



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 253 OF 2003
CHARLES NJOGU LOFTY v BEDOUIN ENTERPRISES LTD
JUDGMENT OF THE COURT

Section 6(1) of the Arbitration Act, 1995, provides:- “6(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 that party enters an appearance or files any pleading or takes any other step in the proceedings, 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.”

On the plain reading of that section, before the court can consider the issues raised in paragraphs (a) and (b) of section 6 (1) of the Act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court:- “..... not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings”

In Civil Case No. 1756 of 2000 between BEDOUIN ENTERPRISES LTD. V. CHARLES NJOGU LOFTY AND JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS which constituted another aspect of the present dispute now before us, GITHINJI, J, as he then was, had rejected the argument that an application for reference to arbitration can be made at three stages, namely at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The learned Judge had there held that:-

“In my view, section 6(1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.

Section 6(1) of the Arbitration Act, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed”

We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings

and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings. The dispute between Charles Njogu Lofty, the appellant herein, and Bedouin Enterprises Ltd, the respondent herein, basically concerns the interpretation given by G.B.M. Kariuki, J. to section 6 (1) of the 1995 Act, “the Act” hereinafter, in light of the circumstances surrounding the dispute.

By a registered lease dated 27th November 1986, the appellant as the landlord, entered into an agreement with the respondent as tenant for a period of seventeen years over a portion of the premises known as L.R. Number 209/10502 at an agreed rent. The lease was apparently to expire on 30th June, 2003. Sometime in the year 2000, the appellant alleged that the respondent was in breach of certain terms of the lease and that as a consequence of the breaches, the appellant was entitled to forfeit the lease. The appellant also instructed one Joseph Mungai Gikonyo T/A Garam Investment to levy distress for non-payment of the rent payable under the lease.

These actions on the part of the appellant precipitated Civil Suit No. 1756 of 2000 to which we have already referred and in that suit the respondent had sued for declarations that it [the respondent] was not in breach of any term(s) of the lease, that the distress levied on its goods and chattels was unlawful and lastly for an injunction restraining the appellant, its servants and agents from forfeiting or attempting to forfeit the lease or from re-entering or attempting to reenter or repossessing the demised premises on the basis of the alleged breach or breaches of the lease. Pending the hearing of the suit the respondent obtained an ex-parte injunction which was extended on various occasions. H.C.C.C. No. 1756 of 2000 was filed by the respondent on 27th October, 2000. On 6th November, 2000, the appellant entered an appearance and on 5th December, 2000 the appellant filed his defence and counterclaim.

In his defence and counterclaim which was subsequently amended on 11th June , 2002, the appellant alleged various breaches of the lease by the respondent and prayed for, among other things. “(i) a declaration that the plaintiff is in breach of the lease agreement. (ii) An order that the plaintiff gives possession of the suit premises to the first defendant [the appellant].”

Meanwhile on 20th April, 2001, the appellant, long after he had entered appearance and filed his defence, made an application to the High Court praying for an order that the proceedings be stayed and the dispute be referred to arbitration. The lease agreement had provided in Clause 6 (2) that :-

“Any dispute or difference between the parties hereto and all claims for compensation (if any) arising out or in connection with this lease shall be referred for decision to a Valuer or Estate Agent appointed by the chairman for the time being of the Estate Agents or Valuers Board from among persons of not less than ten (10) years standing as Valuers or Estate Agents, in accordance with the provisions of the Arbitration Act (Cap 49) Laws of Kenya or any statutory modification or re-enactment thereof for the time being in force.”

The application for stay of proceedings and referral to arbitration was the one heard by Githinji, J. and, as we have seen, he held that the application should have been made at the time of entering appearance, not long after appearance and filing of defence. Githinji, J. dismissed the application with the result that H.C.C.C. No. 1756 of 2000 is still pending and alive in the High Court.

As we have already seen the lease agreement was to come to an end on or before 30th June, 2003. But Clause 6 (3) of the agreement provided that:- “6 (3) The lessor shall on the written request of the lessee made three (3) calendar months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the lessee herein before contained at the expense of the lessee grant to it a Lease of the demised premises for a further term of ten (10) years at the rent set out in Clause 3(b) herein or such higher rent as may be agreed between the parties but containing the like covenants and provisions as herein contained except the present covenant for renewal the lessee on the execution of such renewal to execute a counterpart thereof.”

The respondent was anxious to avail itself of the renewal provision and on 20th March, 2003, the respondent gave to the appellant a written notice for the renewal of the lease. The appellant, by a letter dated 16th March, 2003, [obviously there was some mistake about the date of this letter] told the respondent that he would not renew the lease – “On account of your persistent and very deliberate breach of the terms and conditions of the current lease, you are hereby advised that I shall not accede to a grant of further lease over part of the above premises.” On 26th May, 2003, the appellant visited the premises and told the employees of the respondent to inform the respondent that it must vacate the premises on or before 30th June, 2003. So on 24th June, 2003 the respondent once again returned to the High Court and filed H.C.C.C. No. 634 of 2003, which is the subject of the appeal before us. In that case, the respondent, having recited the various covenants and conditions in the lease and having denied that it was in breach of any covenant or condition, sought a declaration that the option for renewal of the lease was binding upon the appellant and that the respondent was entitled to have the lease renewed for a further ten years. The respondent also asked for an order of specific performance directing the appellant to grant to the respondent a renewal of the lease in accordance with the renewal provision in Clause 6 (3).

