



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 157 of 2008

BLUE LIMITED.....PLAINTIFF

- VERSUS -

JARIBU CREDIT TRADERS LIMITED.....DEFENDANT

RULING

The plaintiff, Blue Limited entered into an agreement dated 27th August 2007 with the defendant, Jaribu Credit Traders Limited. The said agreement was in respect of the sale by the defendant of its debtors' book of business together with various codes issued by the Government of Kenya, semi-government organizations and private employers through which codes the defendant was entitled to deduct hire purchase installments directly from the remuneration of persons employed by the said organizations. In the said agreement, the defendant was also paid goodwill for the business. The defendant agreed to transfer to the plaintiff all the leases that the defendant had secured with various landlords in respect of its various branches within the country as contained in the schedule annexed to the agreement. The purchase consideration that was agreed to be paid by the plaintiff to the defendant was US\$1,600,000.

There were conditions precedent which were required to be fulfilled before the said agreement took effect. One of the condition precedents was that the defendant was required to obtain written approval from the organizations which had issued it with the codes that entitled it to deduct payment from its to customers to enable the transfer of such codes to the plaintiff. The defendant was further required to secure the transfer of leases in respect of the various premises rented by it to the plaintiff. Under clause 5 of the agreement, the effective completion date of the agreement was on the date the defendant handed over documentation confirming compliance with the conditions precedent. It was upon confirmation of compliance of the conditions precedent, that the purchase consideration would be paid.

However, on the same day (*i.e.* 27th August 2007), an addendum to the agreement was signed. The plaintiff agreed to pay to the defendant the sum of US\$100,000 as a sign of good faith and without waiving any of its rights in accordance with the main agreement. From the pleadings filed in court, it appears that there was part performance of the agreement. Part of the debtors books were handed over to the plaintiff. A sum of US\$1,100,000 has been paid to the directors of the defendant. The defendant disputes that this sum was paid to the designated account specified in the agreement. A disagreement arose between the plaintiff and the defendant regarding whether there had been compliance with the terms of the agreement. According to the plaintiff, the disagreement escalated to an extent that on 20th March 2008, the defendant, by its directors, agents or servants broke into the plaintiff's offices at Ramboo Building and unlawfully removed the files relating to the debtors book.

The plaintiff invoked the arbitration clause in the agreement and referred the dispute to arbitration. The clause in the agreement that refers any dispute arising out of the agreement to arbitration is clause 14. It states as follows:

“14. Governing Law

This Agreement shall be governed by and construed in accordance with the Laws of the Republic of Kenya.

14.2.1. Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be Three.

14.3. The seat, or legal place, of arbitration shall be Johannesburg, South Africa. The language to be used in the arbitral proceedings shall be English. This Agreement has been signed on the date appearing at the head of page 1.”

The arbitration process has already commenced since the Registrar of the LCIA has acknowledged receipt of the complaint lodged by the plaintiff herein vide his letter dated 20th March 2008 addressed to the parties concerned in the said agreement.

By an amended chamber summons dated 28th March 2008 purportedly made under Section 7(1) of the Arbitration Act, 1995 Rule 2 of the Arbitration Rules, 1997 and Section 3A of the Civil Procedure Act, the plaintiff sought interim relief in the nature of an order of this court restraining the defendant by itself, its directors, its servants or its agents from dealing with, disposing of or in any way dealing with the files relating to the debtors book or any of them without the consent of the plaintiff. The plaintiff further sought an order of injunction seeking to restrain the defendant by itself or its agents from interfering with the plaintiff's business operations or property within Nairobi or any part of the country. The plaintiff further sought an order of the court to compel the defendant to deliver to the plaintiff all the files relating to the debtors book which lists the debtors in annexure “JM1A” in the affidavit of Joseph Mwangi sworn on 27th March 2008. In the alternative, the plaintiff sought an order of the court directing the files relating to the debtors book be kept in safe custody and storage pending the hearing and determination of the arbitral proceedings. The grounds in support of the application are stated on the face of the application and in the several supporting affidavits filed by Joseph Mwangi.

The application was strenuously opposed by the defendant. Keval Suresh Kantaria swore several replying affidavits in opposition to the application. The defendant also filed a notice of preliminary objection whose content essentially challenged the propriety of the plaintiff's suit. In summary, the defendant contends that since the agreement, the subject of the suit, was not stamped under the **Stamp Duty Act**, the said agreement was non-existent in law. The defendant further contends that the conditions precedent to the giving effect of the agreement were not fulfilled hence the defendant's insistence that the consideration for the agreement had wholly failed. The defendant further argued that the plaintiff had placed no evidence before the court to confirm that the sum of US\$1,100,000 was paid to the designated account of the defendant as alleged. It was the defendant's case that since time was of the essence, the plaintiff's failure to abide by the timelines specified in the agreement resulted in the agreement being frustrated. The defendant was of the view that this court could not grant an interim relief on the basis of a document which was inadmissible in evidence. The defendant reiterated that there was no valid agreement upon this court could grant interim reliefs pending the hearing of the arbitration proceedings. The defendant argued that this court had jurisdiction to consider the matters in dispute and thereafter render a decision even if it reached a determination that there was an arbitration clause in the agreement liable to be enforced.

