REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E418 OF 2018

EASTERN AND SOUTHERN AFRICA TRADE

AND DEVELOPMENT BANK .....PLAINTIFF

VERSUS

MEA LIMITED ..... 1ST DEFENDANT

CRISTLE LIMITED .....2ND DEFENDANT

LEE NGUGI ..... 3RD DEFENDANT

R U L I N G

1. **Eastern and Southern Africa Trade and Development Bank** (the Bank) has filed this action against three Defendants. The 1st Defendant is **Mea Limited** (Mea), the 2nd Defendant is **Cristle Limited** (Cristle) and the 3rd Defendant is **Lee Ngugi** (Lee).

2. The Bank's claim is in respect to the various Banking facility agreements. Those agreements were between the Bank and Mea and were entered into between 17th August 2001 and 20th January 2011. By those agreements the Bank advanced mea revolving import credit facilities not exceeding the principal sum of USD 50 million.

3. The Bank through its Plaint pleaded that the credit facility was reinstated and renewed by various Deeds culminating with the Fourth Deed of Variation dated 17th June 2014, which Deed re-instated and renewed the credit facility agreement dated 20th January 2011.

4. The Bank further pleaded that Cristle and Lee executed and issued unconditional and irrevocable guarantee guaranteeing and securing the repayment of the aforestated credit facility as well as interest, exchange rate deficiencies costs, commissions and charges accruing on that facility.

5. The Bank's case is that Mea, in breach of terms of the facility agreement failed to make payments of the sum due to the Bank. Subsequent to that failure to make payment, as aforestated, the Bank pleaded that there were negotiations between the Bank and the Defendants which resulted in the Deed of Settlement dated 26th April 2016.

6. It is also pleaded by the Bank that under the express terms of the Deed of Settlement the Defendant jointly and severally admitted the debt due to the Bank under the facility which is USD 12,641,184 as at 10th December 2015. In that Deed of Settlement the Defendants further undertook to repay to the Bank the sum of USD 10,351,708 which was negotiated and agreed as settlement amount in 60 monthly installments, commencing on 31st May 2016.

7. It is the Bank's claim in this suit that the Defendants agreed to make payment of amount due to the Bank under the facility which was as at 30th November 2018 USD 9,678,817.65. The Bank's prayer therefore is for judgment against the Defendants jointly and severally for USD 9,678,817.65 and interest until payment in full.

8. Before me are two applications.

9. The first application, in time, is a Notice of Motion application filed by the Bank and dated 19th December 2018.

10. The second in time is a Chamber Summons application, filed by the Defendants and is dated 22nd January 2019. The Bank filed a Preliminary Objection to the Defendants' said application which objection is dated 12th February 2019.

11. I will begin by considering the Defendants' application and the Bank's Preliminary Objection because if the Defendants do succeed in that application the Court need not proceed to consider the Bank's application.

CHAMBER SUMMONS DATED 22ND JANUARY 2019

12. By that Chamber Summons the Defendants seek the order that the proceedings herein be referred to Arbitration. The prayer is based on the provision in the Deed of Settlement dated 26th April 2016 more particularly Clause 3 thereof, which contained provision for dispute resolution. This is what that Clause provides:

> ***"3. Dispute Resolution, Governing Law and Jurisdiction***
>
> ***3.1 The validity, construction and performance of this Deed shall be governed by the Laws of England.***
>
> ***3.2 This Deed may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Deed.***
>
> ***3.3 Any dispute arising out of or in connection with this Deed (including a dispute relating to the existence, validity or termination of this Deed or any non-contractual obligation arising out of or in connection with this Deed) shall be referred to and finally resolved by Arbitration under the Arbitration Rules of the London Court of International Arbitration (LCIA) (the "Rules) for the time being in force, which Rules are deemed to be incorporated by reference into this Agreement. The number of arbitrators shall be three. Each party shall nominate an arbitrator and the third arbitrator, who shall be the chairman of the tribunal, shall be appointed by the LCIA Court. The seat, or legal place, of Arbitration shall be London and the language to be used in the arbitral proceedings shall be English."***

13. It is deponed on behalf of the Defendants that the Bank having agreed to resolve all disputes by way of Arbitration in accordance with Clause 3, above, the Bank ought not to have instituted this case. That the parties to that Arbitration Clause are contractually bound to refer any dispute between them relating to the Deed of Settlement to Arbitration.

14. The application is brought under Section 6 of the Arbitration Act No. 4 of 1995. That Section provides:

"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."

