



REPUBLIC OF KENYA



**ATC Kenya Operations Limited v Telkom Kenya Limited (Civil Case E096 of 2022)
[2023] KEHC 26183 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E096 OF 2022
JWW MONG'ARE, J
NOVEMBER 30, 2023**

BETWEEN

ATC KENYA OPERATIONS LIMITED PLAINTIFF

AND

TELKOM KENYA LIMITED DEFENDANT

RULING

1. On 27th April 2022, the Defendant filed a Chamber Summons under Section 6 of the *Arbitration Act*, Rule 2 of the *Arbitration Rules, 1997*, seeking the following orders: -
 1. That this Honourable Court be pleased to stay further proceedings in this matter pending arbitration.
 2. That the suit be referred to an Expert and Arbitrator by the London Court of International Arbitration ("LCIA") accordance with the terms of the Master Site Licence Agreement dated 1st October 2018 between the Plaintiff and the Defendant, the Master Tower Agreement dated 12th August 2014, Site Sharing Agreement dated 25th November 2009 ("the Tower Agreements").
 3. That costs of this Application be provided for.
2. The application is supported by the grounds on its face and the supporting affidavit sworn by Esther Kihihia on 27th April 2022. Through the Master Site Licence Agreement dated 1st October 2018, the Master Tower Agreement dated 12th August 2014 and Site Sharing Agreement dated 25th November 2009 ("the Tower Agreements"), the Plaintiff and its predecessors in title provided the Defendant with telecommunication infrastructure services for a fee. The Plaintiff was obligated to provide



licensed spaces for installation, maintenance and operation of the Defendant's towers, apparatus and communication equipment as well as operation and maintenance services.

3. Through the Master Site Licence Agreement, the Defendant transferred several sites to the Plaintiff and licensed a portion of each of the sites back to from the Plaintiff at a fee. By a Plaint dated 24th March 2022, the Plaintiff filed this suit against the Defendant for specific damages of USD2,643,176.35 and Kshs.611,074,576.89/- for unpaid invoices due for licensing fees running from 2021.
4. According to the Defendant, the Plaintiff's claims have no basis and are highly disputed as it incurred huge losses due to the Plaintiff's failure to carry out restoration works following outages, disconnecting and allowing obstruction of its apparatus in breach of the Tower Agreements. It also contends that the money claimed by the Plaintiff is with respect to invoices have been either been already offset or settled and/or invoices not shared with it. It further contends that it has been paying the sum of Kshs.150 million per month which the Plaintiff has not pleaded nor acknowledged.
5. For these reasons, the Defendant asserts that the dispute ought to be referred to arbitration pursuant to clauses 11.5 as read together with Clauses 21, and 22.12 of the Master Site Licence Agreement, Clause 20.3 of the Master Tower Agreement and Clause 19.1 of the Site Sharing Agreement.
6. In response, the Plaintiff filed a preliminary objection (PO) dated 23rd May 2022 grounds that the instant application is fatally defective and ought to be struck out because it was filed on 11th May 2022, 16 days after entering an unconditional appearance on 30th March 2022, contrary to section 6 of the Arbitration act. The Plaintiff also filed a Grounds of Opposition dated 18th June 2023, on the grounds that there is no dispute to be referred to arbitration as the Defendant has admitted the debt due to it and has failed to comply with the contractual mechanism for challenging the debt.
7. Both the application and the PO were canvassed by way of written submissions. The Defendants filed written submissions dated 21st August 2023 while the Plaintiff filed written submissions dated 20th September 2023.

Analysis And Determination

8. I have considered the pleadings filed by the parties in this matter and their written submissions. The issue for determination is whether the Defendant has made out a case for stay of these proceedings and referral of the dispute to arbitration.
9. Section 6 of the Arbitration Act provides that:-

“6. Stay of legal proceedings

- (1) A court before 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 refer the parties to arbitration unless it finds—
 - (a) that the arbitration agreement is null and void, 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.



- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
- (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

10. The principles for consideration in such an application were succinctly captured the oft-cited decision in *Niazsons (K) Ltd v China Road Bridge* [2001] KLR, as follows:-

“All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:

- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section:
- (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
- (c) Whether the suit intended concerned a matter agreed to be referred to arbitration”

11. As to the first condition to be satisfied, according to the Plaintiff, the instant application is fatally defective and ought to be struck out as the Defendant only filed its application to refer the dispute to arbitration on 11th May 2022, 16 days after entering an unconditional appearance on 21st April 2022.

12. It is manifest from the record that indeed the present application was filed 16 days after entry of appearance. Following the 2009 amendment to the *Arbitration act*, Section 6 (1) of the *Act* requires that a party files an application for stay of proceedings not later than the time when that party enters appearance. In Eunice Soko *Mlagui v Suresh Parmar & 4 others* (Civil Appeal No. 276 OF 2014) [2017] eKLR, the Court of Appeal while interpreting the 2009 amendment to Section 6 of the *Act* vis a vis the previous provision, confirmed that: - “After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question.

13. In *SBI International Holdings (Kenya) v Kenya National Highway Authority* (Case No. E075 of 2020) [2020] eKLR, the Court, faced with circumstances similar to the present case, stated as follows:-

“13. While the Defendant did not apply for stay at the time of filing the Memorandum of Appearance, it cannot be said that it acknowledged the Plaintiff’s claim say by filing the statement of defence. This the position taken by the Court of Appeal in Eunice Soko Mlagui v Suresh Parmar and 4 Others (Supra) where the court contrasted the law prior to 2009 when the *Arbitration Act* was amended to the current position. After setting out the provisions of section 6 of the *Arbitration Act*, the court observed as follows:

Prior to the 2009 amendment, the pertinent part of section 6(1) provided that:

“A court before 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 files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration...”

The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. [Emphasis mine]” (Emphasis added)

14. Guided by the above decisions, I find that the Defendant was entitled to file the application to stay proceedings before taking any further steps acknowledging the Plaintiff’s claim. Since the Defendant had not filed any defence or taken any steps which would construed as acknowledging the Plaintiff’s claim, the application for stay and reference to arbitration is properly before the court. The Preliminary Objection lacks merit and is dismissed with costs.
15. As regards the second and third conditions, the Defendant relied on Clauses 21, and 22.12 of the Master Site Licence Agreement, Clause 20.3 of the Master Tower Agreement, and Clause 19.1 of the Site Sharing Agreement for the submission that there are valid and binding arbitration agreements between the parties and that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration. It placed reliance on *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] eKLR.
16. On its part, the Plaintiff submitted that there is no dispute between the parties to be referred to arbitration because its claim is for a specific and liquidated claim which is readily ascertainable from the pleadings and that the Defendant’s application is only meant delay payment of the indisputable debt. The Plaintiff faulted the Defendant for not referring any dispute to arbitration in accordance with the contracts, before this suit was filed. The Plaintiff elaborated that pursuant to clauses Clauses 11.1.1, 11.1.2, 11.5 and 11.5 (d) of the Master Site Agreement and Clause 6.4 of the Master Tower Agreement, the Defendant was required to either pay all invoices or notify it of the disputed portion of the invoice with detailed reasons within 30 days of receipt. The Plaintiff thus asserted that a dispute regarding invoices could only be referred to an Expert under Clause 21 if the parties failed to reach agreement on the disputed amounts within 30 days.
17. The Plaintiff also argued that the debt has been admitted by the Defendant in the past. Through an email dated 19th November 2021, the Defendant’s CEO, Mr. Mugo Kibati admitted the indebtedness and offered to pay of Kshs. 2.7 Billion over a period of 18 months at Kshs. 150 Million per month. Again, through a letter dated 7th March 2022, Mr. Kibati did not dispute the debt but acceded that the parties were in discussions over the settlement of amounts owed. The Plaintiff relied on Mustill & Boyd Commercial Arbitration (1st ed, Butterworths, London, 2001) at 96 to argue that since the Defendant agreed that money was due, there is no dispute to be referred to arbitration, rather the suit should proceed.
18. In my assessment, both parties confirm that there was a valid and binding arbitration agreement between them. The issue in contest is whether there exists a dispute that was agreed to be referred to arbitration.



