



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E074 OF 2020

BETWEEN

MART NETWORKS KENYA LIMITED.....PLAINTIFF

AND

HORIZON MEDIA SOLUTIONS KENYA LIMITEDDEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. E086 OF 2020

BETWEEN

HUAWEI INTERNATIONAL COMPANY LIMITED.....PLAINTIFF

AND

MART NETWORKS KENYA LIMITED.....1ST DEFENDANT

HORIZON MEDIA SOLUTIONS KENYA LIMITED.....2ND DEFENDANT

RULING NO. 2

1. The 1st Defendant (“Mart Networks”) in **HCCC No. E086 of 2020** has filed a Notice of Motion dated 11th May 2020 under **Order 2 Rule 15(1)(a), (c), Order 51 Rule 1** of the *Civil Procedure Rules* and **sections 1A, 1B and 3A** of the *Civil Procedure Act* seeking strike out the suit filed against it by the Plaintiff (“Huawei”).
2. The application is supported by the affidavit of the 1st Defendant’s Advocates, Philip Nyachoti, sworn on 11th May 2020. It is opposed by the 2nd Defendant (“Horizon Media”) through the replying affidavit of its director, Abeid Miyumo, sworn on 2nd June 2020 and by the Plaintiff through Grounds of Opposition dated 2nd June 2020. The application was canvassed by way of written submissions with the parties advancing their respective positions.
3. This is the second ruling in this matter which I consolidated with **HCCC E074 of 2020, Mart Networks Kenya Limited v Horizon Media Solutions Kenya Limited**. In that decision I dismissed two interlocutory applications. The first one was filed by Huawei seeking an injunction restraining Mart Networks and Horizon Media from selling or transferring certain equipment subject of the suit pending hearing and determination of the suit and an order compelling them to pay USD 335,500.54 being the balance of the purchase price and the liquidated damages and associated costs amounting to USD 89,243.14 and an alternative order for the court to, “vary Article 24 of the *Distribution Agreement dated 08th June 2015 on the seat and venue of arbitration from Hong Kong Arbitration Centre to Nairobi.*” The second application was by Mart Networks which sought an order directing Horizon Media to comply with an Equipment Release Agreement dated 1st November 2019 and return the equipment subject of the suit.
4. After dismissing the applications, I directed the parties to proceed to mediation. The mediation was ultimately not successful. I am now constrained to determine the application filed by Mart Networks.

5. Before I deal with issue at hand let me recap the undisputed facts which I summarised in my earlier ruling. The issue in this case concerns a Micro-Grid Power Solution Equipment (“the Equipment”) claimed by Mart Networks and Huawei. In **HC COMM NO. E074 OF 2020**, Mart Networks filed suit against Horizon Media seeking an order compelling the Horizon Media to return to it the Equipment valued at USD 777,445.34 supplied to it pursuant to a purchase order dated 19th September 2017. The Equipment was sourced from Huawei and upon delivery, Horizon rejected the equipment. Consequently, the parties executed an Equipment Release Agreement dated 1st November 2018 (“the Release Agreement”) under which the purchase order was canceled and the parties agreed that the Equipment would be released back to Mart Networks in 6 lots. Mart Networks claimed that Horizon Media returned 2 lots leaving 4 lots hence it prays for judgment for USD 523,923.56 being the value of the unreturned equipment together with liquidated damages.

6. In **HC COMM NO. E086 of 2020**, Huawei claimed that it supplied the Equipment valued at USD 721,073.25 to Mart Networks through a Purchase Order No. MNKE/10909. Mart Networks paid part of the purchase price leaving a balance of USD 335,500.54 together with costs amounting to USD 89,243.14 which it now seeks. Huawei also claimed that Mart Networks transferred the Equipment to Horizon Media, it therefore seeks a permanent injunction restraining Mart Networks and Horizon Media from selling, transferring or distributing the Equipment.

