THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO. 628 OF 2018

NATHANAEL GHEBREMICHAL TSEGAY

WELDESILASSIE TEKLEAB HAGOS :: PLAINTIFFS

VERSUS

BIBANGAMBA PETER :: DEFENDANT

BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

RULING ON A PRELIMINARY OBJECTION:

1. Background:

Mr. John Mary Mugisha, Senior Counsel assisted by Mr. Richard Kipaale and counsel appeared before me as counsels for the Defendant while Mr. Medard Ssegona variously represented by counsels on his brief represented the Plaintiff.

On 24th September, 2020, this matter came up for mention and directions. Before court could give directions, Mr. John Mary Mugisha, sought and successfully was granted an opportunity to raise preliminary points of law which he opined could resolve the instant dispute.

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The side of the Plaintiff represented by Mr. Ssekanjako Abubaker who was on brief of Mr. Medard Ssegona, counsel with personal conduct of this matter had no objection to the raising of the same.

Mr. John Mary Mugisha thus was allowed to proceed with his arguments of which he raised orally points of law for consideration by this court including the request that the instant suit be dismissed for being riddled with several irregularities which included the fact this suit was premised on a tenancy agreement within which was an arbitration clause which required that parties first pursue arbitration Additionally counsel for the Defendant submitted that the Defendant was never served with the plaint and was not aware as to proceedings was against it such that if this was so then the suit would automatically abate.

The other point of law was that since the suit was grounded on a tenancy agreement which was being relied upon by the Plaintiff it was the requirement of the law that such a document has on its face that stamp duty had been paid.

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Lastly counsel raise d a point of law that the Plaintiffs were foreigners who were required by law to deposit security for costs before they can suit institute.

In arguing these preliminary objection, counsels for the Defendant relied on the case of ***Makula International Ltd Vs His Eminence Cardinal Nsubuga & Anor (Civil Appeal No. 4 of 1981) [1982] UGSC 2*** where it was held that an illegality once brought to the attention of the court overrides all questions of pleading, including any admission made thereon.

In the alternative, Counsels submitted that even if court was to find the other issues not relevant then the Plaintiff should be directed to properly serve the Defendant who should then be allowed time to file his defence since he had not previously been served.

In response counsel for the Plaintiff, Mr. Ssekanjako Abubaker, holding brief for Mr. Medard Ssegona, submitted that indeed a tenancy agreement existed between the parties before court with a clause relating arbitration but informed court that the said process had failed hence the reason why the Plaintiff opted to file this suit.

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Additionally, Mr. Ssekanjako Abubaker asked court not condemn the Plaintiffs to deposit security for costs merely for the reason that they are foreigners as that would be discriminatory.

On the issue of the document being relied on not having stamp duty paid, counsel for the Plaintiffs argued that the objection was premature and should be overruled for such issue could be determined during a full trial.

In rejoinder, counsel for the Applicant alerted court that that the requirement for stamp duty was mandatory per section 42 of the Stamps Act which situation was confirmed in the case of ***Proline Soccer Academy vs Mulindwa and Others HCMA 459 OF 2009*** where it was held that a cause of action founded on a document which had no stamp could not stand in a court of law.

Additionally, Counsel for the Defendant contended that the case relied on by the Plaintiffs is distinguishable in that a party seeking to file a case which had arbitration cause and where stamp duty was not paid must first seek prior leave of court subject to the law.

In relation to the affidavit of service, Counsel for the Plaintiff cited the case of ***Kensington Africa Limited vs Pankajkumar Hemraj Shah***

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and Another HCMA No. 687 of 2012 where it was held that for proper service to be recognised by a court of law, the person who served process server must attest to in an affidavit of service the fact that the person who accepted service was personally known to him and if not, such attestor must state the names and address of the person who identified and witnessed the one onto whom service was made.

On the issue of arbitration, counsel for the Defendant argued that no evidence had been adduced to show that parties submitted themselves to mandatory arbitration as was required under the tenancy agreement between the two parties that since this was not done in in congruence with several decided cases then this suit should abate with the suit dismissed instantly with costs to the Defendant.

Decision:

I have taken into account the submissions of both parties on the preliminary objection and well as the authorities cited therein.

I will deal first with the issue of arbitration. The perusal of the pleadings in respect of this matter show that attached to the plaint

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was a copy of Tenancy Agreement whose provisions among others provided for parties to subject themselves first to arbitration before trying their dispute in a court of law.

I have had a look at the said document and the clause is indeed Clause 9 (d) which I observe have the following provisions;

Clause 9 (d) of the tenancy Agreement:

" If any dispute or question whatsoever shall arise between the parties, hereto with respect to the construction or effect of this tenancy or any clause or thing therein contained or the rights or duties or liabilities of either party under this tenancy or otherwise in connection with the property the matter in difference shall be determined by a single arbitrator to be agreed on by the parties, or in the absence of such agreement, the dispute shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act and any amendment thereto shall be in force at material time before the parties can proceed to court for settlement."

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The above provision of the law was noted in the holding in **Power and City Contractors Ltd vs LTL Project (PVT) Ltd MA No. 62 of 2011** that by incorporating an arbitration clause in a contract, parties recognize arbitration process as an effective means of solving any a dispute that could arise as a result of implementing the contract between themselves.

Relating the above to the instant matter two letters dated 24th April 2018 and dated 21st May 2018 attached to the plaint shows that the Plaintiff was alive to the requirement of the law and the clause requiring the appointment of an arbitrator for both letters suggest doing so even if there was an apparent response by the Defendant to the same which, though could indicate delay or inaction but this silence cannot be assumed to amount to an intention abandon this clear requirement of the tenancy agreement signed by both parties.

This action would mean that an arbitration is still a requirement for even in the case of ***The Bremer Vulcan [1981] 1 Lloyd's Rep 253 and The Hannah Blumenthal [1983] 1 Lloyd's Rep 103*** it was held that where there is no agreement to abandon arbitration the court cannot bring an end to arbitration.

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If that is so then this court would be bound by the finding in ***Power and City Contractors Ltd vs LTL Project (supra)*** that an arbitration clause signed by parties was binding on the parties as a first obligation, then on this point alone this would preliminary objection would be relevant with this court not able to interfere with the clause of the contract unless it has been shown that the said clause was based on an illegality which is not in the instant matter.

I would find no reason to ignore this clear contractual obligation of the parties herein and on this point alone I would uphold the preliminary objection.

However, I note that other pertinent legal points were raised in this preliminary objection with the issue of service of process featuring highly.

In regard to service of process reference is had to the provisions of Order 5 rule 16 of the Civil Procedure Rules which relates to what form and content an affidavit of service should entail.

I reproduce Order 5 rule 16 of the Civil Procedure Rules herein below:

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Order 5 rule 16 of the Civil Procedure Rules:

> ***"The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons. (Underlining added for emphasis)"***

The above position of rule was interpreted by Hellen Obura (J as she then was) in ***Kensington Africa Limited vs Pankajkumar Hemraj Shah and Another (supra)*** that whenever a person purport to effect service on another such a person must indicate in an affidavit of service that the person who accepted service was personally known to the person who served process and if this was not the case then the same affidavit should indicate the name and address of the person who identified the one on whom service was made which would thus indicate good service.

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In the instant matter Counsel for the Defendant argues that this position was not the case indicating that indeed the Defendant was never served with the plaint while on the other hand counsel for the Plaintiffs argues that actually service was effected on the Defendant as shown by affidavit of service dated 21st September 2020 which stipulates the manner in which the Defendant was served. I note, however, from paragraph 3 of the affidavit of service of a one Benon Kirigoola who deposes that he served that he served the Defendant's manager called Daniel at Holiday Express Hotel on Luwum Street in Kampala. However, the said Kirigoola does not aver to the fact of prior knowledge of the person served nor does he indicate the full names and address of the person on whom he served copy of the hearing notice merely indicating that the Defendant was served but refused to acknowledge receipt.

This affidavit falls short of the strict requirement of Order 5 rule 16of the Civil Procedure Rules which requires that a deponent ought to state in an affidavit as a matter of course that the person who accepted service was either personally known to the person who

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served process or the name and address of the person who identified the one on whom service was made.

The fact that the affidavit of Mr. Kirigoola does not in certain terms state 'so makes fail to meet the requirements of the Order 5 rule 16, which is an indication that the Plaintiff that the Defendant was not served thus making the holding buy Obura J above to apply making me to invariably find in the negative on this point.

The other point for consideration relates to the tenancy agreement which is a document intended to be relied upon as evidence by the Plaintiff for bringing the instant suit against the Defendant. In relations to this document, Counsel for the Defendant points out that for such a document to be admitted in evidence it must indicate that statutory stamp duty was paid in line with the provision of section 42 of the Stamps Act. On the other hand, Counsel for the Plaintiffs admits the fact of attaching the tenancy agreement to the plaint but argues that it was yet to be admitted into evidence as it was merely attached to pleadings before a trial which fact makes the assertion of the Counsel to be invalid.

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With due respect I would reject this line of argument for indeed the said tenancy agreement has been attached to the pleadings and is record and forms part of those documents which the Plaintiff averred they were to rely upon in the suit annexing it to a plaint. Even though trial inform of a hearing is yet to begin, the mere fact the said document was attached to pleadings indicates the reliance by the Plaintiffs in support of their case as against the Defendant and as such a document must prior to attachment to pleadings comply with the provisions of section 42 of the Stamps Act for were this court to severe from the pleadings then there would be no cause of action by the Plaintiff as against the Defendant and thus would leave the case of the Plaintiff naked and thus invalid taking into account the holding in ***Proline Soccer Academy Ltd vs Lawrence Mulindwa*** (supra).

I would find that that a chargeable document which is intended to be relied upon in a case and is attached to pleadings must comply with the provisions of section 42 of the Stamps Act which means that it should indicate that duty has been paid for without doing so then that document is severable from pleadings and would leave, as in the instant matter a bear pleading with no cause of action to point to.

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Invariably the fact that the tenancy agreement is a document which is chargeable and has been attached to the plaint to be relied by the plaintiffs as the basis of their cause of action against the Defendant means that it must indicate that duty has been paid but since the attached document does not bear any indication such indication then the Defendant's submission is valid and so I would answer this issue in the positive.

Arising from the conclusions I have made in relations to the preliminary points of law raised by the Defendant which I have answered all in the positive, I would agree with the Defendant this suit is premature before this court for those very reasons raised in the preliminary objection and I would invariably be constrained to find so with directions to parties to first handle their grievances via an arbitration process as provided for in Clause 9 (d) of the Tenancy Agreement of the tenancy Agreement between the two parties which is a contractual obligation before such a suit can be brought to this court. This suit is thus premature for all the reasons given above and is thus dismissed accordingly as flouting procedure.

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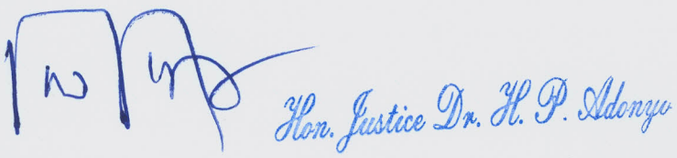
Orders:

Arising from the above I would make the following orders;

i. The preliminary objection raised by the Defendant is allowed with the consequence that this suit would invariably be dismissed with cost to the Defendant.

ii. Consequently, the dispute between the parties herein is referred for arbitration in accordance with Clause 9 (d) of the Tenancy Agreement of the Tenancy Agreement between the two parties herein.

I so order.



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Judge

20th October 2020