This time around, the appellant was represented by Mr. Ochieng’ Oduol, his present advocate and on entering appearance on 2nd July, 2003, the appellant at the same time filed a chamber summons under section 6 of the Act asking for stay of proceedings and referral to arbitration in terms of Clause 6 (2) of the lease. This was the application heard by Mr. Justice Kariuki who, in a considered ruling, dismissed the same on 17th September, 2003. The appellant now appeals to us against that order.

The learned counsel for the appellant Mr. Ochieng’ Oduol argued before us, as he did before the superior court, that the reliefs sought in H.C.C.C. No. 1756 of 2000 were wholly different from those sought in the present suit. In the first suit, the reliefs sought were a declaration that the respondent was not in breach of the terms of the lease, that the distress levied was unlawful, an injunction to restrain re-entry and taking possession of the premises. As at the stage when the first suit was filed the question of renewal of the lease had not arisen as the lease still had some years to run. In the second case what was sought was a declaration as to the binding nature of the renewal clause, and the specific performance of the agreement to renew.

According to Mr. Ochieng’ Oduol, the two cases were accordingly different and the learned Judge of the superior court was wrong in holding that since the High Court had refused to refer the earlier case to arbitration, it would be wrong to refer the present one to arbitration as that would mean that the same issue raised in the two cases would be decided in two different fora. According to Mr. Ochieng’ Oduol, the issues to be considered by the Judge were those contained in paragraphs (a) and (b) of section 6 (1) of the Act and a judge has no jurisdiction to go outside those strict perimeters.

Mr. Nyaoga, learned counsel for the respondent, supported the decision of the superior court. According to Mr. Nyaoga, the earlier suit had been brought on the issue of alleged breaches of the terms of the lease and the respondent was there seeking a declaration that it was not in breach of any of the terms of the lease. What necessitated the first suit was the appellant’s contention that the respondent was in breach and that therefore, the appellant was entitled to forfeit the lease. The question of failure to pay the rent reserved was part of the alleged breaches and was also in issue in the case. In the second case, the respondent sought a renewal of the lease. The appellant resisted that on the ground that the respondent was in breach of the terms of the lease.

So that in both cases, submitted Mr. Nyaoga, the issue of whether the respondent was in breach of the terms of the lease would have to be determined and in paragraph 11 of the plaint in the second suit the respondent specifically pleaded the existence and pendency of the earlier case and that it (respondent) would at the hearing ask the court to consolidate the two suits. Mr. Nyaoga also contended in the superior court, though not so much in this Court, that the question of whether or not there were breaches of the terms of the lease is an issue of law which cannot be determined by a lay arbitrator.

This last contention by Mr. Nyaoga has no basis in law and he did not cite any authority for it. As we have seen, under section 6 (1) (a) and (b) of the Act, the grounds upon which a court can refuse to refer a matter to arbitration are clearly set out, namely that the arbitration agreement is null and void, inoperative

or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. There is no other sub-head that the matter is one requiring the determination of issue or issues of law and therefore, cannot go to arbitration. We reject this contention by Mr. Nyaoga.

Was the learned Judge right in refusing to stay the proceedings before him and referring the matter to arbitration as is mandatorily required under section 6 (1) of the Act?

In the circumstances of this case, we have not the slightest doubt that the learned Judge was right in refusing to refer the matter to arbitration. One central issue is involved in the two cases, namely the issue of whether the respondent had breached the terms of the lease. If the respondent was in breach of the terms of the lease, then the appellant would have been entitled to forfeit the lease and that must be why in his defence and counterclaim in the first suit the appellant was also praying for a declaration that the respondent was in breach of the lease agreement and for an order that the appellant was entitled to take possession of the suit premises. Both parties in that suit were asking the court to determine whether or not the respondent was in breach of the terms of the lease.

Had the appellant been properly advised, the first suit would most likely have been referred to arbitration. But the appellant filed his application for referral to arbitration long after he had lost the right to make such a request and Githinji, J. rightly refused his application, with the consequence that the superior court will still have to determine whether or not the respondent breached the terms of the lease. In the second suit, the respondent is asking for the renewal of the lease and contends that it is entitled to a renewal as it has not breached the terms of the lease. The appellant resisted that claim on the ground that the respondent was in breach of the terms of the lease. If the matter was referred to arbitration, the arbitrator would have to determine whether or not the respondent had breached the terms of the lease . That question, as we have seen, is pending before the High Court in the first case, and it is pending there because the appellant had lost his right to have the same referred to an arbitrator for determination.

There is no reason why one and the same issue should be determined in two different fora. That being so the arbitration agreement is inoperative as to those issues with the result that the superior court is permitted by section 6 (1) (a) of the Arbitration Act to decline to stay the proceedings and refer those issues to arbitration. That was the conclusion of the learned Judge of the superior court. We entirely agree with him and that being our position on the matter, this appeal must fail. We order that the appeal be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Nairobi this 16th day of September, 2005.

R.S.C. OMOLO

JUDGE OF APPEAL

P.N. WAKI

JUDGE OF APPEAL

W.S. DEVERELL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.