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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Appeal 119 of 2005

K-REP BANK LIMITED……..PLAINTIFF

VERSUS

FRANCIS NGIGE NYOIKE…….1ST DEFENDANT

WAIGI PAINTS & HARDWARE LTD……2ND DEFENDANT

BENSON MBUCHU GICHUKI……3RD DEFENDANT

R U L I N G

The application is the one dated 12th January, 2006 brought by the Defendants in which they seek prayers as follows:

2. THAT the interlocutory Judgment in this suit be set aside.

3. THAT the plaint filed on 8th March, 2005 and similarly dated be dismissed forthwith for non-compliance with the Law of Arbitration upon grant of prayer (2) above.

The grounds of the application are seven and are cited on the face of the application as follows:

a) THAT the suit was filed with total disregard requirements and provisions of the law of Arbitration as seeks to challenge an arbitration process.

b) THAT while filing the suit herein, the Plaintiff did not follow the provisions as laid under the Law of Arbitration, hence the incompetence and nullity of the suit herein.

c) THAT the law of Arbitration Explicitly Barred the defendants from filing their defence when applying for a stay and the Plaintiff proceeded to request for interlocutory judgment despite this legal position notwithstanding further that the judgment is not provided for under the Arbitration Act.

d) THAT the judgment obtained by the Plaintiff prevents the Defendants to exercise their

right of being heard.

e) THAT the requirements for Defendants not to file defence as provided under the Arbitration Act does not bar or prevent them from raising points of law as their defence when the suit comes for full hearing, hence the nullity and illegality of the judgment obtained herein which should be set aside forthwith.

f) THAT the issues of arbitration as earlier raised can only be determined after a full hearing and hence no judgment ought to have been entered in the first place.

g) THAT the suit herein is itself a sham and meant to embarrass and delay the fair trial of the dispute as by law provided and its otherwise an abuse of the Court process.

The Applicants have invoked Sub-section 5,7,10,22,24(1) and 26(b) of the Arbitration Act No.5 of 1995 and all enabling provisions of the Law.

There is a supporting affidavit sworn by **FRANCIS NGIGE NYOIKE** dated 12th January, 2007.

The application is opposed. The Respondent filed grounds of opposition in which six grounds are cited as follows:

a) THAT there is no arbitration agreement between it and the Defendants and therefore there is no application of the Arbitration Act to these proceedings.

b) THAT there is no provisions of the law relied upon which the prayers sought can be granted.

c) THAT the issues raised in the application should be raised in opposition to the Plaintiff's application dated 8th March, 2005.

d) THAT the Defendants have taken steps in this suit and the provisions of Section 6 of the Arbitration Act do not now apply.

e) THAT the first and second Defendants have filed previous suits against the Defendant arising from the same transaction giving rise to the present sit both of which are still pending.

f) THAT no basis has been laid for the grant of prayers sought in the subject application.

The Applicants were represented by Mr. Kamau while Mr. Ougo represented the Respondent. I have considered the ably presented submissions by both Counsels, together with the application and cases relied upon.

The Applicant's are seeking the setting aside of the ex-parte interlocutory judgment entered against them and the dismissal of the Plaint filed on 8th March, 2005. The Application is based on the contention that the filing of the suit was in contravention of the Arbitration Act. It is also premised on the provision of Section 6 of the Arbitration Act which the Applicants have invoked to support their contention that the exparte judgment prevented them from being heard.

Having considered submissions by both Counsel, one key issue arises which is, was there an Arbitration Agreement between the parties and if so could the Defendants invoke it"

While Mr. Kamau did not state clearly whether any such Agreement existed, Mr. Ougo was candid in his submissions that no Arbitration Agreement ever existed between the parties. Mr. Ougo submitted further that it was because no such agreement existed that the Respondent moved to court to stay arbitration proceedings commenced unilaterary by the Applicants.

Mr. Kamau on his part appeared to contend that since the parties had submitted themselves to arbitration before the Respondent decided to file this suit and stop the arbitration process proceeding to its conclusion. It was estopped from prosecuting its case or pursuing this suit in Court.

I have perused the Court file to confirm what is pleaded. At paragraph 4 of the supporting affidavit sworn by the 1st Defendant. Paragraph 4 of the said affidavit depones that on 7th April, 2005, the Applicants filed an application seeking stay of the proceedings to enable the parties pursue an out of Court settlement. What the 1st defendant did not state is whether the application was heard and what was the result.

