REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E106 OF 2019

BURN MANUFACTURING USA LLC.....PLAINTIFF/RESPONDENT

VERSUS

SAGE SOUTH AFRICA (PTY) LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect to the application dated 27th January 2020 wherein the applicant/defendant seeks orders to stay these proceedings pending referral, hearing and determination of this dispute herein through the structured dispute resolution mechanism envisaged under Clause 12 of the Parties Agreement dated 29th May 2017.

2. The application is supported by the affidavit of the applicant's Vice President Services – Africa and Middle East **Mr. PeterJohn Patrick Bishop** and is premised on the grounds that: -

1. The plaintiff and the defendant herein entered into a Professional Business Services Agreement dated 29th May 2017 (hereinafter "the agreement") for the defendant to provide, install and implement two software products, the Sage 300 VIP People System Standard, and the Sage X3 Business Management Software System of the benefit of the plaintiff.

2. Clause 12 of the Agreement incorporate an elaborate and tiered dispute resolution mechanism comprising of settlement, mediation and arbitration, which mechanism has not been explored by parties herein despite being incorporated in the Agreement.

3. The defendant is desirous of invoking the dispute resolution mechanism enshrined under Clause 12 of the Agreement as it expressly provides that any dispute or claim arising out of or relating to the agreement would inter alia be referred to arbitration in accordance with the provisions of the applicable Arbitration Act or any amendment or re-enactment for the time being in force.

4. A dispute has arisen between the parties herein as to their respective rights and obligations under the Agreement which dispute should be determined by way of arbitration pursuant to the express terms of Agreement.

5. In complete disregard of the agreed dispute resolution mechanism under the Agreement, the plaintiff moved ahead and filed this suit on 29th April 2019 without declaring in writing that the mandatory dispute resolution mechanisms preceding litigation had been invoked and applied in resolution of the dispute between the parties.

6. Article 159(2) (c) of the Constitution of Kenya encourages this Honourable Court to promote arbitration as an alternative form of dispute resolution especially where parties have expressly incorporated the arbitration agreement in their contract.

7. So far as appertains the enforcement of the arbitration clause in the Agreement, this Honourable Court is enjoined to intervene only as specifically provided for under the Arbitration Act, 1995.

8. Section 59 C of the Civil Procedure Rules Cap 21 of the Laws of Kenya provides that any suit may be referred to any other method of dispute resolution where the parties agree, or the court considers the case suitable for such referral.

9. Furthermore, Order 46 Rule 20 (1) of the Civil Procedure Rules, 2010 stipulates that the court is not precluded from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Civil Procedure Act (Cap 21).

10. It is in the interest of justice to stay the legal proceedings instituted by the plaintiff herein and the dispute between the parties be referred to Arbitration as contemplated in the Agreement and in light of the provisions of Section 6 of the Arbitration Act.

11. That the plaintiff will not suffer any prejudice in the event that the suit is stayed and referred for arbitration.

3. The respondent/plaintiff opposed the application through the Replying Affidavit of its Financial Planning and Analysis Officer **Mr. Thomas Fannon** who states that the application is misleading and had been made in bad faith in order to scuttle these proceedings.

4. He states that while the Professional Business Service Agreement dated 29th May 2017 (the **"Agreement**") under Clause 12 incorporated a tiered dispute resolution mechanism, the arbitration process was elective and not mandatory. He states that under Clause 20 of the Agreement, the parties submitted to the sole and exclusive jurisdiction of the Kenyan Courts and waived any claim or defence that such courts are not a convenient or proper forum.

5. He further states that under Clause 12.2.4 of the Agreement, the parties have the right to elect arbitration or court litigation in the event that mediation fails. He adds that to the extent that the parties have not been able to mediate over the dispute, either party is at liberty to file the suit in court. He avers that the application is an afterthought as the defendant has been aware of the plaintiff's intention to file the suit since the year 2019 and has never suggested that the dispute be resolved through arbitration.

6. He states that because the defendant refused to resolve the dispute through mediation the plaintiff was forced to file this suit and constrained to serve the defendant abroad at great expense. He further states that there is no arbitral dispute between the parties to the extent that the defendant has admitted, via emails, that it is liable to pay the plaintiff the sum of USD 65,560, that had accrued as at 3rd October 2018, for penalties and over-payment of subscriptions fees and software systems.