15. It is apt to consider the Preliminary Objection dated 12th February 2019, filed by the Bank. It raises the following objection:

> ***"PRELIMINARY OBJECTION***
>
> ***(To the Defendants' Chambers Summons dated 22nd January 2019)***
>
> ***1. The Court has no jurisdiction to hear and/or determine the Defendants' chambers summons dated 22nd January 2019, in view of the express provisions of Section 6 of the Arbitration Act, 1995 (As amended by the Arbitration (Amendment) Act No. 11 of 2009.)"***

16. In my view the Arbitration Clause in the Deed of Settlement does indeed provide for the dispute between the parties to be resolved by way of Arbitration. A careful reading of that Clause will show that parties agreed to refer for arbitral on any issue relating to "the validity, construction and performance" of the Deed of Settlement. The Bank alleges that the Defendants have failed to perform as agreed in that Deed of Settlement. It follows that the Bank's claim is a claim that should have been taken to Arbitration for resolution.

17. The Defendants referring to the decision of **OWNERS OF THE MOTOR VESSEL "LILIANS" VS CALTEX OIL (KENYA) LIMITED (1989) KLR** submitted that this Court was without jurisdiction, in the light of the Arbitration Clause and quoted from the aforestated case thus:

"Jurisdiction is everything without it a Court has no power to make one more step. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. The Defendants also relied on the case **SECRETARY, COUNTY PUBLIC SERVICE BOARD & ANOTHER V HULBHAI GEDI ABDILLE [2017] eKLR** where it was held that:

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the Court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

19. In the Bank's view the Court had no jurisdiction to entertain the Defendants' application because of the provisions of Section 6(1) of Act No. 4 of 1995. The Bank emphasized the provision under that Section which require a party to apply for stay of proceedings to do so "*not later than the time when that party enters appearance or otherwise acknowledges the claim*." The Bank relied on a Court of Appeal decision which agreed with the high Court's decision. This is in the case **LOFTY V BEOUIN ENTERPRISES LTD (2005) 2KLR** viz:

"The Learned Judge had there held that:-

> ***"In my view, Section 6(1) of the Arbitration Act, 1995, which Court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems at the object of Section 6(1) of the Arbitration act, 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings. Section 6(1) of the Arbitration Act, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings. Section 6(1) of the Arbitration Act, cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time aft her the applicant has entered appearance. Section 6(1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed."***

"We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of Section 6(1) 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 an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings."

20. The Bank also relied on the case **ACME APARTMENT LIMITED V DEEPAK KRISHNA T/A TEAM 2 ARCHITECTS & ANOTHER (2017) eKLR** where Justice Tuiyott stated thus:

"***The history of Section 6 (1), in my view, underscores that the object of the provision is to ensure that applications for stay are made at the earliest stage of proceedings. Over time, parliament has contracted the stage at which such an application can be made. Given this departure from the past, the Court is unable to hold that this provision is merely a procedural technicality."***

21. The Bank submitted that the Defendants by filing the present application for stay of proceedings ran foul of Section 6(1), of Act No. 4 of 1995, this was because it took the Defendants 34 days, from the date of filing appearance before filing the application.

22. The Bank also submitted that the facts in this matter do not support the application for stay of proceedings. This is because in the Bank's view there is no dispute capable of being referred to Arbitration.

23. According to the Defendants the dispute is that the Defendants are not in breach of the debt settlement because the period under the amortization schedule is yet to lapse.

24. The Defendants filed their Memorandum of Appearance on 19th December 2018. The Defendant thereafter filed their application for stay of proceedings under Section 6(1) on 22nd January 2019. The difference between the date of filing the Memorandum of Appearance and filing the application for stay, as submitted by the Bank, is 34 days. Indeed the said 34 days cannot, by any stretch of imagination be said to as provided under Section 6(11), that is not later than the time of filing appearance. The Court of Appeal in the case **Lofty V Bedowin (Supra)** endorsed the holding of the high Court, in that case, that is, that Section 6(1) does not permit the filing of application for stay of proceedings under Section 6(1) after the entry of Memorandum of Appeal. It is clear from the jurisprudence of the Courts, in regard to that Section, that an application for stay of proceedings can but only be filed at the time of filing an appearance. It follows that the Bank was quite right in raising its objection to the application on the ground that the application fails to meet the statutory requirements of Section 6(1). The Bank's Preliminary Objection, therefore, dated 12th February 2019, succeeds and the Chamber Summons dated 22nd January 2019 fails.

