REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. E230 OF 2020

BETWEEN

S. C. JOHNSON LIMITED.....PLAINTIFF/RESPONDENT

AND

JAYKAY ENTERPRISES LIMITED.....DEFENDANT/APPLICANT

R U L I N G

1. By a Chamber Summons dated 5/8/2020 made under ***sections 1A, 1B and 3A of the Civil Procedure Act, sections 6 and 12 of the Arbitration Act, Rule 2 of the Arbitration Rules, and Order 46 Rule 20 of the Civil Procedure Rules,*** the applicant sought that this suit be stayed and the matter be referred to arbitration.

2. The grounds upon which the application was predicated upon were set out in the body of the Summons and the supporting affidavit of **Nitin Kumar Hansraj Shah** sworn on 5/8/2020. These were that; there was a distribution agreement ("the agreement") between the parties entered in 2018 by which the applicant distributed the respondent's products in designated areas in Kenya; that in November, 2019, the respondent's Country Director compelled the applicant to pre-order products outside the framework of the agreement.

3. That the pre-ordering of the goods altered condition 7.8 of the agreement. That the respondent was in breach as it purported to reduce the applicant's territory of distribution and demanding Kshs. 62,621,252/95, being the amount demanded in this suit. That the agreement had an arbitral clause. In the premises, the applicant prayed that the suit be stayed and the matter be referred to arbitration.

4. The respondent opposed the application vide the replying affidavit of **Anthony Mulinge**, the respondent's Country Manager. He admitted the existence of the agreement by which a trading relationship existed between the parties. That out of the said relationship, the applicant had become indebted to the respondent to the amount claimed. That the said amount was an undisputed debt. In his view therefore, there was no dispute capable of being referred to arbitration.

5. The parties filed written submissions which the Court has carefully considered. The existence of the agreement for distributorship is not in dispute. There is also no dispute that the said agreement contains an arbitral clause, *viz*, Clause 19.4 thereof. The question is whether the claim for Kshs. 62,621,254/95 should be referred to arbitration in accordance with the agreement between the parties or not.

6. It is trite that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction is to be invoked. See ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*** **[2015] Eklr.** This principle is consistent with ***Article 159 of the Constitution*** which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect. This includes arbitration. Indeed, ***section 10 of the Arbitration Act ("the Act")*** expressly bars the court from dealing with matters arbitral except as expressly provided for in the law.

7. ***Section 6(1) of the Act*** provides:-

> ***"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—***
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> ***(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or***
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> ***(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration".***

8. The above provision is clear in its terms, where a matter is a subject of an arbitration agreement, the court is to stay the proceedings and refer the dispute to arbitration save in the case of the exceptions set out in the provision. In the law of evidence, the general rule is that he who alleges must prove. The applicant must demonstrate that the subject matter of the suit or dispute is subject to an arbitration agreement and not subject to the exceptions.

9. The general rule in ***section 6 of the Act*** is however, subject to two exceptions. These are; where the arbitration agreement is found to be null and void, inoperative or incapable of being performed, and where the court finds that there is no dispute between the parties with regard to the matters to be referred to arbitration.

10. In **Adcock Ingram East Africa Ltd vs Surgilinks Ltd [2012] eKLR,** the court held: -

> ***"I would agree with the defendant that it is an abuse of the process for parties to refer their disputes to court if the agreement that gives rise to the proceedings contains an arbitration clause. However, if a certain portion of a claim is not in dispute it is improper to refer the entire claim to arbitration. Before a court can order parties to go to arbitration it has to be satisfied that there is indeed a dispute over the claim in issue".***

11. In **Nanchang Foreign Engineering Co Ltd vs Easy Properties Kenya Ltd [2014] Eklr,** the court observed: -

> ***"… Referral of a matter to Arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reach an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute.***
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> ***If there is no dispute which can be referred to such fora, the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, Article 50 of the Constitution of Kenya, 2010 provides that every person has a right to have any dispute decided in a fair and public hearing before a court".***

12. From the foregoing, it is clear that the existence of an arbitration agreement in a contract does not *per se* lead to a stay of proceedings. It must be demonstrated that the claim presented in court is disputed and is subject to the arbitral agreement. Where it can be demonstrated that part of the claim is not in dispute, it will be a waste of time and against the spirit of ***Article 159 (2)(b) of the Constitution*** to refer such a matter to arbitration. Any application made in such circumstances for stay and reference to arbitration is meant to delay the wheels of justice and should be rejected by the court.

13. In the present case, I did not have the advantage of seeing the plaint which commenced these proceedings. I looked for the same in the e-portal without success. However, having considered the depositions of the parties, the respondent's claim is easily discernible. That there was a trading relationship between the two in the period between 2018 and 2020. That in pursuance thereof; the plaintiff supplied the defendant products for which the defendant incurred a debt of Kshs. 62,621,254/95. This is the amount the plaintiff is claiming.

14. On its part, in preferring the matter to be referred to arbitration, the defendant contends that the relationship between the parties is governed by a distributorship agreement which contains an arbitral agreement. That the plaintiff's Country director had made the defendant make a pre-order that led to some financial hardship on the part of the defendant. That the plaintiff had acted in breach of the agreement between them and therefore the dispute is squarely within the arbitral agreement.

15. I have carefully considered the depositions. It would seem that after the plaintiff demanded the sum of Kshs. 62,621,254/95 from the defendant, the latter did not dispute the same. It went ahead to give repayment proposals. There was no contention that the debt had been incurred in breach of or outside the parameters of the distributorship agreement. There was no reference to the matters being raised now in the supporting affidavit by the defendant. It is clear that the debt had arisen in the normal course of business between the parties.

16. When a debt arises in the normal course of business between parties which is not disputed, notwithstanding the parties being in a relationship that is governed by an arbitral agreement, such a claim cannot be referred to arbitration. Those are the claims which the proviso to ***section 6 of the Act*** sought to exempt.

17. In the present case, the defendant did not dispute the claim when the demand was made. When it had the very first opportunity to dispute the debt it, only pointed out to clause 19.4 that provides for arbitration. In my view, at that first opportunity, the defendant should have given reasons for disputing the claim. Instead, the defendant had only given repayment proposals.

18. To this Court's mind, the issues being raised by the defendant in its application, have no relevance or any relationship whatsoever with the plaintiff's claim.

19. In view of the foregoing, I find that the plaintiff's claim constitute an undisputed debt in terms of ***section 6(b) of the Act*** and does not require to be referred to arbitration. Accordingly, the Summons dated 5/8/2020 is without merit and is hereby dismissed with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 20th day of January, 2021.

A. MABEYA, FCIArb

JUDGE