REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 8 OF 2019

KIKENNI PROPERTIES LIMITED.....1ST PLAINTIFF

TAKAUNGU SPICE LIMITED.....2ND PLAINTIFF

VERSUS

VIPINGO RIDGE LIMITED.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Walker Kontos Advocates for the Plaintiff

A. B Patel & Patel Advocates for the Defendant

RULING

The applicant has moved the court in terms of Article 159 of the Constitution, Rule 2, of the Arbitration, Section 6, 7, & 16 of the Arbitration Act No. 4 of 1995 and Section 3A & 63 of the Civil Procedure Act seeking a substantive order of stay of further proceedings herein on account of the Law of jurisdiction on the part of the this Honourable Court do refer the said matter to be determined in terms of clause 3, 5, and 7 of the sublease dated 7.4.2008 and 27.5.2011.

In support of the chamber summons are the grounds on the face of the summons and an affidavit by **Alaistair Cavenagh** filed in court on 27.9.2019. The application is opposed by the respondent that the dispute in question pursuant to the commercial transaction is an issue for the constitutional court and therefore outside the purview of Section 6, 7, & 10 of the Arbitration Act No. 4 of 1995.

At the hearing of the summons **Mr. Ogunde** for the respondent and **Mr. Khacran** submitted briefly on the legal perspectives as they perceive the claim and applicability of the provisions of the Arbitration Act.

The Law

The relevant facts in issue of the legal contest can be deduced from the sub-lease of Plot No. F20 comprising three thousand one hundred fourteen or thereabouts being part of LR NO. 24880 made on 7.4.2008 and a transfer of sub-lease made on 10.11.2009.

The arbitration submission agreement in Clause 5.6 and 5.7 of the aforesaid sub-lease each provides for the arbitration as follows:

> **"Save as may be hereinbefore otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties shall;**
>
> **Firstly, be referred to the Board for mediation by one of the Board's mutually acceptable directors. If such process should fail; then**
>
> **Secondly, the matter shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1995 or any amendments or superceding acts replacing the same by a single Arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of such dispute by either party to the other, upon application by either party to the Chairman for the time being of Chartered Institute of Arbitrators (Kenya branch). The arbitration shall be conducted in Nairobi and the parties agree to the extent permissible by law to be bound**

by the decision of the Arbitrator. For the avoidance of doubt it is agreed that the costs of such arbitration shall be borne by the party against whom an award is made. Any arbitration proceedings shall take place in Nairobi.

Section 6(1) of the Arbitration Act upon which the chamber summons is founded provides as follows:

> **"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 within the party enters appearance or otherwise acknowledges the claim against which the stay of 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 infact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

In the present application Learned counsel for the respondent argued that the question of the sub-leases cannot be specifically referred to arbitration because its raises constitutional issues under the fundamental rights and freedom to be litigated pursuant to Section 22, 23 and 25 of the Constitution.

A rejoinder by Learned Counsel for the applicant asked this court to construe the commercial contract and nothing constitutional but interpretation of the various terms and obligations in the agreement.

The objector being raised by Learned Counsel for the respondent finds solace in Section 35 (2) of the Arbitration Act that provides as follows:

> **"If the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decision on matters not referred to arbitration may be set aside."**

I am fortified by this provision in the sense that if in the course of framing issues for arbitration, it emerges that the arbitrator has no jurisdiction on a particular issue, his decision cannot be allowed to stand.

As the facts are on record except submissions made by Learned Counsel for the respondent I am in great difficult to find that the dispute is incompatible with the arbitration agreement.

This question troubling Learned counsel for the respondent was determined in the case of **Safaricom Ltd v Ocean view Beach Hotel Ltd {2010} eKLR**:

> **"Although the English Arbitration Act, 1996 is not exactly moduled on the model Law unlike our Act, I fully endorse the principles outlined in the channel (case) because they are in line with the arbitral tribunals jurisdiction as set out in Section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of the arbitral tribunal except by way of an appeal under Section17 (6) of the Arbitration Act as the commercial court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of Section 17 and in particular violated the principle known as 'competence/competence' which means the power of an arbitral tribunal to decide or rule on its own jurisdiction.**

In my view if a specific question is submitted to the arbitrator for his decision he or she is bound to interpret such an issue as provided for under Article 259 (1) of the Constitution in a manner that promotes supremacy of the constitution, its purposes, values and principles, advances the rule of Law, and the human rights and fundamental freedoms in the bill of rights, permits the development of the land and contributes to good governance.

