REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & VISRAM, JJ.A)

CIVIL APPEAL NO. 154 OF 2003

BETWEEN

WESTMONT POWER KENYA LIMITED.....APPELLANT

AND

KENYA OIL COMPANY LTD.....RESPONDENT

(An appeal from the Order of the High Court of Kenya at Nairobi (Milimani Commercial Courts) (Ombija, J) dated 18th December, 2002

in

H. C. C. C. No. 106 of 2002)

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JUDGMENT OF THE COURT

By a plaint filed in the superior court on 30th January, 2002, the respondent commenced proceedings against the appellant claiming a sum of Kshs.33,360,625.40/= being the balance of the agreed purchase price of goods sold and delivered by it to the appellant at Mombasa during the year 1998.

On 27th February, 2002 the appellant entered appearance to the said suit. Strangely, the appearance is dated 4th March, 2002, but was actually filed in the superior court on 27th February, 2002. Some 14 days later, on 13th March, 2002, the appellant lodged an application before the superior court, by way of chamber summons under ***section 6 (1)*** of the Arbitration Act, 1995 (the Act) seeking essentially two orders - that the proceedings before the superior court be stayed, and the dispute be referred to arbitration on the ground that the dispute was the subject matter of an arbitration agreement between the parties. That application was supported by the affidavit of Sanjay Ajit Singh who annexed the said arbitration agreement binding the parties to submit any dispute between them to arbitration.

Notwithstanding the pendency of that application before the superior court, which had also been served upon the respondent, an ex parte judgment was entered against the appellant on 22nd March, 2002 in default of filing defence. This prompted the appellant to file an application before the superior court to set aside that judgment. In its chamber summons dated 13th May, 2002, the appellant sought the following orders:

"1. THAT this Honourable Court be pleased to stay execution of the "ex-parte" judgement entered herein against the Defendant on the 22nd March, 2002 until the hearing and determination of the Defendant's application to set aside the said 'ex-parte" judgement;

2. THAT this Honourable Court be pleased to set aside the "ex-parte" judgement entered against the Defendant on the 22nd March, 2002 to pave way for the hearing and determination of the Defendant's application for stay and referral of the matter to arbitration;

3. THAT this Honourable Court be pleased to make any other or further order in the exercise of its inherent jurisdiction to do justice in this matter;

4. ***THAT costs of this application be provided for."***

The application was based on the following grounds:

"(a) The Plaintiff's application for default judgment was premature as the Defendant's application for stay of proceedings and referral of the matter to arbitration was pending before the court and had been served upon the Plaintiff's Advocates with a date;

(b) The Defendant's Application for referral of the matter to arbitration was filed and served upon the Plaintiff's Advocates well before the stipulated time for filing a defence;

(c) The Defendant has a strong defence against the Plaintiff's claim;

(d) No prejudice will be suffered by the Plaintiff if the default judgement is set aside."

The application came up for hearing before the superior court (Ombija, J) on 26th July, 2002, and in a ruling delivered on 18th December, 2002, the learned Judge dismissed the application, delivering himself, in part, as follows:

"So far as I am aware, there are no limits in law or restrictions on my discretion to set aside judgment entered in default of filing a defence. I am aware that the court ought to exercise its discretion, in the light of the facts and circumstances both prior and subsequent and of the respective merits of the parties (sic) ***as per Harriss J. in KIMANI –vs- MC CONNEL (1966) EA 547.***

I have to consider: -

1. How it came about that the applicant found himself bound by a judgment regularly obtained.

2. Whether any useful purpose would be served by setting aside the judgment.

In respect of the first issue, the affidavit in support of the application merely avers at paragraph 5 that the applicant filed application to stay the proceedings and refer the matter to arbitration on 13th March, 2002 but does not say why the applicant did not seek further time or extension of time for filing of the defence.

In respect of the second issue the applicant entered appearance on 27th February, 2002. The application to refer the matter to arbitration was not made until 13th March, 2002 – 14 days later. In those circumstances, if the court were to set aside the judgment, for the purposes of making an application to refer the matter to arbitration, that would be an exercise in futility since the court had no jurisdiction to refer the matter to arbitration, time having elapsed. See Section 6 of the Arbitration Act of 1995." (emphasis added).

