REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 132 OF 2016

MITS ELECTRICAL COMPANY LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

MITSUBISHI ELECTRIC COPORATION.....DEFENDANT/APPLICANT

RULING

This Ruling seeks to determine two applications by the Defendant/Applicant one dated 10th August, 2016 and the other dated 24th February, 2017. I will begin with the latter.

Application dated 24th February, 2017

The Application seeks orders that the default judgment entered on 20th December, 2016 be set aside and the Applicant's Application dated 10th August, 2016 be fixed for hearing at a date that is mutually convenient for the parties. The Application is premised on the grounds on the face of the same as well on the Supporting affidavit of **TOMOICHIRO TAKAYAMA** dated 24th February, 2017 that the Respondent filed a suit on 9th May, 2016 seeking *inter alia* judgment for a colossal sum of Kshs. 1,290,500,000 on account of breach of distributorship agreement. The Applicant deponed that the claim is subject to a distributorship Agreement dated 9th June, 1999, Memorandum of Understanding dated 1st February, 2009, Memorandum of Understanding for Collaboration dated 1st March 2014 and Memorandum of Understanding for Sales dated 1st March, 2014 all of which provided that disputes arising from the Agreement for breach thereof which cannot be settled by mutual accord should finally be settled by arbitration in Tokyo, Japan.

The Applicant further depones that the Respondent also filed a Notice of Motion dated 9th May, 2016, seeking orders barring the Applicant from contacting or interfering in any manner with the Respondent's employees, contacts, customers and business which application was granted in the said terms. The applicant entered appearance under protest on 9th August, 2016 and on 23rd August, 2016 filed an application under the provisions of section 6(1) of the Arbitration Act seeking stay of the proceedings and reference of the matter to arbitration. The applicant avers that on 22nd December 2016, they instituted arbitration proceedings in Japan but when their Advocates attended the Court registry on 21st February, 2017 and fixed the application dated 10th August, 2016 for hearing on 21st March, 2017, they learnt that a default judgment had been entered on 20th December, 2016. The Applicant relies on section 6(2) of the Arbitration Act which provides that proceedings before court shall not be continued after an application under section 6 (1) of the Arbitration Act has been made and the matter remains undetermined.

The Application was opposed by the Plaintiff/ Respondent who filed a Replying Affidavit dated 20th March, 2017 and sworn by **SATYA GANDHI**, the Managing Director of the Respondent who deponed that the Application is fatally defective as it lacks exhibits in support of the averments in the Supporting Affidavit including the default judgment. It was also deponed that the orders sought are *Res Judicata*. That the application dated 10th August, 2016 is bad in law having been lodged 15 days after the Applicant entered Appearance and the default judgment was properly obtained since section 6 (2) of the Arbitration Act is not applicable in the circumstances.

The Applicant filed a Supplementary Affidavit responding to the issues raised by the Respondent. In the said Supplementary Affidavit dated 12th April, 2017, the Applicant submitted that all the evidence relied on by the Applicant comprises of the pleadings filed, which are in the court file.

The application was canvassed by way of written submissions. The Applicant filed submissions dated 20th April, 2017 and relied on the provisions of section 6 of the Arbitration Act which provides that,

> **"6(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."

The Plaintiff relied on the case of **Kenya Broadcasting Corporation v National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) [2015] eKLR** where it was held that, ***"…once a defendant files an application for stay of suit and seeks for referral of the matter for arbitration, he/she is not expected to file a defence to the claim, until or unless the court determines that application dismissing it thereby paving way for an opportunity to file defence. This is, however, not to say that the application for stay of suit or for referral to arbitration is per se arbitration proceedings. It is an attempt to refer the matter to arbitration, which at the end of it all, the defendant must satisfy the court that the proceedings are arbitrable, to warrant an order of the court in its favour.***

It is for the above reasons that I find that the interlocutory judgment entered against the defendant on 3rd August 2015 in default of defence was improper, and I would proceed to set it aside exdebito justiciae to pave way for the setting down for hearing the defendant's application filed on 16th July 2015 interpartes."

… This court is conscious of the need to dispense justice without undue delay and without undue regard to technicalities as espoused in Article 159 of the Constitution. Nonetheless, it must indeed act within the confines of the law and guard against the temptation to dispense justice through short cuts which are wrong cuts which are likely to deny justice to a party. It would be a traversity of justice, in my view, if a court of law would refuse to hear a party on a pending application merely because it lacked merit without first hearing both parties on its merits and demerits and or dispensing with it as provided for by law. To deny the subject a hearing should be the last resort of a court. I also find that no prejudice will be occasioned to the plaintiff if the exparte judgment is set aside."

The Applicant also relied on **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR** where it was held that, ***"It is therefore my view, and I so hold, that section 6(2) of the Arbitration Act, 1995, does not permit parallel proceedings to be handled simultaneously. Consequently, it was not open to the respondent to take out an application for stay of proceedings and at the same time file a written statement of defence. As stated in the Joab Omino case (supra) the bringing of an application for stay of proceedings under rule 6(1) of the Arbitration Act, 1995, the respondent's duty to file a written statement of defence was suspended."***

Therefore, the Applicant submitted that by entering a default judgment while the Applicant's Application under section 6 (1) of the Arbitration Act was pending, the court purported to continue with the proceedings herein in direct contravention of the express mandatory provisions of section 6 (2) of the Arbitration Act.

The Respondent filed submissions dated 4th May, 2017 and submitted that the Application is defective as the Applicant failed to attach the default judgment and documents relied on and that the Applicant irregularly proceeded to aver that it will rely on the documents filed in the matter as evidence. The Respondent relied on the case of **SAMUEL NDUNG'U KIMANI v ROBERT GIKURA NJOROGE [2009] eKLR** where the Court held that,

"12. There is another issue that has been raised by the Respondent against the Applicant's application, and that is that this application should be dismissed on grounds that the order which is sought to be reviewed and/or set aside has not been annexed to this application. It is now an accepted judicial procedure that any application for review must be accompanied by the order which is sought to be reviewed and or set aside. The Applicant in this case made no effort whatsoever to annex the order complained of to his application. It is not the duty of this court to turn the pages of the court file to find material which the Applicant should have placed before it. On this ground therefore, I would dismiss the Applicant's application."

The respondent also submitted that the matter is *Res Judicata* and offends the provisions of section 7 of the Civil Procedure Act. The Respondent also made submissions in respect to the Application dated 10th August, 2016 which submissions I will consider while determining that application.

I have considered the submissions by both parties.

Section 6 (2) of the Arbitration Act would be applicable in this application which states that, "***(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined***."

Therefore, as long as there is an application to stay proceedings in a suit pending its referral to arbitration the Court should not proceed with the suit before determining the application. The said application was filed on 23rd August, 2016 whereas the default judgment was entered on 20th December, 2016. This in essence means that by the time the default judgment was entered the Application had already been filed. The Respondent has further submitted that the said application dated 10th August, 2016 was filed out of time and that since the instant Application did not have the supporting documents annexed, as well as the default judgment, the application is defective. Whether the application dated 10th August, 2016 was filed out of time is a matter which I will consider within the Application. As to the failure to annex the default judgment, the Applicant referred the court to the documents already filed. I do not find that, a fatal omission, to warrant dismissal of the application since the mentioned documents are part of the record.

As was correctly held in the case of **Niazsons (supra);** ***"It is therefore my view, and I so hold, that section 6(2) of the Arbitration Act,***

1995, does not permit parallel proceedings to be handled simultaneously. Consequently, it was not open to the respondent to take out an application for stay of proceedings and at the same time file a written statement of defence." I also take the view that since the Applicant had contested the jurisdiction of the Court to hear the matter as there is an arbitration clause in the agreement, the Applicant was not expected to file a Statement of Defence before having the Application dated 10th August, 2016 heard and determined as doing so would amount to conceding to the jurisdiction of the Court.