7. The case by Mart Networks is that the Court does not have jurisdiction to determine any dispute regarding the Equipment as between Huawei and itself as all disputes between them should be submitted to the Hong Kong Arbitration Centre in China. Huawei, on its part, acknowledges the existence of this clause. In my ruling, I dealt with the application by Huawei seeking to vary Article 24 of the Distribution Agreement as follows:

*[16] The Distribution Agreement entered into between Huawei and Mart Networks contains an arbitration clause with the seat of arbitration being Hong Kong. Huawei seeks to change the seat of arbitration from Hong Kong to Nairobi on the grounds that it would be expensive. I would only reiterate what the Court of Appeal stated in **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another, Civil Appeal No. 35 of 1999 (UR)** where the Court of Appeal held that a court of law cannot re-write a contract between the parties as the parties are bound by terms of their contract unless coercion, fraud and/or undue influence are pleaded and proved. Such circumstances do not exist in this case.*

8. The question then is whether the court should enforce the arbitration clause by striking out the Plaintiff’s suit. It is worth noting that instead of invoking **section 6** of the **Arbitration Act, 1995**, to stay the suit pending reference to arbitration, Mart Networks chose to apply to strike out the suit for want of jurisdiction. In the circumstances of this case, I would be more inclined to deal with the substance of the matter in view of **Article 159(2)(d)** of the Constitution which enjoins this court to deal with all matters without undue regard to technicalities. This position is fortified by the fact that the Huawei opposed the application by reference to **section 6** of the **Arbitration Act** hence it will not suffer any prejudice by dealing with the matter as such. Moreover, under **Order 2 rule 15** of the **Civil Procedure Rules**, the court has the option of striking out or staying the suit.

9. **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 mine]

10. Huawei objects to the suit being struck out or stayed on the basis that the arbitration clause is inoperative or incapable of being performed because there is a third party involved who is not bound by it. It submits that this suit involves three parties and only two; Huawei and Mart Networks are bound by the Distribution Agreements dated 8th June 2015 and amended on 12th December 2018 which Horizon Media is not party thereto. It further contends that all the parties are resident in Kenya and it would be better that the matter is settled in this country.

11. Its Counsel referred to **Standard Group PLC v Wesley Kiptor Yegon and Another HC COMM No. 83 of 2018 [2019] eKLR** where it stated that:

[45] Thus the position seems to be that, where a third party is involved, the Court may refuse to stay the proceedings as the case will only be appropriate for only part of the dispute.

[46] It is not in dispute that the 2nd Defendant is not a party to the arbitral and neither did it participate in the hearing of the application, obviously for the simple reason that, it is not bound by the arbitral agreement. Therefore, the claim in relation to the second Defendant cannot be referred to arbitration.

12. On its part, Horizon Media, supported the application to strike out the suit on the ground that the Distributorship Agreement was valid, this court having held that there are no grounds to vary the arbitration clause. It adds that there is no privity of contract between Huawei and Horizon Media, nor is the Equipment in its possession hence there is no basis to maintain the suit.

13. Neither party disputed that existence of the arbitration clause in the Distribution Agreement dated 8th June 2015 and amended on 12th December 2018 or that the Distribution Agreement is between Huawei and Mart Networks. In fact, by attempting to set aside the arbitration clause on the basis of hardship, Huawei implicitly accepted the clause. Mart Networks holds that any dispute between it and Huawei ought to

be referred to arbitration while Mart Networks urges that the dispute is tripartite and therefore the arbitration clause is inoperative.

14. The general and accepted principal is that arbitration is dependent on the consent of the parties and the court is duty bound to honour that agreement and give effect to their wishes by staying court proceedings pending reference to arbitrations. In ***Nyutu Agrovet Limited v Airtel Networks Limited NRB CA Civil Appeal (Application)No. 61 of 2012 [2015] eKLR***, the Court of Appeal held that:

Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here.

15. The corollary to this is that a third party is not bound by an arbitration agreement and cannot be forced to proceed to arbitration. In ***Martin Njuguna Ngugi v Ahmed Noor Sheikh and Another NRB ELC No. 1131 of 2016 [2018] eKLR*** the court observed as follows:

I do not think that the legal framework in the Arbitration Act, and indeed our prevailing jurisprudence, contemplates a scenario where a non-party to an arbitration agreement is to be compelled to submit to arbitration as a party to the arbitral proceedings. An arbitration agreement binds parties to the agreement, not non-parties.