7. He maintains that referral of the case to arbitration would delay the ultimate hearing and determination of the dispute herein.

8. Parties canvassed the application by way of written submissions.

Applicant's submissions.

9. The applicant/defendant submitted that it had satisfied the grounds for referral of the dispute between the parties to arbitration as envisaged under Section 6(1) and 2 of the Arbitration Act (hereinafter "**the Act**"). It maintained that it did not file defence or acknowledge the claim but proceeded to file the instant application.

10. It was submitted that the delay of 18 days between the time the defendant entered appearance and the date of filing the present application fell during the exempt period between 21st December in any year and 13th January in the following year, from computation of time for filing any pleading as provided for under Order 50 Rule 4 of the Civil Procedure Rules.

11. It was submitted that the court record indicates that the applicant's advocate wrote to the Deputy Registrar seeking assistance to retrieve the court file for purposes of filing the application and that the court file was only availed in February 2020. For the above arguments counsel cited the decision in ***Safaricom Ltd v Flashcom Ltd*** [2012] eKLR wherein it was held: -

"In the case of CORPORATE INSURANCE CO- VS- WACHIRA [1995-1998] 1EA 20 it was held that the arbitral clause in the contract in question was in the nature of a Scott-v- Avery clause which provides that disputes shall be referred to arbitration. The court went on to hold that' "In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering and pleading. By filing a defence the appellant lost its right to rely in the clause."

It is from the foregoing, that an application by the defendant ought to have been for stay of proceedings and reference to arbitration. The same should also have been made before delivering a defence. In the words of the Section, the defendant ought not to have taken any other step in the proceedings after entering appearance but to have brought this application."

12. Reference was also made to the decision in ***MITS Electrical Company Ltd v Mitsubishi Corporation*** [2018] eKLR wherein the court allowed a similar application for stay of proceedings and referral to arbitration filed 14 days after the defendant entered appearance and filed a Replying Affidavit. In the said case, the court relied on the provisions of Article 159 (2) (c) and (d) which enjoins the court to promote alternative dispute resolution mechanism without undue regard to procedural technicalities and granted an order to refer the dispute to arbitration.

13. It was submitted that the existence of Clause 12.3 of the arbitration agreement indicated that the conditions precedent before initiating court litigation had not been observed.

14. It was submitted the existence of a dispute between the parties had not been denied as shown by the delivery of the termination notice dated 17th January 2019 citing breach of contract by the defendant.\

15. It was the applicant's case that the parties are bound by their agreement. The applicant relied on the decision in ***International Consultancy Company Ltd (suing by a Power of Attorney No. P/A 65175/1 of Apexvision Limited v Telkom Kenya & Another*** [2019] eKLR in which the court held: -

"I further find that the defendants herein took the earliest opportunity, upon becoming aware of the filing the case, to seek the reference of the dispute to arbitration. My take therefore is that the issue of the reference being overtaken by events does not arise. Needless to say, the parties herein, under Clause 24 of the said Agreement chose to bind themselves to the arbitration clause and this court cannot therefore be seen to remove them from the terms of their agreement by determining this case as to do so would be tantamount to rewriting the agreement between the parties (See Musimba Investments Ltd v Nokia Corporation [2019] eKLR."

16. The applicant submitted that the parties herein should comply with the mandatory dispute resolution mechanism enshrined under Clause 12 of their agreement.

Respondent's submissions.

17. **M/S Coulson Harney LLP advocates** for the plaintiff respondent relied on the averments contained in the respondent's replying affidavit and submitted that under the provisions of Section 6 of the Arbitration Act (hereinafter "**the Act**") which provisions are mandatory in nature, the defendant ought to have filed this application its Memorandum of Appearance.

18. It was submitted that by failing to file its application within the period of entering appearance, this court is vested with jurisdiction over the matter. For this argument, counsel cited the case of ***Roofspec & Allied Works Ltd v George Kamau Thugge*** [2014] eKLR wherein it was held: -

"The mere fact that the defendant did not file its application at the time it filed it Memorandum of Appearance or as envisaged in Section 6 of the Arbitration Act brought this matter within the ambit of this court. The court became fully sized of this matter."

19. Counsel submitted that the reasons advanced, by the defendant, for the delay being inability to trace the court file and absence of signatories who were in South Africa in filing the application were not supported by any affidavit evidence.