At the hearing of the application, the parties to this application agreed by consent to file written submissions in support of their respective positions. I have read the said written submissions and further considered the oral arguments made in court by Mr. Gachuhi for the plaintiff and by Mr. Mwenesi for the

defendant. I have also read the pleadings filed by the parties in support of their respective opposing positions. I have also considered the authorities cited by counsel in support of their respective positions. The issues for determination by this court are twofold; whether there is a valid agreement with an arbitration clause capable of being enforced by this court. Secondly, whether the plaintiff is entitled to the grant of interim reliefs sought pending the hearing and determination of the said arbitral proceedings.

As regards the first issue for determination, it is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. In the present application, the defendant argued that there exists no valid arbitration clause capable of being given effect to by the court, since, in its view, the agreement was inadmissible in evidence as it was not stamped as per the Stamp Duty Act. This court is aware that at this stage of the proceedings, it is not being called upon to determine the merits or otherwise of the plaintiff's suit nor the counter claim filed by the defendant. This court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. This court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court.

In this regard, this court has been guided by two English decisions, namely Harbour Assurance Co. (UK) Ltd vs. Kansa General International Assurance Co. Ltd and others [1993] 3 All ER 897 and Heyman and another vs. Darwins, Ltd [1942] All ER 337 where the Court of Appeal and the House of Lords in England recognized the principle of separability of an arbitration clause in a written contract. In Harbour Assurance vs. Kansa Assurance (supra) Laggatt LJ held at page 907 as follows;

"I am therefore chary of the assumption upon which we have been invited to proceed for the purpose of this appeal that the retrocession agreement was itself illegal by reason of the assured illegality of the underlying re-insurance agreements. But making that assumption, I agree with the judge's conclusion that –

'The separability principle, as applicable to cases of the initial invalidity of the contract, is sound in legal theory. It is also in the public interest that the arbitral process, which is found on party autonomy, should be effective. These are strong policy reasons in favour of holding that an arbitration clause is capable of surviving the initial invalidity of the contract ... As a matter of precedent it is therefore open to make a ruling such as I have indicated. In my judgment, the developments which have taken place, and reasons for it, require me to make such a ruling. I do so (See [1992] 1 Lloyd's Rep.81 at 93)'

I also agree that it would be consistent with his general approach to say that the initial illegality of the contract is capable of being referred to arbitration, provided that it does not impeach the arbitration clause itself; that supervening illegality can be so referred; and that an arbitrator appointed under a contemporaneous document separate from the contract can determine an issue as to initial illegality"

At page 910, he further held that;

"In my judgment this court is not obliged by authority to prevent the arbitrator from determining the issue of initial illegality. The tide is flowing in favour of permitting the arbitrator to do so, and it is no more necessary on grounds of public policy for the courts to retain exclusive control over the determination of the initial legality of agreements than over their subsequent legality. In particular, it would ill become the courts of this country, by setting their face against this jurisdiction, to deprive those engaged in International Commerce of the opportunity of entrusting such disputes to English commercial arbitrators without the need for arbitration clauses containing elaborate self-fulfilling formulae."

That principle recognizes the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party to the agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement.

It is for this reason that this court holds that the issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. This court's concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by Section 6(1)(a) of the Arbitration Act, 1995. Having considered the arguments made, I hold that the said arbitration clause is valid and is capable of being performed. In fact, the defendant acknowledged the fact that the arbitration process has now been put in motion, the plaintiff having already declared the existence of a dispute. This court cannot enter into the proceedings and determine the issues in dispute at this stage. The parties to this suit have agreed for such dispute to be determined by arbitration. It is only the arbitrators who have jurisdiction to determine the matters in dispute between the plaintiff and the defendant.

Having held that there is a valid arbitration clause capable of being enforced, can this court grant the interim reliefs sought by the plaintiff in its application? Section 7(1) of the Arbitration Act, 1995 grants this court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement. As stated earlier in this ruling, the subject of the agreement between the plaintiff and the defendant was a chose in action. The defendant agreed to sell to the plaintiff the debtors books, the various codes held by various employers that enabled the defendant to deduct payments from the remuneration of its customers, the goodwill and the unexpired leases of the premises where it conducted its hire purchase business.

From affidavit evidence before court, it is evident, that in part performance of the agreement the defendant had handed over the said debtors books to the plaintiff. The defendant had even introduced the plaintiff to the some of the employers of its customers. Some of the deduction codes had been transferred to the plaintiff. Although the defendant claims that the sum of US\$1,100,000 was paid to persons other than the defendant, what is clear is that the plaintiff paid the said amount to persons who are the recognized directors of the defendant. As to whether the plaintiff actually paid the defendant the said sum as stipulated in the agreement, is an issue that will be determined during the hearing of the dispute by the arbitration.

As stated earlier, since it appears that the defendant had already handed over the debtors book and the files containing the list of the debtors in part performance of the agreement, and since there is evidence that the defendant repossessed the said debtors books, it is only fair and just that pending the hearing and determination of the dispute between the plaintiff and defendant by arbitration that the plaintiff and the defendant be placed in the position that they were prior to the defendant repossessing the debtors books and the files thereto.

I will therefore grant the interim reliefs sought by the plaintiff in terms of prayers 2, 3 and 4 of its application. The defendant is ordered to deliver to the plaintiff all the files relating to the debtors book as set out in the debtors list annexed to the affidavit of Joseph Mwangi as annexure "JMIA" within fourteen (14) days of today's date pending the hearing and determination of the dispute by arbitration. The defendant by itself or its directors or servants or agents are restrained from dealing with the debtors books or interfering with the plaintiff's business in Nairobi or any part of the country pending the hearing of the dispute by arbitration. The plaintiff shall have the costs of application.

DATED at NAIROBI this 25th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE