



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. E419 OF 2019

HAVAS MEDIA LIMITED.....PLAINTIFF

VERSUS

SWITCH TV LIMITED.....DEFENDANT

PRELIMINARY OBJECTION

RULING

PLAINTIFF'S CASE

1. The Plaintiff filed a suit seeking judgment against the Defendant for the sum of **Kshs.25, 479,111.88**. The amount arose from services rendered by the Plaintiff pursuant to an agreement of the parties dated **17th September 2018**. This amount became due upon delivery of services and the parties held several meetings.
2. The Defendants Chief Operating Officer gave a proposal to pay the sum outstanding by installments and even undertook to pay a sum of Kshs.3 Million by the stated date. Having given these proposals, the Defendant failed to honor payment and it is on failure to do so that the Plaintiff filed the suit.

DEFENDANT'S CASE

3. The Defendant filed a defense dated **10th January 2020** and denied the averments in the Plaintiff and stated that the agency fees of 8% would only be payable to the Plaintiff if it satisfactorily fulfilled its obligations which it failed to fulfil and the agency agreement further stipulated that the Plaintiff would reimburse the Defendant all discounts and commissions and provide the Defendant with invoices as proof of costs.
4. The Defendant denied owing the Plaintiff the sum of **Kshs.25, 479,111.88** and does not submit to the jurisdiction of this court as stated in the Plaintiff.

PRELIMINARY OBJECTION

5. The Defendant raised a preliminary objection dated **5th October 2020** on the grounds that;-
 - a) **Clause 20** of the Agency Agreement has an arbitral clause for resolution of disputes through arbitration.
 - b) The plaintiff's suit is in contravention of the Arbitral clause thus incompetent, fatally defective. It is an abuse of the court process.
 - c) The Court lacks the requisite jurisdiction to take cognizance, hear and determine the Application and intended suit.
 - d) The Parties are bound by the Arbitration Act to resolve the dispute by way of Arbitration.

PLAINTIFF'S SUBMISSIONS

6. The Plaintiff submits that the fact that service were rendered is not in dispute. The fact that monies became due and owing is not in dispute. The fact that the Defendant has admitted the debt is not in dispute. These are the circumstances the court is entitled to look at in

determining its jurisdiction, and they submit that in a case where there are clear correspondence admitting the debt, there cannot be any claim that there is a dispute for reference to arbitration. In the case of *Polyethene Industries Limited Vs Buzeki Dairy Limited [2015] eKLR* Kariuki J. stated as follows when it comes to correspondence and admission;

“Going by the facts of this case, the letter by the Defendant dated 21st August 2014 contains a clear and unequivocal admission that it owed the Plaintiff Kshs.9, 179, 985.88. Further, the cheque of Kshs.363, 282.00 was issued on 12th April 2014, but was subsequently dishonored, was also in my view an admission of debt on the part of the Defendant. In my view, the test laid down by Madan JA (as he then was) in the Choitram case in relation to admissions has been answered in the correspondence availed to court with regard to this matter. I am satisfied that it is plain and obvious that the Defendant clearly admitted its indebtedness to the plaintiff herein. To my mind, there is no point in letting this matter go to trial for there is nothing to be gained by having a trial on the issue of the principle amount”

7. It is the Plaintiff’s submission that the claim before court is one seeking to recover sums due and owing which sums have been admitted and even proposals on repayment given.

8. Further, the Plaintiff submits that the Defendant entered appearance to the matter and proceeded to file defense. The act of filing a defense automatically flouted the procedure which requires that an application be lodged not later than the time of lodging appearance.

DEFENDANT’S SUBMISSION

9. The Defendant submits that the courts cannot re-write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute in relation to the agreement, then the same would be subject to arbitration and the court cannot re-write the same.

Further, that the defendant filed a defense but it did not submit to the jurisdiction of the court and this did not waive the jurisdiction of an arbitration.

10. It is their submission that the Plaintiff’s claim is improperly before the court and owing to the existence of an arbitration clause in the agreement between the parties. Which clause vests jurisdiction in all disputes arising from the agreement, then this court lacks jurisdiction to entertain the dispute.

DETERMINATION

11. The Arbitration Clause (**Clause 20**) of the Agency Agreement reads as follows: -

“Dispute Resolution

20.1 If a dispute between the parties arises out of or is related to this agreement, including any matter relating to the breach of any of the provisions of this agreement, any party herein may issue a written notice to the other declaring the dispute as soon as practicable. The parties shall meet and negotiate in good faith to attempt to resolve the dispute. If after 30 days from the date upon which the dispute has been declared by a party, the dispute is not resolved, the matter shall be determined by arbitration as provided.”

12. The issue of jurisdiction is well settled in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1*, where Nyarangi J. of the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. The power of a court to stay proceedings and refer matters to arbitration is provided for under **Section 6 of the Arbitration Act Cap 4 of 1995**. It provides 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 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.”

14. In *Civil Appeal No. 186 of 2013 Mt. Kenya University –versus- Step Up Holding (K) Ltd [2018] eKLR* Waki, Nambuye & Kiage JJA held as follows:-

“We have construed section 6 of the Arbitration Act on our own and considered it in light of the case law highlighted above. We adopt the position taken by the Court in the above pronouncements as in our view; they represent a correct interpretation of the

provision. Considering the above in light of the findings of the trial Judge, it is our finding that the trial Judge correctly exercised his discretion and properly appreciated both the facts and the law and arrived at the correct conclusion on the matter. We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed."

15. It is clear that for a Court to entertain an application for stay of proceedings, the said application ought to have been filed not later than the date when a party enters appearance. In the instant application, the Applicant entered appearance on **10th January 2020** and the instant application was filed on **5th October 2020**. In addition, the Applicant filed a defense and this amounts to taking of a procedural step in the matter.

16. It is the Court's finding that the Applicant did not comply with the provisions of **Section 6 of the Arbitration Act No. 4 of 1995**, for the reasons that, the Defendant did not file this application promptly, after entering appearance.

17. The Defendant in filing Defence at paragraph 14, did not submit to the jurisdiction of this Court. Therefore, it remains for the party to comply with **Section 6 of the Arbitration Act** and not raise a Preliminary Objection as there is set legal procedure to invoke arbitration clause.

18. The Preliminary Objection is hereby dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MAONDO FOR THE PLAINTIFF

MS NJAGI FOR THE DEFENDANT

COURT ASSISTANT - TUPET