20. It was submitted that the Act is a complete code for the resolution and determination of disputes in which case, the provisions of Order 50 Rule 4 of the Civil Procedure Rule (CPR) are not applicable in this case. For this argument, reference was made to the case of ***Anne Mumbi Hinga v Victoria Njoki Gathara*** [2009] eKLR wherein the Court of Appeal observed that: -

"…All the provisions including the Civil Procedure Act and Rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states; "Except as provided in this Act no court shall intervene in matters governed by this Act."

21. It was the respondent's case that the application is an afterthought having been filed almost a year after the initial demand was made. It was the respondent's case that the delay in filing the application is inexcusable and that the application ought to be dismissed. Reference was made to the decision in ***Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd*** [2014] eKLR wherein it was held: -

"……I should add that, the requirement in Section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through though arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration….a party who fails to adhere to the law such as Section 6(1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court. With that understanding, a delay of fourteen (14) days becomes unreasonable in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail."

22. It was submitted that the dispute resolution mechanism and arbitration agreement under Clause 12 of the Agreement is inoperative and incapable of being performed in view of the fact that it provide under Clause 12.1, for mediation under Commercial Engagement Team. Reference was made to ***Danki Ventures Ltd v Sinopec International Petroleum Services Ltd*** [2014] eKLR wherein in dismissing an application under Section 6 of the Act it was held: -

"***As alluded to earlier, the said arbitration clause appears to be incomplete as it does not specify the person who should be appointed as the Arbitrator. The Arbitration Act does not have a chairman. Therefore, even if there was a dispute that could be referred to arbitration, the party wishing to invoke the arbitration clause would not know the person who it should make an application to…. As the organization whose chairman could have appointed an arbitrator was not identified by the arbitrators, that renders the arbitral clause inoperative …. The court cannot impose on the parties either a particular arbitrator or a method for choosing the arbitrator. In the event, as the arbitral clause is inoperative, I reject the defendant's application to refer the case to arbitration."***

23. It was further submitted that under Clause 20 of the Agreement, the alternative dispute resolution mechanism is elective and not mandatorily provided for in the arbitration agreement. It was submitted that alternative dispute resolution mechanisms are optional and do not necessarily oust the court's jurisdiction. For this argument, the respondent cited the decision in ***Musimba Investments Ltd v Nokia Corporation*** [2019] eKLR wherein it was held:

"***Did the learned judge properly apply the principles for the grant of an application for stay under Section 6? We are, with***

respect, unable to disagree with the conclusion reached the learned judge. Although the agreement explicitly directed that disputes arising out of or in connection with the terms of the agreement would be settled by one arbitrator; and that the arbitration proceedings would be held in Helsinki, Finland, the same agreement also expressly gave the respondent the latitude and liberty to recover by suit instituted in "a court of any country", any money that the outstanding from the appellant or to apply to " any other court" or to " the courts of agreed territory" for injunction and other equitable relief. The exclusive jurisdiction clause in this agreement was not entirely exclusive, at it allowed certain disputes to be instituted in court and in jurisdiction outside Finland. In conclusion, we are of the considered view that this was not a proper case for staying the proceedings, and the rejection of the appellant's application was a proper exercise of discretion by the learned judge."

24. It was submitted that there is no dispute capable of being referred to arbitration in view of the applicant's admission that it was indebted to the respondent for the sun of USD 65,560. Counsel relied on the decision in ***Nanchana Foreign Engineering Company (K) Ltd v Easy Properties (K) Ltd*** [2014] eKLR wherein it was held: -

"Referral of a matter to arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view of reaching an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute. If there is no dispute which can be referred to such for a, the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, Article 50 of the Constitution of Kenya, 2010 provides that every person has a right to have any dispute decided in a fair and public hearing before a court…… The court has arrived at the conclusion that it would not be in the interests of justice to stay the proceedings herein as had been sought by the defendant for the reason that it did not demonstrate that there was indeed a dispute that was capable for referral to arbitration."

Analysis and determination.

25. I have carefully considered the instant application, the plaintiff's response, the parties' submissions together with the authorities that they cited. The main issue for determination is whether the defendant/applicant has made out a case for stay of these proceedings pending referral to arbitration.

26. The substantive provision under which Section 6 of the Act court's intervention is sought is which stipulates as follows:

6. Stay of legal proceedings

(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.

27. The obligation of the court, upon being moved under the above provision, has been the subject of numerous court decisions. In ***Niazsons (K) Ltd v China Road Bridge*** [2001] KLR it was held: -

"All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:

(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;

(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

(c) Whether the suit intended concerned a matter agreed to be referred to arbitration"

28. In ***Corporate Insurance Company v Wachira*** (supra) the court held *inter alia* that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings.

29. In ***UAP Provincial Insurance Company Ltd v Michael John Beckett*** (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the Arbitration Act. In the said case, the court had this to say:

"16. In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the Arbitration Act was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the Arbitration Act under which UAP's application for stay of proceedings was presented provides in the relevant part:

.....

it is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.

18. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

19. the provisions in section 6 (1) (b) of the Arbitration Act are similar to the provisions of Section 1(1) of the Arbitration Act, 1975 of England before its amendment by the Arbitration Act, 1996."

30. In ***Adrec Limited v Nation Media Group Limited*** **[2017] eKLR,** the court added that:

"Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration"

31. In the present case, it was not in dispute that the parties herein entered into an agreement that contained an arbitration clause at Clause 12 thereof which stipulates as follows: -

12.3.1-" Should the parties after failed mediation by agreement to refer the matter to arbitration, this arbitration shall be by single arbitrator in accordance with the provisions of the requisite Arbitration Act as amended and shall be conducted in accordance with such procedure as may be agreed between the parties or, failing such agreement, in accordance with the Arbitration Rules published by The Nairobi Centre for International Arbitration(NCIA) current at the date the arbitrator is appointed.

12.3.2. The arbitrator shall be mutually agreed upon or, failing agreement, to be nominated by the person named in the Agreement Data."

32. The respondent's case was that there was an unreasonable delay, on the part of the applicant, in making the application for referral of the dispute to arbitration.

33. According to the respondent Section 6 of the Act mandatorily requires that the application ought to have been filed together with the defendant's Memorandum of Appearance. On its part, applicant maintained that it was not able to file the application at the same time with the Memorandum of Appearance as its signatories were not within the court jurisdiction.

34. The question which then arises is whether the instant application, filed about 18 days after the filing of Memorandum of Appearance can be said to be an afterthought thus vesting this court with jurisdiction over the matter. The next question is whether the delay is excusable.

35. My take is that a reading of Clause 6(1) of the Act presents 2 scenarios regarding the filing of an application for stay of proceedings pending referral to arbitration. The Section provides that the application should be filed not later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.

36. In the present case, I note that the Memorandum of Appearance was filed on 7th December 2019 and the instant application filed on 28 January 2020 before the filing of any other pleading that can be said to be an acknowledgement of the claim. I find that the instant application was filed in time and within the period envisaged under Section 6(1) of the Act as the applicant had not taken any further steps in the proceedings prior to instituting the application apart from filing a Memorandum of Appearance. I am guided by the decision in ***Eunice Soko Mlagui v Suresh Parmar 4 Others*** [2017] eKLR wherein the court reflected on Section 6 of the Act as follows: -

"Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.

We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration. See also the ruling of the High Court, (Gikonyo, and J) in Dioceses of Marsabit Registered Trustee –vs Techno trade Pavilion Ltd, HCCC No. 204 of 2013.

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The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.

Be that as it may, to the extent that after amendment section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty versus Bedouin Enterprises ltd, CA No. 253 of 2003, this court considered section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence. (See also Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12, Corporate Insurance Co. versus Loise Wanjiru Wachira, CA 151 of 1995 and Kenindia Assurance Co. Ltd versus Patrick Muturi, CA No. 87 of 1993).

37. Turning to the respondent's argument that the applicant's reasons for the delay in filing the application had not been explained, I note that the applicant's claim was that its signatories were away in South Africa. I have perused the affidavit in support of the application and I note that the deponent avers that he resides in Johannesburg South Africa.

38. In its own replying affidavit, the respondent explains that it went to a great expense to effect service on the applicant's directors in South Africa. I therefore find that the explanation given for the delay was plausible.

39. Turning to the respondent's argument that the dispute resolution mechanism under their arbitration agreement is inoperative and incapable of being performed, for lack of definition of the Commercial Engagement Team, I note that Clause 12.1 of the Agreement stipulates that: -

"12.1.1 – The parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to the Agreement and may not initiate any further proceedings until either party has, by written notice to the other, declared that such negotiations have failed. The Commercial Engagement Team will be the forum for such negotiations.

