



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 26 OF 2013

SOUTH NYANZA SUGAR COMPANY LIMITED.....PLAINTIFF

VERSUS

MEGA WHOLESALERS LIMITED.....DEFENDANT

RULING

The originating summons before the court for determination is brought by the plaintiff under section 12(3) (b) of the Arbitration Act, and Rule 3 of the Arbitration Rules. The applicant seeks a determination of the question whether:

- 1. Pursuant to the terms of the contract dated the 27th of February 2007 between it and the Defendant, an Arbitrator should be appointed to determine a dispute which has arisen as the parties have failed to agree on an arbitrator after notice to concur in such appointment.***
- 2. Who should bear costs of this application.***

It is supported by the affidavit sworn by Eunice Kitche-Oduor on the 7th January, 2012, in which she deposes that; following a contract entered into between the plaintiff and the Defendant herein, on or about the 27th day of February, 2007, for transportation of sugar to the customers/distributors of the plaintiff, within the Republic of Kenya, a disagreement has arisen due to an un-procedural overpayment that was made by the defendant.

It is averred that there is an arbitral clause in the contract but despite request for referral to arbitration, the defendant has declined and/or ignored to participate in the appointment of an arbitrator to hear and determine the dispute between them. That, it is therefore necessary in the interest of justice and in furtherance of the court's overriding powers that, the summons be allowed so that the dispute between both parties can be ventilated before the forum chosen by the parties.

When the application came up in court for hearing on the 30th January 2018, it proceeded *ex parte* as the Respondent did not file a response to the application and it also did not attend court despite having been served with a hearing date.

The court has considered the application together with the supporting affidavit and the annexures thereto.

As rightly deposed by the applicant, a sugar transport contract was entered into between the parties herein on the 27th day of February, 2007 and it's duly signed by both parties.

Under Clause 3(h) is an arbitration clause which provides that any dispute or question that may arise at any time between the two parties regarding the agreement shall be referred to the decision of two arbitrators to be appointed by the parties. It further provides that the arbitration shall be conducted in accordance with and subject to the provisions of the arbitration Act Cap. 49 laws of Kenya as may be amended from time to time.

The applicant herein contends that a disagreement has arisen and the defendant has declined to participate in the appointment of an arbitrator to hear the dispute. The applicant has annexed a letter dated 27th May 2011 to the Respondent notifying them that they have declared a dispute between the parties and that they propose to appoint Steven Gatembu Kairu as one of the arbitrators. In the same letter, they sought a confirmation from the defendant of their concurrence with the process as well as the name of their proposed arbitrator within 7 days from the date of the letter.

The applicants averred that the Defendant did not respond to the said letter and has declined to participate in the appointment of an

Arbitrator.

In view of the terms of the contract and particularly Clause 3(h), I find that the originating summons has merits and the same is allowed as prayed. I do order that parties do appoint an Arbitrator as provided for under Clause 3(h) and if the defendant declines to participate in the appointment, the Applicant shall be at liberty to appoint one without the participation by the defendant.

The defendant shall bear the costs of the application.

Dated, signed and delivered at NAIROBI this 31st day of January, 2019

L. NJUGUNA

JUDGE

In the presence of:

..... For the Defendant

..... For the Plaintiff