REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 8 OF 2018

ROCKEY AFRICA LIMITED.....APPLICANT

-VERSUS-

MINISTRY OF EDUCATION,

SCIENCE & TECHNOLOGY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. ***Rockey Africa Limited*** (*the plaintiff*) filed this action on ***10th January 2013*** seeking judgment against the ***Ministry of Education Science and Technology*** (*the 1st defendant*) for specific performance in regard to products delivered but not accepted by the ministry and for judgment for ***ksh 123,794, 665.***

2. The defendant has raised a preliminary objection (PO) in the following terms:

> *"Take Notice that the 1st and 2nd Defendants shall on the hearing date hereof raise a preliminary objection on the ground that this Honourable Court has lacks the jurisdiction to hear and determine this matter. The Defendants and the Plaintiff are bound by the contract they made to refer any dispute that will arise therein to adjudication or arbitration pursuant to Arbitration Act, 1995. WHEREFORE the 1st and 2nd Defendants shall seek to matter be referred to arbitration as agreed by parties in the subject contract, section 6 of the Arbitration Act, 1995 and Article 159 (2) (c) of the Constitution."*

3. The PO is brought under the provisions of Section 6 of the Arbitration Act Cap 49 which provides as follows:

> *"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 or 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."*

4. Apart from the above notice of PO, the defendants did not file any other document in relation to its transaction between the plaintiff and the 1st defendant. It follows that the court only has the plaintiff's claim, witness statements and the bundle of documents to determine whether this suit should be stayed as sought by the defendants.

5. The plaintiff's claim as supported by the witness statement and the plaintiff's bundle of documents is for goods supplied in accordance with the 1st defendant's order for which payment has not been effected. The plaintiff pleaded that on ***25th September 2012***, the plaintiff and the 1st defendant entered into a valid contract for the supply of basic learning support material for maths and science subjects in the secondary schools. In accordance with that contract the plaintiff pleaded that it supplied the said goods and delivered them but the 1st defendant selectively accepted some and rejected others.

6. The plaintiff referred to a letter dated ***8th April 2016*** written by the principal secretary (PS) of the 1st defendant in the following terms:

> *"REF:MOE.SCHM/7/31 8th April, 2016*
>
> *The Managing Director*
>
> *M/s Rockey Africa Ltd*
>
> *P.O. Box 2680-00100*
>
> *NAIROBI*
>
> *RE: SUPPLY OF BASIC LEARNING SUPPORT MATERIALS FOR MATHS & SCIENCE TENDER NO.MOE/033/EDUC/2011-2012: SUPPLY OF LABORATORY EQUIPMENTS TO 49 SPECIAL/INTERGRATE SECONDARY SCHOOLS.*
>
> *CONTRACT AGREEMENT NO. 25/2012-2013*
>
> *The Ministerial Tender Committee at its meeting No. 12/2015-2016 (Min.3) held on 7th April, 2016 concurred with the advice of the secretariat that these goods should be received and paid for at a cost of Kenya Shillings twenty four million, one hundred and fifty four thousand, six hundred and sixty nine only Kshs 24,154,669.00 by the Ministry.*
>
> *This is therefore to notify you to supply the goods immediately as per the contract agreement.*
>
> *MR. KENNETH MWANGI*
>
> *FOR PRINCIPAL SECRETARY."*

7. The plaintiff further pleaded that the 1st defendant despite that letter did not accept the rejected goods nor pay the plaintiff for the goods supplied. The plaintiff stated that the goods, the subject of the contract, were exempt from tax and that accordingly the plaintiff cannot sell them in the open market to recoup its loss. That as a consequence the plaintiff has had to store the rejected goods which has escalated the amount the 1st defendant owes it to ***Ksh 123,794,665.***

8. As stated before the defendant did not file any document in this matter, other than filing he PO under consideration.

9. A close scrutiny of Section 6 of Cap 49 will reveal that where there exists an arbitration clause the court can decline to stay court proceedings if the court determines that the arbitration clause is null and void inoperative or incapable of being performed or where the court finds that *'there is not infact any dispute between the parties'*.

10. I confirm that the contract betwen the plaintiff and the 1st defendant has a valid arbitration clause. It follows that part 6 of Cap 49 is satisfied.

11. The defendant had an obligation, in seeking to stay this proceedings to show that there is a dispute capable of being referred to arbitration. With the material before me, I find that there is infact no dispute. The 1st defendant through its PS acknowledged the plaintiff's principal debt. What then is there to be referred for arbitration?. In my considered view, there is nothing for referral.

12. In the case of **UAP Provincial Insurance Company Ltd v Michael John Beckett**, the court of appeal held:

> *"it is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6 (1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.*
>
> *The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. Was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute."*

The decision of **Mutungi J**, that the court of appeal referred to with approval above is as follows:

> *"...I hold that there is no dispute between the parties to warrant reference, to arbitration. The differences, if any, were sorted out by the parties themselves, prior to the agreement concluded on 13th November 1996 in the terms therein. The existence of the arbitration clause in the Insurance Policy in this case is no bar to the action before this court in respect of the admitted claim of Kshs. 6 million. It is illogical for the Defendant to seek stay of proceedings simply because there is an arbitration clause in the policy document, unless he can demonstrate that there is a dispute."*

13. In view of the above decision, and my finding, that there is no dispute, to be referred for arbitration, the PO dated ***4th June 2018*** fails and it is dismissed with no orders as to cost since the plaintiff did not participate in the hearing. This matter shall proceed before this court in the normal course.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Applicant

..... for the 1st Respondent

.....for the 2nd Respondent

MARY KASANGO

JUDGE