19. Clauses 11.1.1, 11.1.2, 11.5 and 11.5 (d) 21 and 22.12 of the Master Site License Agreement provide for internal dispute resolution mechanism within the agreements referred hereto and specifically clause 22.12 of Master Site License Agreement provides as follows:-

22.12.2 Dispute Remedies

If within five (5) Business Days of a Dispute having been referred to the individuals specified in clause 22.2.1 (b) no agreement reached (or such longer period as the Parties may agree in writing), then either Party may by notice in writing to the other Party, refer the dispute to binding arbitration as provided in clause 22.12.3 of this Agreement.

22.12.3

- (a) Each party shall use its reasonable endeavors to settle amicably any Dispute.
- (b) Save as herein otherwise specifically provided, any Dispute between the Parties which cannot be settled amicably within fifteen (15) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party to be settled by arbitration by the London Court of International Arbitration (LCIA) in accordance with the provisions of clauses 22.12.3(c) to 22.1.3 (i) (both inclusive)..."

20. Similarly Clause 20.3 of the Master Tower Agreement, provide as follows:-

20.3 Arbitration

20.3.1 Parties agree that for any Dispute not settled pursuant to Clause 20.1 of this Agreement the parties shall use their best endeavors to ensure that all the disputes between the parties are resolved in the spirit of mutual co-operation. However, any dispute arising between the parties with regard to this Agreement that fails to be resolved as set out above shall be referred to arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by the parties or in default of agreement within 14 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Chartered Institute of Arbitrators of the United Kingdom ("the Institute") who shall appoint an arbitrator. Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said institute and subject to and in accordance with the provisions of the *Arbitration Act* 1995(Act No. 4 of 1995) or any other statutory modification or re-enactment thereof or such other Acts or Acts for the time being in force in Kenya in relation to arbitration and the rules of Arbitration of the Institute.

20.3.2

Such arbitration shall be conducted in English language.



20.3.3

To the extent permissible by Law, the determination of the arbitrator shall be final and binding upon the parties provided parties reserve the right to appeal on points of law.

20.3.4

Each Party shall be entitled to seek necessary and appropriate injunctive relief to maintain the status quo depending on the outcome of the arbitration or any other temporary measures from the courts of competent jurisdiction to enjoin the other Party from taking certain actions which may infringe on the rights of the Party bringing such claim, provided that any proceedings and decisions as to merits of the dispute, including permanent injunctions.

20.3.5

The cost of arbitration shall be determined by the arbitrator.”

- i. if, within ten (10) Business Days of the Dispute having been referred to the individuals specified in Clause (iii) no agreement has been reached, the Dispute Resolution Procedure shall be deemed to have been exhausted for discussions by members of the respective parties and the matter shall be resolved by arbitration. The arbitration shall be undertaken in Nairobi and conducted in English pursuant to the rules of the International Chamber of Commerce by a single arbitrator to be agreed upon between the Parties or failing such agreement within ten (10) Business Days of the dispute being referred to arbitration, an arbitrator shall be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch to upon written request of either party.”

21. From the above, it is clear that the parties agreed to resolve disputes through arbitration where their attempts at amicable settlement informally through discussions failed. In this matter, the dispute relates to payment of invoices issued by the Plaintiff for licensing fees with respect to sites for its towers, apparatus and communication equipment.
22. From the record, it is manifest that there was a dispute between the parties with respect to unsettled invoices for licensing fees. The agreement between the parties clearly outlines how the disputes arising thereto would be resolved and parties agree that if they cannot internally agree to resolve the dispute the same would be referred to arbitration as per clause 20.3 of the agreement.
23. Consequently, I am satisfied that the application to stay the proceedings and refer the matter to arbitration has merit and I shall allow the same. Parties will proceed as per clause 20.3.5 of the agreement herein. Each party will bear its own costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30th DAY OF NOVEMBER, 2023.



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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Kahora for the Plaintiff/Respondent.

Mr. Nyaburi for the Defendant.

Amos - Court Assistant