The Respondents has submitted that the instant application is *Res Judicata*. I do not think so. This application seeks orders to have a judgment entered in default set aside whereas the application dated 10th August, 2016 is for stay of proceeding pending reference of the suit to arbitration. Section 7 of the Civil Procedure Act provides that, "***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***"

The matter in issue in the application dated 24th February, 2017 is not substantially the same as the matter in issue in the application dated 10th August, 2016.

The upshot of the above is that I allow the application for setting aside of the default judgment entered on 20th December, 2016.

Application dated 10th August, 2016

This Application seeks orders that pending reference of the dispute to arbitration and/ or resolution of the dispute between the Applicant and the Respondent, there be a stay of proceedings in the suit. The Applicant also sought an order that the injunction order issued ex parte in favour of the Respondent on 9th May, 2016 be set side and the costs of the application be provided for.

The Application is supported by the Supporting and further Affidavits of **TOMOCHIRO TAKAYAMA**, the general manager of the Applicant who averred that as long as the cause of action is not statutory barred, the arbitration clauses are binding on the parties. That the distributorship agreement dated 1st February, 2009 and relied on by the Respondents in the Application dated 9th May, 2016 was never signed by the Applicant and therefore is not binding on the Applicant. The Applicant also avers that the ex parte injunction order prevents the Applicant from contacting or interfering in any manner with the Respondent's employees, contracts, customers and business which is grossly unfair to the Applicant as the same is too wide. The Applicant pleaded with the court to have the proceedings stayed, for the matter to be referred to arbitration and the exparte injunction order issued be set aside.

The Respondent filed a Replying Affidavit sworn by **SATYA GANDHI** on 20th March, 2017 who averred that the presence of an arbitration clause in any agreement is no bar for a party to seek interrim reliefs from this court as set out in section 7 of the Arbitration Act, that the Court has the mandate to determine claim of violation of constitutional rights and that the Respondent's cause of action is premised on articles 40 and 46 of the Constitution.

The Applicant filed submissions dated 8th December, 2017 and submitted that the Respondent's customers are consumers of the Applicants products and the injunctive orders prevents the Applicants from contacting the respondents employees, contractors, consumers and business or interfering with them in any manner which they submitted is grossly unfair. The Applicant further submitted that the Respondent is trying to confuse the court that the matter raises constitutional question which is not correct since had that been the case, the respondent would have filed his claim in the Constitutional and Human Rights Court. That the Applicant has already instituted arbitration proceedings which are currently underway in Tokyo, Japan and the Respondent has been participating in them.

The Respondent also filed their submissions dated 17th January, 2018 and submitted that for a party to rely on section 6 (1) of the Arbitration Act, the application for stay of proceedings and reference of the matter to arbitration must be filed at the same time when that party enters appearance. On this, the Respondent relied on the provision of section 6 of the Arbitration Act,

The Respondent also relied on the case of **Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR** where it was held that, ***"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."***

> The Respondent also relied on the case of **Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd [2014] eKLR** where Justice Gikonyo held that
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> > **" The court too takes the same view but 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 arbitration by providing for stay of proceedings but only where a party is 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."**

In order to justify that the Court had the jurisdiction to grant the interim order, the Respondent relied on section 7 of the Arbitration Act which provides that,

> **"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."**

Having considered this Application and the Parties submissions, I do find that the interim orders issued on 10th May, 2016 are proper as the court had the jurisdiction so to issue. Section 7 of the Arbitration Act empowers this Court to issue orders regardless of the presence of an arbitration clause in an agreement. In the Application for the interlocutory orders, the Respondent had expressed their fear that if the Applicant is not estopped from dealing with its customers, it would poach them and jeopardise the Respondents business.