It is against that Ruling that the appellant has appealed to this Court on 13 grounds.

In his submissions before us, Mr. Nowrojee, learned counsel for the appellant, argued essentially that the appellant's application under ***section 6 (1)*** of the Act having not been determined, no defence to the respondent's claim could have been filed by the appellant. He submitted, therefore, that the default judgment entered against the appellant on 22nd March, 2002 was irregular, and ought to have been set aside *ex debito justitiae*. He relied upon the cases of ***Joab Henry Onyango Omino v Lalji Meghji & Co. Ltd [1995-1998] 1 EA 264***; ***Remco Ltd v Mistry Jadva Parbat & Co. Ltd and Others [2002] 1 EA 233*** and ***Gandhi Bross v H. K. Njage T/A H. K. Enterprises Nairobi HCCC 1330 of 2001*** (unreported) and to **Supreme Court Practice** 1995 Vol. 1 Part 1 at page 141.

Mr. A. A. K. Esmail, learned counsel for the respondent, on the other hand, submitted that the filing of an application for stay of proceedings under ***section 6 (1)*** of the Act did not stay those proceedings; that the defence having not been filed, the judgment entered against the appellant was a regular judgment that could not be set aside except by demonstrating that there was a good defence, which the appellant had not done; that the appellant's application for referral to arbitration, having been filed 14 days after the appearance was entered, was "time-barred" under ***section 6 (1)*** of the Act, and accordingly the court had no jurisdiction to refer the matter to arbitration, and, therefore, setting aside the ex parte judgment would have been an exercise in futility.

We are unable to agree with Mr. Esmail's proposition that it was incumbent upon the appellant to demonstrate that he had a good defence to the claim for the ex parte judgment to be set aside. There is no question here of the appellant wanting to, or being subjected to, the filing of a defence, when the appellant says clearly that the parties are subject to an arbitration agreement and have chosen to resolve their dispute in a different forum. That is the only issue that the superior court was obliged to determine, that is whether the matter was one that ought to be referred to arbitration, but it chose to ignore the application dated 13th March, 2002, and entered ex parte judgment. We repeat what this Court said in the case of ***Omino vs Lalji Meghji Patel (supra)*** that when an application under ***section 6 (1)*** of the Act is made by a party to an arbitration agreement, it is incumbent upon the court to which such application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement and if it does, then it is for the opposing party to show cause why effect should not be given to the agreement.

We would emphasize strongly that it was incumbent upon the learned Judge to allow the application for referral to arbitration dated 13th March, 2002 to be heard on its merit and that could only be possible if the ex-parte judgment was vacated. It is in dealing with that application, that Mr. Esmail's other arguments such as the application being time-barred, and the futility of referral to arbitration, could have been ventilated. However, in taking the course he did, the learned Judge denied the appellant the opportunity to be heard on its application, and condemned it unheard. The exercise of judicial power imposes upon a court the duty to hear both sides on merit. It was wrong, in our judgment, for the learned Judge not to have set aside the exparte judgment in the face of an undetermined application to refer the matter to arbitration.

Accordingly, we allow this appeal, set aside the ex parte judgment entered against the appellant on 22nd March, 2002 and order that the appellant's application under ***section 6 (1)*** of the Arbitration Act dated 13th March, 2002 be set down for hearing in the superior court before any Judge other than Ombija, J.

In the prayers before us, the appellant also seeks refund of the decretal sum already paid to the respondent. The order that best commends itself to us in the circumstances of this case is that the decretal sum paid to the respondent be deposited in an interest earning account in the joint names of the two advocates on record with any reputable bank in Kenya within the next 21 days. If that cannot be accomplished for any reason within the time-frame stipulated herein, we order that the funds be deposited in court.

The appellant shall have the costs of this appeal and of its application to set aside the ex-parte judgment entered against it in the superior court.

Dated and delivered at Nairobi this 1st day of April, 2011.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR