



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E532 OF 2020**

**BETWEEN**

**SCALES AND SOFTWARE LIMITED ..... PLAINTIFF**

**AND**

**WEB COMMERCIAL SYSTEMS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ABSA BANK KENYA PLC ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application for consideration is a Chamber Summons dated 22<sup>nd</sup> December 2020 filed by the 1<sup>st</sup> Defendant under the provisions of **section 6(1)** and **7** of the *Arbitration Act, 1995* (“the *Act*”) seeking orders, inter alia, that the proceedings in this matter be stayed pending and the matter be referred to arbitration and for an order restraining the 2<sup>nd</sup> Defendant (“the Bank”) from releasing any money held in the bank account in the name of the Plaintiff and 1<sup>st</sup> Defendant.
2. The application is supported by the affidavit of its director, Dickson Irungu Kibathi, sworn on 22<sup>nd</sup> December 2020. The Plaintiff opposed the application through Grounds of Opposition dated 4<sup>th</sup> February 2021. I heard the parties respective counsel.
3. Before I deal with the substance of the application, I propose to outline the background facts which are not in dispute and are set out in the Plaintiff dated 7<sup>th</sup> December 2020. The Plaintiff and 1<sup>st</sup> Defendant collaborated in execution of various projects for various clients including County governments. The parties entered into a Memorandum of Understanding dated 14<sup>th</sup> March 2019 (“the MOU”) in order to execute the construction of the Nanyuki Maternity Hospital Project on behalf of the Laikipia County Government (“the Project”).
4. Clause 12 of the MOU provides that the all disputes and differences between the parties touching on Project shall be referred to a single arbitrator agreed on by the parties if they fail to resolve the matter through amicable negotiations. In default of such agreement, the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter) is authorized to appoint an arbitrator.
5. The dispute between the parties concerns operation of the joint account established under the MOU in which the proceeds from the Project would be paid. The Plaintiff contends that the 1<sup>st</sup> Defendant unilaterally and maliciously proceeded to instruct the Bank to effect changes to the mandate contrary to the MOU. It therefore seeks a permanent injunction restraining the Bank from changing the mandate or preventing the Plaintiff from dealing with the subject account. It also seeks a permanent injunction restraining the Bank from acting unilaterally on the 1<sup>st</sup> Defendant’s instructions in effecting any changes to the account.
6. The arbitration clause in the MOU is not in dispute. The 1<sup>st</sup> Defendant has invoked **section 6 (1)** of the *Act* which 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.

(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.

7. The import of the aforesaid provision is that the court will ordinarily stay an action if the pre-conditions for grant of stay are met (see **UAP Provincial Insurance Company Limited v Michael John Beckett NRB CA Civil Appeal No. 26 of 2007 [2013] eKLR** and **Eunice Soko Mlagui v Suresh Parmar and 4 Others NRB CA Civil Appeal No. 276 of 2014 [2017] eKLR**). In the present case, the Plaintiff does not allege that the 1<sup>st</sup> Defendant has waived its right to stay the proceedings and refer the matter for arbitration or that there is in fact no dispute.

8. The thrust of the Plaintiff's opposition is that the arbitration clause is inoperative because of the presence of the Bank in these proceedings as the Bank is neither party to nor bound by the arbitration clause or the MOU. It contends that the dispute between all the parties is intertwined and the Bank cannot be severed from the dispute. It adds that severing the proceedings by referring an aspect of the dispute to arbitration will result in parallel proceedings which may result in conflicting decisions which will impede enforcement. The Plaintiff's opposition is captured by the following finding by the court in **Martin Njuguna Ngugi v Ahmed Noor Sheikh and Another NRB ELC No. 1131 of 2016 [2018] eKLR**:

*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.*

The Plaintiff also cited **Damaris Wanjiru Nganga v Loise Naisaie Leiyen and Another NKU HCCC No. 82 of 2015 [2015] eKLR** and **Eunice Soko Mlagui v Suresh Parmar and 4 Others (Supra)** to support its position.

9. The 1<sup>st</sup> Defendant takes the view that the arbitration clause does not affect the Bank. It submits that the Bank is not a party to the dispute and that it will only comply with the any orders issued as it is only holding money on behalf of the parties according to the MOU. On its part, the Bank states that in fact, there is no cause of action against it as it is not party to the MOU. It applied to be struck out from the suit on the ground that it is a custodian of the money held in the account within the control of the parties and subject to any court order.

10. I am in agreement with the Plaintiff that the court will not enforce an arbitration clause against a third party. The basis of arbitration under the **Act** is consent of the parties. In the absence of consent, a third party cannot be compelled to submit to arbitration under the **Act**. This case however raises a different issue and it is whether by merely joining another defendant not party to the arbitration agreement to the proceedings, a plaintiff can resist reference to arbitration.

11. As I have outlined above, the case between the Plaintiff and 1<sup>st</sup> Defendant arises from the MOU and the manner in which the joint account at the Bank is to be operated. The Bank is merely a custodian of the parties' money and only acts in the accordance with the parties' instructions. I would even go as far as holding that if relief against the 1<sup>st</sup> Defendant is successful, then it would be restrained from operating the account in any other manner other than in accordance with the court decision. The point here being that the Bank is not a necessary party to these proceedings and will only comply with the court orders in the absence of an agreement between the parties.

12. In **Damaris Wanjiru Nganga v Loise Naisaie Leiyen and Another (Supra)** where the court declined to refer the matter to arbitration because the performance of agreement between the parties was intimately tied to the third party, it evaluated the cause of action and took the view that:

*25. The pleadings, aside, the presence of KCB and their significance to the ultimate prayers sought by the plaintiff cannot be ignored. The plaintiff will never have the property transferred to her if KCB declines to register a discharge of charge over the property. Their continued interest in the property is not known at the moment. It is also not known whether the loan account is cleared or not. It is apparent to me that the dispute arising from performance of the agreement does not only involve the two parties to it. KCB is a necessary party to the dispute but it is not a party to the agreement between vendor and purchaser. KCB cannot therefore be compelled to go before the arbitrator and it cannot be bound by the award for it is not a party to the arbitral agreement. Given the presence of KCB in the dispute, and her central part in whether or not the property ought to be transferred to the plaintiff, I am of the opinion that the arbitral agreement cannot be performed. Clearly the arbitrator cannot make an order compelling KCB to discharge the charge, or to transfer the property to the plaintiff, which is what the plaintiff ultimately wants. It will therefore be futile to refer the matter to arbitration since a key issue will not be determined through the said proceedings. The dispute has morphed into one that renders the arbitral clause inoperative. The only avenue to have the dispute settled once and for all remains the court.*

13. In **Eunice Soko Mlagui v Suresh Parmar and 4 Others (Supra)**, the Court of Appeal also held that an arbitration clause could not bind third parties who were not party to the agreement. In that case, the court upheld the decision of the trial judge refusing to refer the matter to arbitration because the third parties, the auditors of the Company, were not bound by the Articles of Association which only applied to members of the company. In addition, the court declined to refer the matter to arbitration because it is the plaintiff who joined the third parties to the proceedings and could not turn around and ask the court to sever the dispute so that one part is heard by the arbitrator and the other in court as this would lead to parallel proceedings which the court disapproved.

14. It is clear to me that both decisions cited by the Plaintiff are distinguishable. First, **Damaris Wanjiru Nganga v Loise Naisaie Leiyen and Another (Supra)** demonstrates that the 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. Second, the plaintiff in **Eunice Soko Mlagui v Suresh Parmar and 4 Others (Supra)** joined the third parties to the suit on her own volition and the dispute between the parties could not severed.

15. The core of the dispute between the Plaintiff and 1<sup>st</sup> Defendant is who between them should operate the joint account. This is a dispute falling within the MOU. As the Bank correctly submitted, it is merely a custodian of the money and will abide by any decision the court or arbitrator may make. It does not make any claims to the money held in the account. I therefore do not see any risk of parallel proceedings. A similar situation arose in **Directline Assurance Company Limited and 4 Others v Suninvest and 15 Others ML HC No. E278 of 2019 [2019] eKLR** where 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]*

16. The 1<sup>st</sup> Defendant has also sought an interim measure of protection under **section 7** of the **Act** in the nature of an injunction restraining the Bank from releasing any money from the Bank account. In its Grounds of Opposition, the Plaintiff states that its suit and application are in the nature of seeking grant of interim measure of protection. I would also note that when it filed suit, the Plaintiff also filed an application seeking orders restraining the Bank from acting on the 1<sup>st</sup> Defendant’s instructions to change the mandate, from freezing or otherwise interfering with the account. On 14<sup>th</sup> February 2021, I issued the following order:

***THAT** an injunction be and is hereby issued restraining the 2nd Defendant whether by itself, its employees, servants or agents and or otherwise howsoever from acting on the 1st Defendants instructions from changing the signing mandate, freezing and preventing the Plaintiff from dealing with the **Bank Account No. xxxxxxxx** domiciled at the 2nd Defendant’s Westlands Branch pending interparties hearing of the application or until further order of the court.*

17. Both parties have applied for interim relief against the Bank yet the dispute is between themselves. Since I have held that the Bank is not a necessary party to the arbitral proceedings, I do not see any prejudice to the parties and indeed the Bank if the Plaintiff and the 1<sup>st</sup> Defendant are both restrained from interfering or dealing with the Bank account pending the reference of the dispute to arbitration. This conclusion is fortified by the fact that the arbitration proceedings will resolve the manner in which the account is operated.

18. For the reasons I have set out above, I now order as follows:

(a) The Chamber Summons dated 22<sup>nd</sup> December 2020 is allowed on terms that the proceedings herein are stayed pending reference of the dispute between the Plaintiff and 1<sup>st</sup> Defendant to arbitration in accordance with the Clause 12 of the Memorandum of Understanding dated 14<sup>th</sup> March 2019.

(b) Pending the hearing and determination of the reference to arbitration or further orders of the arbitral tribunal, the Plaintiff and 1<sup>st</sup> Defendant howsoever are hereby restrained from interfering with or dealing with the ABSA BANK, Westlands Branch, **Account No. xxxxxxxx**.

(c) The 2<sup>nd</sup> Defendant is hereby struck off and discharged from these proceedings with costs to be paid by the Plaintiff.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of FEBRUARY 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Limo instructed by Limo and Njoroge Advocates for the Plaintiff.

Mr Njuguna instructed by Njuguna Ng’ang’a and Associates Advocates for the 1<sup>st</sup> Defendant.

Mr Nyaribo instructed by Muthaura, Ayugi and Njonjo Advocates for the 2<sup>nd</sup> Defendant.