25. The application will additionally fail because I do indeed find that there is no dispute capable of being referred to Arbitration herein. This is because the Deed of Settlement dated 26th April 2016 between the Bank and Mea, Cristle and Lee provided, under Clause 2.9, the Bank right of enforcing its security and claiming from the guarantors 'all the amounts due if the settlement amount and any accrued interest, charges and expenses are not paid as agreed.' The dispute the Defendants argued was there, that the period under amortization schedule had not lapsed, is incorrect. The Bank had the power to call for the full payment if the payment schedule was not adhered to. The consideration whether there is a dispute capable of being referred to Arbitration is one that should be considered when an application is brought under Section 6 (1). This is what the Court of Appeal stated in the case **UAP PROVINCIAL INSURANCE COMPANY LTD V MICHAEL JOHN BECKETT** Civil Appeal No. 26 of 2007 where the Court discussed the same as follows:

*"In the English case of **Ellis Mechanical Services Ltd v Wates Construction Ltd (Note) [1978] 1 Lloyd's Rep 33** which was determined on the basis of the 1975 English Arbitration Act, Lord Denning, M. R at page 35 had this to say:*

> ***"There is a point on the contract which I might mention upon this. There is a general Arbitration Clause. Any dispute or difference arising on the matter is to go to Arbitration. It seems to me that if a case comes before the Court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the Court is able , on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to Arbitration. The Defendants cannot insist on the whole going to Arbitration by simply saying that there is a difference or dispute about it. If the Court sees that there is a sum which is indisputably due then the Court can give judgment for that sum and let the rest go to Arbitration, as indeed the master did here."***

1. Bridge L.J in the same case at page 37 captured the same principle as follows:

> ***"To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least £X is presently due from the Defendant to the Plaintiff? If it is, then judgment should be given to the Plaintiff for that sum, whatever X may be, and in a case where, as here, there is an Arbitration Clause the remainder in dispute should go to Arbitration. The reason why Arbitration should not be extended to cover the area of the £X is indeed because there is no issue or difference, referable to Arbitration in respect of that amount."***
>
> ***We identify fully with those pronouncements by English Courts. The words "that there is not in fact any dispute between the parties" appearing in Section 6(1)(b) of the Arbitration Act are in our view not superfluous and require the Court to consider whether there is in fact a genuine dispute when considering an application for stay proceedings. "***

26. The Defendant's application also fails because there is no dispute capable of being referred to Arbitration.

27. The Defendant's application also fails because of filing an unconditional Memorandum of Appearance.

28. As it will be recalled Clause 3 of the Deed of Settlement provided that the law to govern the determination of the validity, construction and performance of Deed shall be the law of England.

29. The Defendant having filed an unconditional Memorandum of Appearance they submitted themselves to the jurisdiction of this Court. This was the holding in two cases of the Court of Appeal namely:

> ***KANTI & CO. LTD V SOUTH BRITISH INSURANCE CO LTD [1981] eKLR***
>
> ***"I am of the opinion that the Defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not thereafter abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of the Court releasing it from its admission and acceptance of the jurisdiction. Once a Defendant submits to the jurisdiction of the Court, the Plaintiff acquires a vested interest which the Defendant cannot deprive him of at his whim by entering a conditional appearance or an appearance under protest. As long as the unconditional appearance stood, as it stands even today, the Court was seized of jurisdiction to try the suit. This is what Simpson J may have had in mind when he said that he was by no means certain that the Defendant had adopted the correct procedure."***
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> ***W K, M W K (Both suing as the Administrators of the Estate of DR. W K) & ANOTHER V BRITISH AIRWAYS TRAVEL INSURANCE & ANOTHER [2017] eKLR***
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> ***"....we agree with this Court's holding in KANTI & COMPANY LIMITED v SOUTH BRITISH INSURANCE COMPANY LIMITED (Supra), that a Defendant who enters an unconditional appearance to a summons submits to the Court's jurisdiction...."***

30. **On the above grounds the Chamber Summons dated 22nd January 2019 fails and is dismissed. Having been dismissed the costs rightly due and are awarded to the Plaintiff (the Bank). The Plaintiff is also awarded costs of the Preliminary Objection dated 12th February 2019.**

31. Although I had directed parties to submit to both the Chamber Summons dated 22nd January 2019 and the Notice of Motion dated 19th December 2018 I later on second contemplation of Section 6(2) realized that the proceedings in all other respect are stayed when the application under Section 6(1) is considered. It follows that at the reading of this Ruling a date will be given for Court to receive submissions, particularly of the Defendants, in respect to that Notice of Motion dated 19th December 2018.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH day of JULY, 2019.

MARY KASANGO

JUDGE

Ruling Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**

..... **FOR THE 3RD DEFENDANT**