



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL APPEAL NO. 3 OF 2016**

**JIMMY MUTUKU MWITHI T/A OASIS FARM.....APPELLANT**

**-VERSUS-**

**ERIC OKONDO OMANGA T/A CIDAI FARM.....RESPONDENT**

**RULING**

The appellant herein filed notice of motion dated 2<sup>nd</sup> February 2016 pursuant to section 6(1) of the Arbitration Act Cap 49 (1) of the Civil Procedure Rules and Section 1A of the Civil Procedure Act Cap 21 of the Laws of Kenya.

He seeks in substance an order to stay all the proceedings at Kajiado Magistrate's Court at Kajiado in Civil Suit No. 1 of 2016 – ERIC OKONDO OMANGA T/A CIDAI FARM Vs. JIMMY MUTUKU MWITHI T/A OASIS FARM.

That further the honourable court be pleased to order the parties to the said case to an arbitration in accordance with Clause No. 13 of the agreement which is attached to plaintiff's list of documents dated 12<sup>th</sup> January, 2016 and in accordance with the Arbitration Act of 1995 Cap 49 of the Laws of Kenya.

In support of the application are grounds on the face of the notice of motion which constitute and crafted as follows:

- a. **That the appellant is aggrieved by the orders made by the Principal Magistrate Court on 26/1/2016.**
- b. **That the application dated 18<sup>th</sup> January, 2016 and 26<sup>th</sup> January 2016 shall be heard simultaneously on 9/2/2016, parties are to file response to the said application.**
- c. **That the respondent may file a response in respect to the contempt application but it shall not be marked as a waiver of their right challenging this court's jurisdiction.**
- d. **That status quo be maintained.**
- e. **That the appellant has challenged the jurisdiction of the honourable court in the application dated 18/1/2016 seeking to have the matter referred to arbitration in accordance with Clause No. 13 of the Parties Agreement which is filed as the Plaintiff's documents dated 12<sup>th</sup> January 2016 and in accordance with the Arbitration Act 1995 Cap 49 of the Laws of**

## **Kenya.**

### **BACKGROUND**

The gist of the claim is based on contract entered between the plaintiff and respondent on 2/9/2013. In the course of implementing the contract a dispute arose on or before 11/1/2016.

The plaintiff filed suit in court on 12/1/2016 against the defendant seeking a permanent injunction and an order on specific performance. Together with the plaint a notice of motion under certificate of urgency to be granted *ex parte* temporary order of injunction to preserve the suit property.

The trial court under certificate of urgency on 12/1/2016 issued interim orders on stay which were served upon the respondent/defendant. The defendant on being served filed a notice of motion dated 18/1/2016 pursuant to section 6(1) of the Arbitration Act and Order 50 Rule (1) of the Civil Procedure Rules.

The notice of motion sought substantial order of stay of proceedings and reference of the dispute to Arbitration in compliance with the agreement dated 2/9/2013. Before the two applications could be decided on merit plaintiff filed yet another notice of motion dated 26/1/2016 seeking an order for the defendant to be cited for contempt of court. The alleged contempt of court was in breach of an order issued on 12/1/2016 and served upon the defendant.

Being dissatisfied in the matter and conduct of proceedings the defendant filed an appeal for review of these orders of the trial court dated 26/1/2016. The appeal/motion was argued before me by way of oral submissions and further supplementary written submissions to buttress the law on the matter.

### **SUBMISSIONS BY THE APPELLANT**

Mr. Mwangela counsel for the appellant argued and submitted that the appellant and respondent entered into a valid contract agreement.

He further stated that the agreement signed on 2/9/2013 which the respondent attached to the pleadings regulated the relationship between the parties.

In his submissions counsel further submitted that besides other terms in the agreement, dispute resolution mechanism was well spelt out.

The appellant in essence faulted the learned trial magistrate for not giving effect to Clause 13 of the agreement and order the dispute arising thereto be referred to alternative dispute resolution.

The appellant in the said submissions questioned the procedure adopted by the plaintiff in resorting to file suit in court without exhausting the provisions of Clause 13 on law and dispute resolution in the agreement.

Further Mr. Mwangela contends that the *ex parte* interim orders granted by the trial court were issued without jurisdiction. Mr. Mwangela maintains that in view that the parties had acknowledged existence of a valid agreement which provided for in the manner disputes arising were to be resolved. That forum according to counsel for the appellant was binding between the parties to the agreement.

Mr. Mwangela further submitted that the trial magistrate orders to preserve status quo by way of temporary injunction was in contravention of Section 7 of the Arbitration Act.

Mr. Mwangela further submitted that the court ought to have taken into account that jurisdiction to issue conservatory orders in arbitral process and procedure is vested in the High Court.

Mr. Mwangela was emphatic that though the subject matter of the case is within court's jurisdiction, there was a feature in Clause 13 of the agreement which prevented the court to exercise that jurisdiction.

In essence counsel maintained that the orders issued on stay were issued without jurisdiction.

The learned counsel further added that once the trial magistrate lacked jurisdiction to issue order under Section 7 of the Arbitration Act those orders cannot be used against the defendant.

Counsel further submitted that on the strength of the above case the court needed to appreciate the language and provisions of Section 6(1) of the Arbitration Act.

Counsel urged this court to apply the principles on provisions of Section 6(1) of Arbitration Act as illustrated in the case of **UAP PROVINCIAL INSURANCE COMPANY LTD VS. MICHAEL JOHN BECHETT 2013 ECLR.**

The court stated thus:

***“It is clear from this provisions that the enquiry that the court undertakes and is required to undertake under Section 6(1) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such a dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute.”***

Counsel in buttressing his argument for an order of stay of proceedings referred to the case of **NYUTU AGROVET LTD VS. AIRTEL NETWORKS LTD 2015 ECLR**; where the court had to consider the principle of freedom of contract and sustain the arbitration principle by strictly limiting courts intervention in arbitration matters. This is to empower parties to arbitral agreements to map their own path in resolving disputes in accordance with the agreement. He urged the court to find that the respondent should not have invoked the jurisdiction of the court in contravention of the arbitral agreement. The mechanism on law and dispute resolution provided for under Clause 13 had not been exhausted by the parties to warrant the plaintiff to file suit against the defendant.

In this regard counsel submitted and cited the case of **MIDLAND FINANCE & SECURITIES GLOBETEL INC VS. ATTORNEY GENERAL & ANOTHER [2008] ECLR.** In urging caution as to how courts should approach arbitral matters the court held:

***“As I have held before, our constitution does assume the existence of other laws.”***

In this respect Section 10 of the Arbitration Act states:

***“Except as provided in the Act, no court shall intervene in matters governed by this Act.”***

With that background he urged this court to set aside the order by the trial court and give effect to the intention of the parties. The intention of the parties according to counsel is as provided for under the agreement Clause 13 on Law and Dispute Resolution.

### **THE RESPONDENT’S SUBMISSIONS**

Mr. Waithaka counsel for the respondent submitted that the appeal before court was vexnous, bad in law and an abuse of the court process. He relied on the grounds of opposition to the application for stay of proceedings. He further submitted that there is no dispute that an agreement between plaintiff and defendant was executed.

Counsel submitted that the agreement provides under Clause 13 dispute resolution forums and jurisdiction on injunctive orders. Counsel urged the court to make a determination that the applicant is not deserving of the orders. He further submitted that sole intention is to delay the application against defendant for flouting court orders. It was his contention that the order sought lacks merit and should be dismissed with

costs.

## **ANALYSIS AND RESOLUTION**

I have carefully considered the application of stay of proceedings and order sought by the appellant. The rival submissions by both counsels together with authorities referred to and legal principals in support of the application.

In light of the submissions the main issues to be resolved by this court at this interlocutory stage can be stated as follows:

- a. **Whether the parties had entered into an agreement containing an arbitral clause.**
- b. **Whether a dispute has arisen between the parties.**
- c. **Whether the interim orders of injunction issued by the lower court were issued without jurisdiction.**
- d. **Whether this court can exercise its discretion to stay proceedings and order for arbitration.**
- e. **Whether appellant is entitled to orders sought.**

The general rule is that the burden of proof lies on the party who asserts the affirmative of the question or issue in dispute.

From the pleadings, and affidavit evidence by both parties they are in agreement that their terms of engagement were reduced into writing on 2/9/2013. The agreement annexed to the plaint established an existence of a contractual relationship between the plaintiff and defendant.

A perusal of the agreement by this court shows parties agreed on various terms and rules. It contained interalia financial obligations, intellectual property rights, confidentiality, indemnity clause, agency clause, partnership clause, termination procedure, law and dispute resolution mechanism etc.

The jurisdiction clause on law and dispute resolution particularized as Clause 13 (1-6) vested forum on alternative dispute mechanism process.

The contentions clause in these proceedings provided as follows:

**“This memorandum will form the basis for negotiation of the definitive agreement referred to.....**

### **Clause 13 (3)**

**The parties shall use their efforts to amicably settle any dispute, controversy, or claim arising out of or in connection with this memorandum of understanding (including any question regarding its interpretation, existence, validity or termination)..... within thirty (30) days after receipt by one party of any other party’s request for such amicable settlement.....in absence of settling the matter amicably.....**

**The parties shall refer the dispute to a mediator agreed upon between them and if within (30) days of one party requesting mediation the parties do not agree on a mediator or fail to settle the dispute through mediation, it may be referred by any party to and finally resolved by arbitration under the provisions of the Arbitration Act 1995.”**

According to the agreement the arbitral proceedings shall be adjudicated by a single arbitrator to be

agreed upon by both parties within 30 days.

It further provided that in absence of reaching a consensus on the arbitrator either party can apply to the Chairman of the Chartered Institute of Arbitrators of Kenya to appoint one.

Having analysed Clause 13 of the agreement it is clear that the process and procedure on alternative dispute mechanism was agreed by both parties. The clause contained various forums of dispute resolution and time limits to resolve disputes.

The clause staggered dispute resolution mechanisms into phrases:

- a. **First the parties preferred a self-help amicable settlement to bind them.**
- b. **Second was mediation through a neutral mediator agreed by the parties should amicable settlement fail.**
- c. **Third and final process was arbitration in default of mediation.**

There is no disposition in the affidavits by appellant and respondent whether any attempts was made by either party to resolve dispute arising under any of the mechanisms stated herein.

The parties had an obligation to breathe life into the dispute resolution clause in the agreement. However from the record and pleadings there is no such evidence that attempts were made to invoke provisions of Clause 13 (1-6).

There is evidence from the pleadings and plaint filed in court on 12/1/2016 that a dispute has arisen from the terms of the agreement. All disputes and claims emanating from or in connection with the agreement were to be a subject to law and dispute resolution under Clause 13.

**The question therefore to consider at this stage is whether this court should enforce the arbitration clause; and refer the matter to arbitration.**

The procedure and authority is provided for under Section 6 of the Arbitration Act. It provides as follows:

**“6 (1) A court before which proceedings are brought in a matter which is a 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 proceedings is sought, stay the proceedings and refer to arbitration unless it finds:**

- b. **That the arbitration agreement is null, 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.”**

The arbitration agreement is defined under Section 2 as:

**“An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a signed relationship, whether contractual or not.”**

The affidavit on support sworn by the parties shows that disputes have arisen in the course of performance of the contract.

There is no consensus between the parties and there is no doubt that plaintiff has invoked the court's jurisdiction already. I venture to conclude that not enough attention has been directed to the function and provisions of the arbitration clause. The clause embodies the parties to an agreement in the event a

dispute arises and obligations to be undertaken to resolve the same.

Though the plaintiff filed a complaint against the defendant, the record shows that the defendant has seized the first opportunity to apply for a stay of proceedings before filing a defence or any proceedings.

In my view, the right to refer the matter by this court as required by law to arbitration has not been extinguished. The proposition was considered in the Court of Appeal decision dealing with the proposition of Section 6 in **KISUMUWALLA OIL INDUSTRIES LTD Vs. PAN ASIATIC COMMODITIES PVE LTD & ANOTHER CA No. 100 of 1995**.

The court held inter alia:

**“In view of the reasons I have endeavoured to state above, and in light of the clear provisions of Section 6 of the Arbitration Act, unless the defendant waives his right to rely in such a clause he would be obliged to apply for a stay of proceedings.”**

The appellant has not waived his right under the arbitration clause by taking any steps to file a defence or pleadings to the claim by the plaintiff. The plaintiff's plea and statement filed on 26/1/2016 invoked the magistrate's court jurisdiction to hear and determine the dispute.

The defendant/appellant by application before this court has challenged the procedures taken by the plaintiff. In reading and perusal of the agreement annexed to the plea, a contract between the parties does exist. The terms that regulated their relationship are in the agreement.

The forum for settlement of disputes arising from the contract is provided for in Clause 13. The facts as deposed in the affidavits and statement of claim by the plaintiff have limited the court's intervention due to the existence of an arbitration clause.

The provisions of Section 10 of the Arbitration Act give credence to this legal position on courts' limited jurisdiction on arbitral matters.

Under Section 10 of the Act it states as follows:

**“Except as provided in this Act, no court shall interfere, in matters governed by this Act.”**

The feature of an arbitration clause in the contract prevents the courts from exercising jurisdiction. The subject matter of the case is within the jurisdiction of the court but the arbitration clause limits court intervention.

Under Clause 13(6) of the agreement, the parties had consented to the grant of interim conservatory orders:

Clause 13(6) states:

**“Notwithstanding the foregoing, a party is entitled to seek a preliminary injunctive relief or conservatory measures from a court of competent jurisdiction pending the final award.”**

In the case before me, there is evidence that the plaintiff applied for interim injunctive orders from the court on 12/1/2016. The orders were granted *ex parte* to preserve and protect the subject matter.

My interpretation of this action by the plaintiff was a step he took to give effect to Clause 13(6) of the agreement. The agreement in question was valid and enforceable. The proper forum for either party to seek an interim measure of protection was the High Court.

Under Section 7(1) of the Arbitration Act, Cap 49 of the Laws of Kenya, it stipulates as follows:

**“The interim measure of protection shall be applied for and granted by the High Court. It is**

**not incompatible with an arbitration agreement for a party to request from the High Court before or after doing arbitral proceedings, an interim measure of protection and for the High Court to grant the measure.”**

The decision of the court of appeal in the case of **SEVEN TWENTY INVESTMENTS LTD Vs. SANDHOE INVESTMENTS KENYA LTD [2013] eKLR** is illustrative of this position.

The court held as follows:

**“Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there was a dispute or whether there would be losses by either side would not be a factor for a court when deciding whether or not it should grant the said interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral process.”**

From the law and legal principles and authorities cited it is clear that the trial magistrate did not have jurisdiction to grant injunctive or interim measure of protection. The proceedings and subsequent orders as to the interim measure of protection under Arbitration Act was therefore a nullity for want of jurisdiction.

In this respect the absence of jurisdiction by the trial court to grant injunctive orders under Section 7(1) of the Arbitration Act goes to the root of the contempt proceedings commenced by the plaintiff. It would be difficult to sustain the application and orders issued where clearly the law ousted jurisdiction of a court or tribunal.

The interim restraint orders which had been issued in this matter in favour of the respondent were improperly obtained. The respondent though attached the arbitral agreement did not disclose that legal point which squarely placed the proceedings under Arbitration Act. The appellant has met the test and specific provision of section 6(1) of the Arbitration Act expressed in mandatory terms.

I have further considered the material placed before and rival arguments by both counsels to the plaintiff and defendant. This court finds that there exist an arbitral clause governing the disputes resolution of a contract between them.

The clause has not been made in operative or void or nullified in enforcing the right of the parties. There is a prima facie evidence that a dispute has arisen capable of being referred to arbitration under Clause 13 of the agreement.

In order not to render the arbitral proceedings nugatory I am satisfied that there is sufficient cause to grant interim measure of protection under Section 7(1) of the Arbitration Act.

## **DECISION**

The totality of my consideration of the matter applying the law to the facts is that there is sufficient cause to exercise discretion and allow the notice of motion dated 2/2/2016. In exercising discretion the following orders are hereby granted:

- a. **That the notice of motion dated 2/2/2016 be and is hereby allowed.**
- b. **For the avoidance of doubt, the proceedings in SPMCC No. 1/2016 are hereby stayed.**
- c. **That this court grants interim orders of protection under Section 7(1) of the Arbitration Act to preserve the subject matter from being wasted.**

- d. **That the dispute be and is hereby referred to arbitration.**
- e. **That the arbitrator be appointed as stipulated under Clause 13 of the aforesaid agreement.**
- f. **The Deputy Registrar to provide administrative support by writing to the Chairman of the Chartered Institute of Arbitrators Kenya Chapter to be served with an order to give effect to Clause 13(6) of the agreement.**
- g. **The file be remitted back to the trial court for administrative management in any event.**
- h. **The costs of this application shall abide the outcome of the arbitral proceedings.**

It is so ordered.

*Dated, delivered at Kajiado on 26/2/2016.*

R. NYAKUNDI

JUDGE

**Representation**

Mr. Sekento for Mr. Waithaka for the Respondent present

Mr. Mwongela on record for appellant present

Mr. Mateli Court Assistant present