For present purposes, it is also necessary to say that the Arbitration proceedings are anchored first in Article 159 (2) (1) of the Constitution on the broad rubric of alternative forms of dispute resolution mechanisms subject to clause (3) that requires that the traditional dispute resolution mechanisms should not be used in away hat contravenes the bill of rights.

It follows that the save to residual reservation clause on traditional dispute mechanisms, the constitution recognizes arbitration as a preferred method of resolving disputes. Needless to say that Section 6 (1) of the Arbitration Act on stay and referring a dispute to arbitration is not inconsistent or incontravention of any constitutional provisions. Much as Learned counsel for the respondent would have wanted this court to oust the jurisdiction of an Arbitrator provided for in the arbitration agreement, this mechanism rests on the key principle of part autonomy to resolve disputes.

On the other hand the constitution under Article 10 (1) provides that the national values and principles of government bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution, applies or interprets any Law or makes or implements public policy decisions. The fears by the respondents are therefore not to be founded.

Whether the arbitrator would have jurisdiction to hear matters arising out of the dispute pursuant to the terms and conditions in a commercial contract, the persuasive decisions in **Produce Brokers Co. Ltd v Olympia Oil and Cake Co. {1916} 1 AC 314 and Attorney General for Manitoba v Kelly & others Lord Atkinson** stated that:

> **"Prima facie one would suppose that authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any Judge or arbitrator to determine whether any particular dispute arose out of a contract unless until he knows what that contract is. This involves that the arbitrator must in such a case construe the contract which the parties entered into, and thus determine that they meant to express by the language they have used. If, for instance, in a contract relating to any art or trade or business the parties use terms having technical meanings in that art, trade or business, then those terms should prima facie have that meaning attributed to them, simply because the parties to the contract presumably used those terms in their technical sense. In such a case it would appear to me that arbitrators or an umpire would, under such a submission as exists in this case, necessarily have authority to determine what was the technical meaning of those technical terms."**

The correct approach in our system of Law which is hardly emphasized is that any judicial and quasi body involved in adjudication of a dispute can weigh and take into account in the first instance the question of jurisdiction. The threshold arbitrability questions as well as underlying merits of the disputes forms the integral part of jurisdictional issue.

It is unnecessary to adjudicate on a dispute without first determining the issue of jurisdiction. The same applies to Arbitration proceedings. This view is supported by the **Learned Author in Chitty on Contracts, 31st Ed, Vol II, Specific Contracts, at page 162** where it is stated:

> **"Tribunal can rule on its own jurisdiction. English Law has always taken the view that the arbitral tribunal cannot be the final adjudicator of its own jurisdiction. The final decision as to the substantive jurisdiction of the tribunal rests with the court. However, there is no reason why the tribunal should not have the power, subject to review by the court, to rule its own jurisdiction. Indeed, such a power (often referred to as the principle of 'kompetenz-kompetenz' has been generally recognized in other legal systems. It had also been recognized by English Law before the 1996 [Arbitration] Act, but Section 30 of the Act puts this on a statutory basis. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement……."**

I am afraid the submissions by Learned counsel for the respondents is wholly devoid of any force that the cause of action itself arises out of constitutional infringement and not on the contract agreement. With respect to any of the perspective, Learned counsel for the respondent, may hold any disputes arising out of the agreements should initially be subjected to arbitration.

Applying the test, thus propounded in the above cases, when the respondents and the appellants inserted an arbitration clause in their contract the intention, must be presumed that they were willing to abide by the effective machinery of arbitration for the settlement of disputes arising out of any clauses in the agreement.

No doubt, it is significant for me to point out that construction and interpretation of contract terms is a legal question and not a fact finding issue for the trier of facts when the arbitrator is seized of jurisdiction of the dispute he will address the issues whether they fall under Constitutional Law or under the contract entered between the parties, to first establish the arbitral tribunal jurisdiction.

In the scenario advanced by the applicant, I am certain that there would be no jurisdictional challenge which the arbitrator would have no basis to surmount to the extent to give effect to the arbitration clause in the agreement. With respect to Learned counsel for the respondents if the parties have entered into a contract and in it chosen the forum to resolve disputes by way of mediation or arbitration, truly speaking the court should give effect to that intention.

In **Insigma Technology Co. Ltd v Alstom Technology Ltd {2009} 3 SLR 936** (insigma) it was stated:

> **"Where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars so long as the burden carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party."**

In the light of the foregoing, the result of all these cases and principles is that the chamber summons dated 26.9.2019 be considered as successful by granting an order of stay of proceedings before this court and in the alternative have the dispute referred to arbitration as provided for in the agreement. The application is therefore allowed with costs to abide the outcome of the arbitration.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MARCH, 2020

.....

R. NYAKUNDI

JUDGE