be provided for.**
3. On the other hand, the Application dated 19<sup>th</sup> September, 2013 was filed by the Plaintiff seeking for a stay of arbitration proceedings pending the hearing and determination of this suit. In fact, the Plaintiff's Application is simply opposing the Defendant's Application.

**The Defendant's case:**

4. The Defendants are seeking to have the current proceedings stayed pending arbitration on the ground that clause 3(b) of the Lease Agreement between the Plaintiff and themselves stipulated that any dispute arising therefrom shall be referred to arbitration.
5. According to the Defendants, this suit has been commenced in violation of the Lease Agreement despite the Plaintiff knowing that arbitration is ongoing in Mombasa before a single arbitrator appointed by the Chairman of the Law Society of Kenya.

**The Plaintiff's case:**

6. The Plaintiff's position is contained in its Application dated 19<sup>th</sup> September, 2013 and its

- director's Replying Affidavit sworn on 18th September 2013.
7. According to the Plaintiff, the Lease Agreement between the parties provided at clause 3(a) that if the Lessee shall not comply with the request for the payment of rent, the Lessor may, one year from the date of the request, re-enter, at any time thereafter upon the said premises and the lease shall be deemed terminated.
  8. It is the Plaintiff's directors' deposition that the Defendants have willfully refused or neglected to pay for the maintenance and management charges as required by the Lease or at all.
  9. It is the Plaintiff's contention that the agreement has terminated as per clause 1 (v) of the Lease and that the Plaintiff is entitled to vacant possession. According to the Plaintiff, the arbitrator cannot deal with the question of the validity of the contract itself where the same has already been terminated.

### **The Defendants' Supplementary Affidavit**

10. In response to the Plaintiff's averments, the Defendants have denied that they ever entered into a Management and Maintenance agreement with the Plaintiff and that they are not in arrears of any charges as alleged.
11. Consequently, it was argued, the lease document has not terminated and that in any event, the Plaintiff has already submitted itself to arbitration.

### **Submissions**

12. The parties filed their respective submissions in respect to the two Applications.
13. Ms Chepkwony, counsel for the Defendants, submitted that there exists a Lease Agreement between the parties which is valid.
14. According to counsel, as per the Plaintiff's demand letters of 28<sup>th</sup> June 2013 and 11<sup>th</sup> March, 2013, one year has not lapsed as per clause 3(a) of the Lease Agreement for the Plaintiff to claim that the Lease has terminated. Counsel further submitted that his clients are strangers to a company known as Green Park Enterprise Limited which purported to claim service charge from them and that that issue can only be dealt by the arbitrator.
15. The Defendants' counsel further submitted that in view of the issues raised by his clients, there is a dispute which should be determined by the arbitrator. Counsel relied on numerous authorities which I have considered.
16. Mr. Ole Kina, counsel for the Plaintiff submitted that this suit can only be stayed pending arbitration if the Lease was still subsisting, which, according to counsel, is not the position in this case.
17. It was submitted that in view of the fact that the Lease between the Plaintiff and the Defendants had been forfeited, the issues between the Plaintiff and the Defendant are not "matters in dispute" for the purpose of the Arbitration Act.
18. The Plaintiff's counsel finally submitted that the issue as to whether Green Park Enterprises Ltd was entitled to issue notices on behalf of the Plaintiff under the Lease or whether the period of one year has lapsed since the demand for payment of service charge was made, or whether a right to forfeit the lease has accrued can only be dealt with in the substantive suit.

### **Analysis and findings:**

19. According to paragraph 8 of the Amended Plaint, on 28<sup>th</sup> June 2013, the Plaintiff's advocate on record served on the Defendants a notice in writing specifying the particular breaches of covenant and requiring the Defendants to remedy the said breaches pursuant to the then existing Lease Agreement.
20. The Plaintiff has further averred that by the said breaches, the Defendants lost their right, privilege and title to the suit property. Consequently, the Plaintiff has sought for a declaration that pursuant to clause 3(a) of the Lease, the Plaintiff was at liberty to terminate the lease and the Lease was indeed terminated.
21. The above averment is supported by the demand letters annexed on the Plaintiff's affidavit as annexures FG 1 and FG 2.

