



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 146 OF 2015**

**GENTION AG ..... PLAINTIFF**

**VERSUS**

**BELOILCO HOLDINGS LIMITED..... DEFENDANT**

**AND**

**BHAVASAR ANANDKUMAR t/a**

**SARAX ENTERPRISES..... INTERESTED PARTY**

**RULING**

1. On 2/11/2017, one Mr. Mwai attended the Registry on behalf of the Defendant and had the Defendant's Application dated 27/1/2016 fixed for hearing on the 30/01/2018. When parties attended court as scheduled, Mr. Kadima who appeared as holding brief for Mr. Koceyo for the plaintiff informed the court that he had perused the application and the submissions filed thereto and was conceding to the application in terms of prayer 2.

2. That prayer reads:-

**“That in the alternative, all further proceedings herein be stayed and the matter be referred to arbitration”.**

3. That prayer is disclosed at ground (h) to be anchored on clause 18 of the lease agreement which itself reads:-

**“Any dispute between the lessor and the lessee arising from the lease shall be referred to the final arbitration of a single arbiter”.**

4. The law as I understand it is that where parties agree on the forum for the resolution of their dispute then the jurisdiction of this court is postponed till the contract between the parties choosing the forum is complied with<sup>[1]</sup>. This position of the law is informed by equally established principle of law that parties are entitled to their bargain being the best custodians of their contractual interests and that the court has no business nor right to write for the parties the terms of their contract<sup>[2]</sup>.

5. From the papers filed by the plaintiff and accepted by the defendant being the lease, it is not in doubt that the parties agreed that their first part of call incase of a dispute would be the single arbiter appointed

in terms of clause 18 who would apply the law of Switzerland. Infact the document says “the only competent jurisdiction is the jurisdiction of the city of NYON, Switzerland.

6. It is that contract the Defendant sought to enforce by the application dated 27/1/2016 and which the plaintiff unequivocally informed the court it wishes not to oppose.

7. This court proceeds from the learning that the court exists to determine dispute presented before it by parties and should never enter a dispute where parties agree.

8. That position was well captured by the court of Appeal in the decision in *VAP Provincial Insurance Co. Ltd vs Mordecai Mwangi Nandwa* when the court said:-

**“The fallacy lies in treating a private dispute between two as if it was a litigation belonging to the court or judge personally this is not so”.**

9. Here the defendant sought that the matter be referred to arbitration and the plaintiff says it concedes to the request. I infer that there is no dispute on whether or not the matter ought to be referred if the party were to be left to enjoy their bargains. I would see no reason to employ judicial time in delaying the matter by conducting an inquiry on a request by the defendant which is conceded by the plaintiff. To do otherwise would be to invite the fallacy the court appeal abhorred way back in 1996.

10. I allow the application and order that further proceedings in this suit shall be stayed and the entire dispute referred to the arbitration by a single arbiter appointed pursuant to clause 18 of the lease between the parties dated 9/6/2011.

11. Let the appointment be made within 30 days from today and an award be lodged in court within 160 days from the date of appointment. Let the parties attend court on the 20/9/2018 to report on the progress made in the arbitral proceedings.

Dated and delivered at **Mombasa** this **30th** day of **January 2018**.

**P.J.O. OTIENO**

**JUDGE**

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**[1] Tononoka Steels Ltd vs Eastern and Southern Trade and Development Bank quoted with approval in Niazons (K) Ltd vs China Road and Bridge Corporation [2001] eKLR**

**[2] National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another (2002) EA 503**