16. Even where there is an arbitration agreement featuring in a dispute between multiple parties, the court should not be shy to refer the dispute between the parties to arbitration. Much of course will depend on the circumstances of each case as the court will have to determine what part of the dispute will be referred to arbitration. In ***Damaris Wanjiru Nganga v Loise Naisaie Leiyen and Another NKU HCCC No. 82 of 2015 [2015] eKLR*** the court declined to refer the matter to arbitration because the performance of the agreement between the parties was intimately tied to the third party.

17. In ***Directline Assurance Company Limited and 4 Others v Suninvest and 15 Others ML HC No. E278 of 2019 [2019] eKLR*** Kasango J., allowed the matter between the principal parties to proceed to arbitration while staying the suit in respect of the other parties. The court relied on the decision of ***Yaworski v Gowling Lafleur Henderson LLP 2012 ABQB 424 (CanLII)*** where the court held as follows:

In The Law of ADR in Canada An Introductory Guide, (Glaholt, Duncan and Rotterdam, Markus LexisNexis, Canada 2011) at page 101 the authors state that:

“Where third party claims are involved, Courts have ordered that litigation with regard to matters within the Arbitration agreement and between the principal parties be stayed pending Arbitration, and, with regard to third party matters not governed by the Arbitration agreement, have ordered a stay of proceedings for the estimated time it would take the principal parties to complete their Arbitration. Thus, while a Court has no jurisdiction to order third parties to submit to Arbitration, the Court can stay third party claims pending Arbitration when it appears just and equitable to do so.” [emphasis added]

18. Finally, in ***Scales and Software Limited v Web Commercial Systems Limited and Another HC COMM No. E532 of 2020 (UR)***, I took the view that the court could refer the matter to arbitration as the third party's involvement in the matter was peripheral to the dispute. In that case I held as follows:

[14] [T]he court has an obligation to evaluate the cause of action to see whether the third party is intimately involved in the matter so as to exclude the application of the arbitration clause. To hold otherwise would undermine the whole purpose of the Act as a party would be permitted to circumvent an otherwise valid arbitration clause by merely adding a third party, with a peripheral interest in the matter, to the proceedings and thereafter claim that the clause cannot be enforced by the court.

19. Turning to the facts of the case, the claim by Huawei against Mart Networks is for the balance of the purchase price. The claim is also distinct from claim for possession of the Equipment in the hands of Horizon Media as confirmed by ***HC COMM E074 of 2020*** in which Mart Networks has sued to collect the Equipment. In fact, it is not disputed that Mart Networks and Horizon Media have entered into an Equipment Release Agreement which it Mart Networks seeks to enforce.

20. At the end of the day, the claim between Huawei and Mart Networks is covered by a valid arbitration agreement. Huawei is not party to the Equipment Release Agreement which is subject of ***HC COMM No. E 074 of 2020***. Even in ***HC COMM No. E 086 of 2020***, Huawei admits that the Equipment is in possession of Horizon Media. The two cases may proceed independently of each other as Huawei has no relationship with Mart Networks. If Huawei succeeds in the arbitration claim, it would be entitled to the balance of the purchase price and or the equipment from Mart Networks.

21. For the reasons I have set out above, I now make the following orders:

(a) This suit be and is hereby stayed pending reference of the dispute between the Plaintiff and 1st Defendant to arbitration in accordance with Clause 24 of the Distribution Agreement dated 8th June 2015 as amended on 12th December 2018.

(b) The costs of the application shall be borne by the Plaintiff.

DATED and DELIVERED at NAIROBI this 24th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

HC COMM No. E074 of 2020

Mr Kinuthia instructed by Nyachoti and Company Advocates for the plaintiff.

Mr Kimata instructed by Kimata Alutira and Company Advocates for the defendant.

HC COMM No. E086 of 2020

Ms Alusiola instructed by Mutissya and Company Advocates for the plaintiff

Mr Kinuthia instructed by Nyachoti and Company Advocates for the 1st defendant

Mr Kimata instructed by Kimata Alutira and Company Advocates for the 2nd defendant