REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. E355 OF 2020

BETWEEN

UNIVERSAL CORPORATION LIMITED.....PLAINTIFF

AND

KENYA MEDICAL SUPPLIES AUTHORITY.....DEFENDANT

R U L I N G

1. By its Notice of Motion dated 26/10/2020, made under ***section 6(1) of the Arbitration Act of 1995 and Order 51 Rule 1 of the Civil Procedure Rules, 2010,*** the defendant sought for the stay of these proceedings and that the dispute herein be referred to an Alternative Dispute Resolution (ADR) Mechanism as set out in **Clause 1.22** of *USAID/KEMSA/MCP RFQ 003/2016- 17 - SUPH003 - UNIVERSAL CORPORATION LIMITED, ("the Contract").*

2. The application was supported by the affidavits of Evans Cheruiyot sworn on 26/10/2020 and 1/12/2020, respectively. The defendant contended that **Clause 1.22** of the Contract envisaged a Disputes, Appeals and Arbitration Mechanism requiring the parties to make every effort to resolve amicably through mutual agreement any dispute arising between them.

3. That in the event it was unsuccessful, the parties were to escalate the dispute to higher management levels and thereafter both agree in writing to proceed with a claim to be settled in accordance with the Rules of Commercial Arbitration of the American Arbitration Association in force on the date of the subject contract. That in the premises, the plaintiff had acted in total violation and/or breach of **Clause 1.22** of the Contract.

4. The application was opposed by the plaintiff through the Grounds of Opposition dated 3/11/2020 and the replying affidavit of **Perviz Dhanani** sworn on 3/11/2020. The plaintiff contended that there was no binding agreement to arbitrate in the contract. That in the premises, the suit cannot mandatorily be referred to arbitration under ***Section 6 of the Arbitration Act.***

5. The plaintiff further contended that **Clause 1.22** of the Contract required the parties to separately agree and sign a standalone agreement to submit a dispute to arbitration. That no written agreement had been reached to submit the dispute to arbitration. That in the absence of a separate consensual agreement, the arbitral clause in the contract was inoperative and incapable of being performed within the meaning of ***section 6(1)*** *of the* ***Arbitration Act.***

6. The plaintiff further contended that the application was irregularly inviting the Court to rewrite the contract by voiding the clear, literal and express contractual requirement under **Clause 1.22.** That for over two and a half years, the defendant had frustrated all of the cascading dispute resolution mechanisms prescribed in the contract by refusing to engage the plaintiff. That the application was therefore an attempt to prevent the plaintiff from exercising its constitutional right of access to justice in line with ***Articles 48, Articles 25(c) and 50(1) of the Constitution of Kenya, 2010.***

7. On a without prejudice, the plaintiff stated that the direct and indirect costs of conducting arbitration in Washington, D.C was prohibitively excessive, will waste time and present a real barrier to it from legitimately mounting its claim for the recovery of the payments due to it.

8. In response to the plaintiff's said contentions, the defendant retorted that there were two issues requiring determination by the court. These were; whether the Contract between the parties contained an Alternative Dispute Resolution mechanism and whether the parties had complied with the same.

9. That the ADR Mechanism in the Contract was in three (3) stages which were mandatory; first that every effort be made to resolve amicably through mutual agreement any dispute between the parties, secondly, in the event it is unsuccessful, the parties do escalate the dispute to a higher management levels and thirdly, failing an amicable settlement, both parties to agree in writing to proceed with a claim which is to be settled in accordance with Rules of Commercial Arbitration of the American Arbitration Association in force on the date of the agreement.

10. That there was no evidence that the plaintiff had taken any steps to have the matter settled amicably. That the court can only step in to determine the dispute once it is clear that the dispute cannot and/or is incapable of being resolved amicably by the parties or that the ADR Mechanism envisaged in the contract is completely incapable of performance. That the defendant was not insisting that the arbitration be held in Washington DC. That it was willing to have the same held in Nairobi. In the premises, the application should be allowed.

11. The facts leading to the dispute are that on 22nd March 2017, the defendant (KEMSA) and the plaintiff (UCL) entered into a contract referenced *USAID/KEMSA/MCP RFQ 003/2016-17 -SUPH003-UNIVERSAL CORPORATION LIMITED* ("the Contract"). It was agreed that UCL would supply five drugs to KEMSA, namely; *Acyclovir, Cotrimoxazole (tablets and suspension) Fluconazole* and *Pyridoxine* manufactured and packaged according to the specified formulation, dosage, packaging size and quantities; and for pre-determined fixed prices totaling $3,423,500.