It is clear that for a Court to entertain an application for stay of proceedings, the said application ought to have been filed not later that the date when a party enters appearance. In the instant application, the Applicant entered appearance on 9th August, 2016 and the instant application was filed on 23rd August, 2016. I find that the circumstances of this case are peculiar for two reasons. One, the fact that the Applicant entered appearance under protest and the parties have instituted arbitration proceedings and the Respondent has submitted themselves to the arbitral process in that they here participated in it. Secondly the jurisdiction to which the parties have submitted themselves to in that the contract would be interpreted in accordance to the law of Japan.

In the Applicant's Supporting Affidavit, it was deponed that the applicant entered appearance under protest on 9th August, 2016 and on 23rd August, 2016 the Applicant filed an application under the provisions of section 6(1) of the Arbitration Act seeking stay of the proceedings and reference of the matter to arbitration. This was not controverted by the Respondent. It was further argued that the reasons why the Applicants failed to file defence was because by doing so, they would have submitted to the jurisdiction of this court. The Applicants nonetheless filed the application to stay proceedings 14 days later.

In dispensing justice, a court of law ought to consider the circumstances of each case in whole without due regard to procedural technicalities. The intention of the parties in entering appearance under protest was clear in the circumstances of this case as what they were protesting was the jurisdiction of the court to hear the suit. When faced with a similar situation like this, the Court of Appeal in the case of **Family Bank Limited v Kennedy Moruri Mokua t/a Moco Auctioneers [2017] eKLR** held that:-

> "20. Though the applicant (respondent herein) filed a Notice of Motion application against the respondent (appellant herein) the proceedings show that the appellant seized the first opportunity to raise the issue of arbitration in his replying affidavit though ideally the same ought to have been raised by way of a preliminary objection. However, by the dint of the provisions of Article 159 of the Constitution which frowns upon procedural technicalities, the right and duty of this court to refer this matter to arbitration has not been extinguished. The Court of Appeal, when faced with a similar scenario had the following to say in the case of **Kisumuwalla Oil Industries Ltd Vs. Pan Asiatic Commodities PTE Ltd & Another CA No. 100 of 1995 (unreported)**:-
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> **"In view of the reasons I have endeavoured to state above, and in light of the clear provisions of Section 6 of the Arbitration Act, unless the defendant waives his right to rely on such a clause he would be obliged to apply for a stay of proceedings."**
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> '21. I find that even though the appellant did not seek for stay of proceeding in the trial court, he filed a replying affidavit in which clause 8 of the Service Level Agreement on dispute resolution was invoked. Under those circumstances, the trial court should have stayed the matter before it pending the outcome of the arbitration in line with clause 8 of the Service Level Agreement."

In the instance case, the distributorship Agreement and Memorandum of Understanding in question had clear provisions that disputes which could not be determined by mutual accord were to be referred to arbitration in Tokyo, Japan pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Japan. It has not been disputed that the arbitration clause was operational neither has it been disputed that there is a dispute in terms of the arbitration clause. It was deponed as well submitted by the Applicant that they have already instituted arbitration proceedings which are currently underway in Tokyo, Japan and the Respondent has been participating in them which position was not denied by the Respondent.

In the circumstances of this case, I find that it would be prejudicial to allow parallel proceedings to take place in this court when the parties have instituted arbitration proceedings in Japan. The court of Appeal frowned against concurrent proceedings taking place in the case of **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR** where it was held that, **"it is therefore my view, and I so hold, that section 6 (2) of the Arbitration Act, 1995, does not permit parallel proceedings to be handled simultaneously. Consequently, it was not open to the respondent to take out an application for stay of proceedings and at the same time file a written statement of defence."**

Notwithstanding the foregoing, it was also expressly stated in the aforementioned agreements that the validity, construction and effect of the agreements was to be governed by the laws of Japan. Therefore, in view of the aforegoing and in the special circumstances of this case, I find that it is only reasonable that the proceedings in this court be stayed and the dispute be referred to arbitration.

In the end, the orders of the court are that the default judgment entered on 20th September, 2016 is set aside and the dispute is referred to arbitration in accordance with the terms of the arbitration clause.

Dated, Signed and Delivered at Nairobi this **19th** Day of **March, 2018.**

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Applicant

…….. For the Respondent