I do note from the record that the application was argued before the Court and a ruling made on 5th December, 2005. In the ruling, the Learned **Azangalala, J** dismissed the Applicant's application for being incompetent. The incompetence is explained in the ruling. At page 10-11 and 13 of the ruling, the learned Judge observed:

"I agree with these observations. Indeed our own Arbitration Act makes it clear that parties to an arbitration agreement must have reached consensus regarding submission to arbitration in respect of all or certain disputes which may arise or have arisen as I have stated above before reference can be made.

In my view even if the Defendants had shown a valid arbitration agreement, they would not be entitled to rely upon the same in view of the fact that the 1st Defendant had instituted HCCC No. 807 of 2003 and HCCC No.661 of 2004 in spite of the said arbitration agreement. In filing the two suit, the 1st Defendant would have been taken to have waived his right to refer the purported dispute to arbitration. In filing the said suits the 1st Defendant recognized the jurisdiction of the High Court over the dispute between him and the Plaintiff. He cannot be allowed to approbate and reprobate.

The Defendants application having been filed after Appearance clearly offends Section 6(1) of the Arbitration Act. The Section is very clear and leaves no room for doubt. The application for stay is to be made not later than the time when appearance was made. In the premises the Defendants application would still have been untenable.

The upshot of the above considerations is that the Defendants application dated 7th April, 2005 is incompetent and must be dismissed"

As can be observed from excepts of the Learned **Judge Azangalala's** ruling, the Court found that the Defendants had waived their right to invoke the provisions of Section 6 of the Arbitration Act irrespective of whether an arbitration agreement existed between the parties. The basis of this finding is given as two fold:

1) that the Defendants did not apply for stay of proceedings simultaneously with the entry of the memorandum of appearance; and,

2) that by reason of fact the Defendants had filed two previous suits against the Plaintiff, they had

waived their right to arbitration and submitted to the jurisdiction of this Court.

Those findings are on record. The Applicants have not filed any Notice of Appeal challenging the decision of the learned Judge. The Defendants are therefore bound by the said findings of the learned Judge and the ruling given therein.

The ruling affects the present application in that the Defendants have proceeded as if no findings had been made in regard to the issue of arbitration and the procedure adopted by them. The position of the matter is that the Applicants were dully served with the summons to enter appearance and the plaint. Indeed the memorandum of appearance was duly filed but no defence was filed. The Interlocutory judgment herein was a regular one and not one that can be set aside *ex-debito justitiae* as Mr. Kamau implied.

The Applicants should have given a reasonable explanation for the default to file a defence. What the Applicants have argued, that the parties had a valid arbitration agreement is untenable. The Applicant's conduct smacks of attempt to delay the matter than a genuine belief that the parties had a genuinely binding arbitration. I am aware that the Court's discretion to set aside a regular Judgment in order to do justice to the parties is unfettered. See **SHAH VS MOGO & ANOTHER [1966] EA 116.**

The Plaintiff/Respondent was not guilty of contravening the Arbitration Act by filing the suit. Even then, if the Defendants wished to invoke the provisions of the said Act, they are now too late to do so. As already found in **Azangalala J's** ruling, the Defendant's application to stay proceedings to refer tge matter to arbitration was incompetent. The Defendant cannot use the same reason, that an arbitration agreement existed between the parties, to have the regular judgment entered herein set aside.

Such argument contradicts the learned **Azangalala's** ruling and cannot be countenanced by this Court.

As far as the instant application is concerned, the same as incompetent as it seeks to set aside an interlocutory judgment and to have the plaint dismissed without invoking the powers of the court to do so. Even though the Court may overlook failure to invoke the relevant provisions of the law relied upon for orders sought inorder to do substantive justice, in light of the other findings affecting this application, the omission is not one that can be condoned.

The upshot of this application is that the application dated 12th January, 2006 is incompetent for failing to invoke the relevant provisions of the law and the jurisdiction of the Court. In addition and more importantly, the interlocutory judgment entered in this case was regular and no grounds have been given to justify the same to be set aside.

By reason of Azangalala Judge's ruling dated 5th December, 2005 the instant application is incompetent and the Applicants, contention that the filing of this suit contravened the Arbitration Act in untenable.

The application is dismissed with costs to the Respondent.

Dated at Nairobi this 18th day of December, 2007.

LESIIT, J

JUDGE

Read, signed and delivered in the presence of:

M/s Karimi for Ougo for the Respondent

In open Court.

WARSAME, J

JUDGE