



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 1088 OF 2002

MOHAMED MUNIR CHAUDHRI.....PLAINTIFF

VERSUS

CAPTAIN MUSA HASSAN BULHAN.....1ST DEFENDANT

EQUATOR AIRLINES LIMITED.....2ND DEFENDANT

AFRICAN EXPRESS AIRWAYS (K) LIMITED.....3RD DEFENDANT

RULING

1. The Share Transfer Agreement of 27th October 1998, entered between Mohamed Munir Chaudhri (**the Plaintiff herein**) and Captain Musa Hassan Bulhan (**the Defendant**) provided for dispute Resolution by way of Arbitration.

2. The Arbitral clause read as follows:-

“Any dispute which may arise out of these presents shall be referred to a single Arbitrator whose Award shall be binding on all the parties hereto, namely Mohamed Aslam”.

3. As it sometimes happens, a dispute arose and the Plaintiff filed this suit on 5th February 1998. The suit was against the 1st Defendant co-sued with Equator AirlineS Ltd (the 2nd Defendant) and African Express Airways (k) Ltd (the 3rd Defendant). All the three Defendants Entered Appearance on 27th October 1998 and filed a joint Defence on 6th November 1998.

4. Seventeen (17) years later, the Defendants have filed a Notice of Motion dated 9th August 2016 for the following orders:-

1. THAT this Honorable Court be pleased to stay these proceedings and to direct that the dispute herein be referred to arbitration in accordance with clause 7 of the Memorandum of Agreement dated 27th October 1988.

2. THAT the costs of this application be provided for.

The Application is brought under the auspices of among other provisions of the law, Section 6 of the Arbitration Act.

5. Section 6 of the Arbitration Act provides as follows:-

“(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”.

6. This Application was always going to be a cropper. First it is common ground that the parties appointed a named and specific person, one Mohamed Aslam as the person who would comprise the Arbitral Tribunal to resolve any dispute arising. It is also common ground that the said Mohamed Aslam died on 18th November 1991. For that reason the Arbitration Agreement is incapable of being performed.

7. At any rate the Defendants have filed this application after Entering Appearance and filing Defence. They have come later than the time permitted by Section 6(1) of the Act. This position is so well known that it is needless for this Court to cite any of the many decisions that affirm it.

8. The Notice of Motion of 9th August 2016 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 9th day of March, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Achuolo for Applicant

N/a for Respondent

Nixon–Court clerk