12.1.2 Any dispute or claim arising out of or relating to the Agreement which cannot be settled directly between the parties within 30 (thirty) days of the date that the dispute has been first brought in writing to the attention of either of the parties, shall in the first instance be referred by the parties to mediation."

40. The question which then arises is whether the above clause is capable of performance and whether under the Agreement the arbitration is optional and not mandatory.

41. The respondent argued that under Clause 20 of the Agreement, the arbitration process is optional and does not oust the court's jurisdiction. Clause 20 of the Agreement stipulates that: -

"***20.1. The Agreement has been executed by both parties in the Republic of Kenya and the Services are intended to be performed in the Republic of Kenya. This Agreement, its validity, construction and effect, shall be exclusively governed by and construed under the laws of the Republic of Kenya, without regard to its conflicts of law principles, and without regard to the United Nations Convention on Agreements for the international sale of goods. Unless otherwise agreed by Sage, any dispute arising from or relating to this Agreement will be subject to the sole and exclusive jurisdiction of the Kenya courts, and both parties hereby waive any claim or defense that such forum is not convenient or proper…. Each party hereby agrees that any such court in Republic of Kenya will have in personam jurisdiction over it and consents to service of process by any means authorized by Kenyan law. Work to be performed in or received outside the Republic of Kenya will be governed by the law set forth in the applicable. Change in legislation.***

"20.2 If after the commencement of the Agreement, the cost or duration of the Services is altered as a result of changes in, or additions to, any statute, regulation or by-law, or the requirements of any authority having jurisdiction over any matter in respect of the project, then the Agreement price and Period for Performance shall be adjusted in order to reflect the impact of those changes, provided that, within 14 days of first having become aware of the Change, Sage furnished the client with detailed justification for the adjustment of the Agreement Price. In the event that the Agreement Price increases by more than 10% (ten percent) as a result of the provisions of this Clause 20.2, the client will have the right to cancel this Agreement forthwith. Should the client elect to cancel this Agreement due to an increase in the Agreement Price by more than 10% (ten percent) the client

shall be liable to Sage for the full amount of any services performed by Sage prior to such cancellation, which amount shall be payable within no later than 30(thirty) days from the date of cancellation."

42. My finding is that Clause 20 of the agreement cannot be read in isolation but must be read in conjunction with Clause 12.3.1 which provides that disputes be referred to arbitration by a single arbitrator in the event that mediation fails. In the present case, the respondent did not demonstrate that it had initiated the mediation process or made efforts to refer the dispute to arbitration before opting for the court process. I further find that Clause 12.3.1 binds the parties herein and this court cannot in the circumstances be invited to depart from the parties' clear intentions. Furthermore, Article 159 (2) (c) of the Constitution mandates this court to promote alternative forms of dispute resolution including mediation and arbitration. For the above reasons I find that the dispute herein ought to be subjected to arbitration.

Whether there is a dispute capable of being referred to arbitration.

43. It was submitted, the respondent, that owing to the applicant's admission that it was indebted to it for the sum of USD 65,560, there was no dispute capable of referral to arbitration.

44. I have perused the respondents claim as narrated in the plaint filed 29th April 2019 and note that it is for the following orders: -

a) Damages of USD 288,884 and penalties which continues to accrue thereon at the rate of USD 350 per day until payment in full.

b) Interest at court rates.

c) Costs of this suit and the interest thereon; and

d) Any other or further relief as this Honourable court may deem just and fair to grant.

45. Having regard to the above stated prayers in the plaint which far exceed the sum of USD 65, 560 that is alleged to have been admitted by the applicant, I find that it cannot be said that there is no dispute capable of being dealt with under arbitration.

46. I find that the parties herein having voluntarily agreed to subject their disputes to arbitration, cannot be seen to run away from the terms of their agreement. Needless to say, it is trite that parties are bound by the terms of their agreement.

47. For the reasons that I have stated in this ruling, I find that the application dated 27th January 2020 is merited and I therefore allow it and order that there shall be a stay of these proceedings pending referral, hearing and determination of the dispute through the structured dispute resolution mechanism envisaged under Clause 12 of the Agreement dated 29th May 2017.

48. I award the costs of the application to the applicant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muthuri for the Defendant/Applicant.

Mr. Kuyo for the Respondent

Court Assistant: Sylvia