22. According to annexure FG1, which is the Plaintiff's advocate's letter dated 28<sup>th</sup> June 2013, the Plaintiff's advocate gave the Defendants a notice of 30 days to pay Euro 2,739.18 failure of which the Plaintiff was to commence its rights of terminating the lease as set out in clause 3(a).
23. It would appear that even before the receipt of the said demand letter, the Defendants' advocates had already put in motion the provisions of clause 3(b) of the Lease which provides for the appointment of a single arbitrator. The said arbitrator was subsequently appointed by the Chairman of the Law Society of Kenya on 24<sup>th</sup> June 2013.
24. In his letter of 23<sup>rd</sup> July, 2013, the Plaintiff's advocate did not object to the appointment of the said arbitrator. However, the plaintiff proceeded to file this suit which the Defendants are now seeking to stay pursuant to the provisions of section 6 of the Arbitration Act.
25. Section 6 (1) (a) of the Arbitration Act provides that the court may stay any arbitral proceedings if it finds that either the arbitration agreement is null and void, inoperative or incapable of being performed or if in fact there is no dispute between the parties with regard to the matters agreed to be referred to arbitration.
26. In view of the pleadings and documents before me, the only issue that I am supposed to determine is whether there is a dispute or disputes to be referred to arbitration in view of the provisions of clause 3 (b) of the Lease Agreement.
27. The word "dispute" should be given its normal meaning. There is no special or unusual meaning conferred upon it by lawyers (see **Secretary of State for Transport (2004) ENHC 2339 (TCC) October 2004**).
28. Clause 3(b) of the Lease dated 23<sup>rd</sup> July, 2009 provided as follows:

**“Any dispute arising between the parties hereto in connection with this Lease of the construction or application thereof or any clause herein contained or on the right or liabilities of any party hereunder, shall be referred to the award of a single arbitrator to be appointed by the parties hereto, by mutual assent or, in default of such an agreement, the said dispute shall be referred to a legal counsel, appointed by the Chairman, currently in office, of the Law Society of Kenya, in accordance with the provisions of the Arbitration Act or any Act or Acts amending or replacing the same.....”**

29. The Plaintiff's claim, as I have already stated above, is for a declaration that the Plaintiff be at liberty to terminate the Lease pursuant to the provisions of clause 3(a), and that indeed the lease has terminated.
30. Clause 3(a) of the Lease provides that if any monies provided under 1(u) shall remain unpaid for 30 days, or if any covenants shall not be performed or observed, it shall be lawful for the Lessor to serve on the lessee a 30 days' notice specifying the non-payment and requiring the Lessee to remedy the same.
31. The same clause further provides that if the Lessee shall not within one (1) year of the expiry of the notice pay all the outstanding amount, then the Lease shall absolutely determine.
32. Pursuant to the provisions of clause 3(b) of the Lease, it is the mandate of the arbitrator to construe the provisions of the Lease. It is also the mandate of the arbitrator to determine the rights and liabilities of the parties to the Lease.
33. It is the position of the Plaintiff that the Lease has terminated for non-payment of the service charge and management fees. On the other hand, it is the position of the Defendants that the so called service charge and Management fees have not accrued and cannot accrue. This, in my view is an issue which goes to the interpretation of the terms of the Lease. It is the arbitrator who is supposed to interpret those terms and make a finding on them.
34. The Defendants have also contested the Plaintiff's position that at the expiry of a 30 days' notice, the Lease automatically determines. The Defendants' argument arises from the provisions of clause 3(a) which provides that the Lessor may re-enter the premises after the expiry of one year. That, again, is a dispute that can only be resolved by the arbitrator.
35. Having found in the preceding paragraphs that there is in existence an arbitration agreement between the parties and that there are disputes arising from the Lease Agreement, I am in agreement with the Defendants' advocates' submissions that these proceedings should be stayed pending the hearing and determination of the arbitration, which, in any event, have commenced.

36. The Plaintiff's counsel submitted that the arbitrator cannot deal with the issue of the validity of the Lease. According to counsel, the Lease Agreement has determined for nonpayment of service charges and management fees and it is only this court that can make that declaration.
37. I do not agree with those submissions. Pursuant to the provisions of section 17 of the Arbitration Act and the doctrine of *competence/competence*, an arbitrator should be able to determine his own jurisdiction while dealing with the issues before him. Under that principle, and the provisions of section 17 of the Act, the arbitrator can rule on both the validity of the arbitral clause and the Lease Agreement as a whole. This court cannot usurp that role.
38. It is the constitutional responsibility of this court, pursuant to the provisions of Article 159 (2) (c) of the Constitution to encourage and not to stifle alternative dispute resolution, which includes referring matters to arbitration in appropriate cases.
39. In the circumstances, and for the reasons I have given above, I allow the Defendants' Application dated 12<sup>th</sup> September 2013 in the following terms:
- a. **That there be a stay of all proceedings herein pending arbitration.**
  - b. **That the dispute between the parties herein be referred to arbitration for hearing and determination.**
  - c. **That the Plaintiff to pay to the Defendants the costs of this Application.**
  - d. **The Plaintiff's Application dated 19<sup>th</sup> September, 2013 is hereby dismissed with costs.**

**Dated and delivered in Malindi this 9<sup>th</sup> day of May, 2014.**

**O. A. Angote**

**Judge**