12. KEMSA only submitted purchase orders for only four (4) out of the five (5) drugs aforesaid. As a result UCL claimed that KEMSA had breached the contract as a result of which UCL had suffered. This precipitated the institution of the instant suit by UCL.

13. I have considered the depositions and the record. The only issue for determination is whether the suit should be stayed and the dispute be referred to arbitration. The application is premised on the exhaustion doctrine which posits that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction is invoked. (See the Court of Appeal decisions in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] Eklr**, and **In the Matter of the Mui Coal Basin Local Community [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.

14. Section 6(1) of the ***Arbitration Act*** provides as follows: -

> **6(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. (Emphasis added).**

15. The parties are in agreement that there is a dispute between them. Their point of divergence is whether the Contract has an arbitral clause or not. The subject clause in the Contract is **Clause 1.22** which provides: -

> **"1.22 Disputes, Appeals and Arbitration**
>
> **Every effort will be made to resolve amicably through mutual agreement any dispute which may arise between Parties under this agreement. In the event that such good faith efforts are unsuccessful in resolving the dispute, the Parties shall escalate the dispute to higher management levels. Failing an amicable settlement at the management level, both Parties shall agree in writing to proceed with a claim and shall be settled in accordance with Rules of Commercial Arbitration of the American Arbitration Association are in force on the date of this agreement. The arbitration shall take place in Washington, D.C, unless otherwise agreed to by the Parties. The number of arbitrators shall be there and they will be appointed in accordance with the Association's procedures.**
>
> **The decision of the arbitrators will be governed by and will not rewrite, invalidate or expand upon the terms and conditions of this Agreement. The resulting award shall be final and binding on the Parties and shall be in lieu of any other remedy. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Each party will bear its own costs of arbitration".** *[emphasis mine]*

16. From the foregoing, it is clear that the parties agreed that once there is a dispute, they were to first attempt to resolve the dispute in good faith. If the attempt was unsuccessful, the parties were to refer the dispute to higher management levels. If there is no settlement at the higher management level, then the parties were required to agree in writing to refer the dispute to arbitration by way of a Claim in accordance with the Rules of Commercial Arbitration of the American Arbitration Association. That arbitration may take place in Washington D.C or any other place as agreed by the parties.

17. To my mind, the issue of the referring the dispute to alternative dispute resolution mechanism as a point of first call is not optional. It is all there in the contract. There are three tiers, first an attempt to resolve the dispute in good faith. The second level is to refer the dispute to higher management levels. The third level is then that the parties are required to agree in writing to refer the matter to arbitration.

18. Clause 1.22 in my view is not an arbitral clause so called. The parties did not agree that if the first two levels of alternative dispute resolution mechanisms fail, the matter be automatically referred to arbitration. The parties were left to freely agree in writing to refer the matter to arbitration. In this regard, there was no automatic referral to arbitration as contended by the defendant.

19. To the extent that there was no automatic reference to arbitration and that the parties had first to agree in writing for such referral and in so far as there has been no such agreement, ***section 6 of the Arbitration Act, 1995*** is not applicable.

20. Therefore, the submissions by the defendant that contract had an arbitral clause us erroneous. Since the parties had agreed that they would attempt amicable settlement in two levels, the plaintiff should have made those two attempts before lodging the present suit. There was no evidence to show that the plaintiff had contacted the defendant with a view to settle the matter.

21. In view of the foregoing and for the stipulation in ***Article 159(2)(c) of the Constitution,*** the parties should first attempt to settle their dispute in accordance with ***Clause 1.22*** of the Contract before the suit can be proceeded with. Now that the parties are before Court and to give effect to the intention of the parties in their Contract, I will refer this matter to Mediation.

22. Accordingly, the application is partially successful. The suit is hereby stayed pending mediation. Mediation is to be held expeditiously. The matter to be mentioned after 90 days of the date hereof to confirm the outcome of the mediation. Since the application was only partially successful, the costs of the application to be in the cause.

It is so ordered.

DATED and DELIVERED at Nairobi this 25th day of February, 2021.

A. MABEYA, FCI Arb

JUDGE