



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 160 OF 2012

MAHENDRABHAI MITHABHAI PATEL & ANOTHER.....PLAINTIFF

VERSUS

TRICON INTERNATIONAL LTD & 5 OTHERS.....DEFENDANTS

R U L I N G

- 1). Vide the plaint dated 26-9-2012 the plaintiff prayed for the following Reliefs:
 - 1) **Permanent injunctive orders in terms of paragraph 20 (a) to (f) of the plaint.**
 - 2) **An order in terms of paragraph 21 of the plaint.**
 - 3) **A declaration that the removal of the plaintiffs as Directors and the 2nd plaintiff a Managing Director was unlawful, irregular and unprocedural.**
 - 4) **Orders reinstating the plaintiffs as Directors and also the 2nd plaintiff as Managing Director of the 1st defendant company.**
 - 5) **Orders removing the 3rd, 4th and 5th defendants as signatories to the 1st defendant company's bank accounts and reinstating the 2nd plaintiff as a signatory.**
 - 6) **A declaration that the appointment of the 6th defendant as company secretary was/is unlawful, irregular and unprocedural and ordering him removed as company secretary.**
 - 7) **A declaration that the allocation of shares to the 2nd to 5th defendants as Directors of the 1st defendant company was/ is irregular, unprocedural, unlawful and ordering that they be removed as Directors of the 1st defendant company.**
 - 8) **A declaration that the allocation of shares to the 2nd to 5th defendants was/is unlawful, irregular, unprocedural and ordering that the said allocations be deemed null and void, invalid *ab initio* and the same be reversed.**
 - 9) **General damages.**
 - 10) **Costs of this suit and interest thereon.**

11) Any other relief that this honourable court will deem fit and just to grant.

2). Contemporaneously with the same the plaintiff did file an application dated 12-11-2012 which sought several reliefs against the defendants jointly and severally.

3). The defendants raised a preliminary point of law dated 27-9-2013 citing two grounds, namely, that under clause 31 of the 1st defendant's Articles of Association any dispute between them ought to be referred to arbitration in line with the provisions of section 10 of the Arbitration Act 1995, and secondly that the issues herein relates to the 2nd plaintiff's employment which ought therefore to be determined by the Industrial Court.

4). It is now trite law that if there are any valid preliminary legal points raised in a matter the same ought to be determined as a matter of priority. Having perused the entire pleadings herein I have no doubt in my mind that the parties herein especially the plaintiffs and the defendants all gravitate under the issue relating to the 1st defendant company. Consequently, they are subject to the provisions of the Articles of Association of the Company and of course the other relevant laws.

5). In this preliminary objection I propose to start with the 2nd ground, namely whether this matter relates to employment of the 2nd plaintiff and consequently it ought to be governed by the Employment Act 2007. Having read the rival affidavits and the attachments I do not think this is a ground that can easily be determined by way of a preliminary objection. There are several averments by the plaintiff which goes to suggest that they are still directors of the 1st defendant and that if at all they were removed then it was illegal. I do not think that this ground is significant to permit me allow the objection.

6). However and more importantly is the first ground. As earlier alluded all the parties in this suit are in one way or the other affected by the first defendant. Clause 31 of the Articles of Association state as follows:

“Wherever any differences arise between the company on one hand and any of its members or their assigns on the other hand touching the true intent or constitution or consequences of the Articles or any claim on account of breach relating to the Article or statute, or any affairs of the 1st defendant, those differences shall be referred to the decision of an arbitrator”.

7). The issues of whether the 1st and 2nd plaintiffs were removed procedurally or otherwise in my opinion are those anticipated by clause 31 of the Articles of Association above. Since the parties herein are subservient to the said clause I do not think it is worthwhile for this court to interfere by going against it.

8). I do equally find that the defendants have satisfied clause 6 (1) of the Arbitration Act which states:

“A court 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 appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refers the parties to arbitration unless it finds;

a) that the arbitration agreement is null and void, inoperative or unacceptable 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”.

9). I do find indeed that there is an arbitration clause, namely clause 31, which binds all the parties herein. Section 6 above appears to me that it is worded in mandatory terms. This court has no option but to comply with the same. In the premises I do order stay of this suit and order that this matter be referred to arbitration in line with the Arbitration Act. Costs in the cause.

Dated, signed and delivered at Kisumu this 18th day of February, 2015.

H.K. CHEMITEI

JUDGE



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