



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 94 OF 2018**

**TITUS KITONGA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**TINA HOLDINGS LIMITED.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**TOTAL KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ENERGY REGULATORY COMMISSION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The subject application herein is dated 27<sup>th</sup> March 2018 and filed in court on 3<sup>rd</sup> April 2018 by the 1<sup>st</sup> Defendant (herein “the Applicant”). It is brought under the provisions of Article 159(2) of the Constitution of Kenya, 2010, Section 6 of the Arbitration Act, Cap 49, Laws of Kenya and Rule 2 of the Arbitration Rules, 1997.
2. The Applicant is seeking for orders that, the suit be stayed pending referral hearing of the dispute through arbitration process. That the dispute herein be referred to arbitration for hearing and determination and the costs of the application be provided for.
3. The Applicant avers through the grounds and affidavit sworn in support of the application by Rosemary Wakaba, the Plaintiff (herein “the Respondent”) and the Applicant entered into various Market License Agreements (herein “MLAS”) in relation to three Total Petrol Stations owned by the Applicant namely; Machakos, Karen and Limuru Road. That, Article VIII (iv) of the MLAS, provides that, any dispute, difference or question relating to the construction, meaning or effect of the MLAs be referred to arbitration in accordance with the Arbitration Act (1995) or any amendment or re-enactment for the time being in force.
4. That a dispute has arisen between the parties herein in relation to their respective rights and obligations under the MLAs which dispute should be determined by way of arbitration process pursuant to the express terms of the MLAs. However, in total disregard of the arbitral clause, have filed this suit. Hence the Court should intervene and stay the proceedings and order the matter be referred to arbitration.
5. However, the application was opposed by the Respondents vide a Replying affidavit dated 26<sup>th</sup> April, 2018, sworn by Titus Kitonga, the Managing Director of the 2<sup>nd</sup> Respondent. He conceded that, the parties entered into the aforesaid MLAs and that the same contains an arbitration clause. However, the Applicant terminated the said MLAs, without due regard to the said clause, and forcefully took over the subject petrol service stations. It was argued that it will be unfair for the Applicant to invoke the clause after the suit is filed. Further, as a result of the terminated agreements, there is no binding contract between the parties and the clause cannot be invoked.
6. It was argued that, the circumstances of this case are different, as the Plaintiff/Respondent has also sued the 2<sup>nd</sup> Defendant/Respondent who is not a party to the MLAs, who has no obligations or rights there under and not bound by the provisions thereof, cannot be dragged to arbitration. Thus if the application is allowed, the 2<sup>nd</sup> Defendant/Respondent will be prejudiced.
7. Finally, the Respondents urged that the Applicants have come to court with unclean hands following the termination of the MLAs, therefore the application lacks merit and should be dismissed with costs to the Respondents.
8. The 2<sup>nd</sup> Respondent, informed court on 30<sup>th</sup> April 2018 that it was not participating in the subject application.

9. Be that as it were, the participating parties agreed to dispose of the application by filing submissions which I have considered in this ruling. I find that, the key issue to determine is whether the Applicant has made out a case for grant of the orders sought.

10. The parties raised several issues for consideration and I summarized as follows:-

(a) Whether there is a valid “agreement” between the parties;

(b) (if so), whether there is an arbitral clause therein;

(c) Whether, a dispute has arisen between the parties;

(d) Whether the matter should (if there is an arbitral clause), be referred to arbitration;

(e) Whether the alleged termination of the agreement, had any legal effect of the arbitral clause in the agreement;

(f) Whether, the 2<sup>nd</sup> Defendant who is not a party to the agreement herein can be subjected to arbitral proceedings; and/or will be prejudiced by the arbitral process; and

(g) If not, whether the court can still order that the matter goes to arbitration.

11. I shall consider the 1<sup>st</sup> issue, jointly with the 2<sup>nd</sup> issue. In that regard, I find that, there is no dispute that the 1<sup>st</sup> Defendant/Applicant granted the Plaintiffs/Respondents a marketing license on 1<sup>st</sup> December 2014, to operate its Machakos Total Petrol Station, and on 1<sup>st</sup> April 2012 to operate the Limuru Road Petrol Station. Apparently, the copy of the agreement (attached to the supporting affidavit) in relation to Karen Petrol Station Services does not show the date it was executed, (as the copies provided, show page 1 thereof and omit all the other 9 pages, and then moves to page 10). However, the plaint indicates the date as 17<sup>th</sup> March 2011.

12. Be that as it were, MLAs contains clause (VI), which provides for settlement of disputes, and recognizes Arbitration as the agreed forum for settlement of disputes between the parties. It is indeed conceded by the Respondents under paragraphs 4 and 5 of the Replying affidavit, that, the parties “entered into the stated agreements” and the “said agreement had the provisions of an Arbitration clause”. Therefore it is not in dispute that the parties entered into the subject MLAs which contains an arbitral clause.

13. The third issue relates to the alleged dispute that has arisen. I shall consider this issue alongside two other issues namely; whether, the said dispute is among the disputes contemplated to be referred to arbitration and/or whether the referral of the same has been overtaken by intervening circumstances; being the termination of the Agreements.

14. To determine whether a dispute has arisen, one must have regard to the nature of prayers sought for, in the plaint. The Plaintiffs/Respondents allege that, the 1<sup>st</sup> Defendant/Applicant has generally frustrated its businesses, forcing it to close them down. That the Applicant was selling to the Respondent Petroleum products at a price higher than the authorized and/or gazetted price. That rent, service charge plus VAT; commission on dealers charges plus VAT for all the three Petrol stations charged were unlawful.

15. It is therefore clear that, the alleged acts of breach of contracts fall squarely within the nature of the business of operating a Petrol station services and which was covered under the MLAs as stated under the preamble thereto. Article (IX); governs the general provision whereas clause (IV) states that;

*“if at any time, during the continuation of this Agreement, any dispute, different, or question relating to the construction meaning or effect of this Agreement or of any clause herein arises between the parties, then the aggrieved party shall give a written notice of not less than 21 days to the other party herein.....”*

16. In my considered opinion, the dispute herein falls under Article (IV), that deals with “commercial terms” which include clause (vi) on pricing and margins and article (vii) that deals with termination of the Agreement. I therefore find and hold that the issues raised in the pleadings refer to the matters agreed on by the parties and which are a subject of arbitration.

17. The next issue to consider is whether, the termination of the contract, rendered the arbitral clause inoperative. The Applicant submitted extensively on the issue, arguing that under the principle of separability, the arbitral clause survives the termination of the contract. Reference was made to the cases of; Nedermar Technology B.v. Ltd vs Kenya Anti Corruption Commission & Another 2006 eKLR and The Branch Manager Magama Leasing & Finance Ltd & Another vs Potluti Madhavilata & Another Civil Appeal No.6399 of 2009.

18. However, the Respondent on its part maintained that, even if the arbitration clause between the Plaintiff/Respondent and the 1<sup>st</sup> Defendant/Applicant still survives, the same cannot bind the 2<sup>nd</sup> Defendant/Respondent, as the 2<sup>nd</sup> Defendant/Respondent was not party to the MLAs.

19. In my considered opinion, the law is settled that an arbitration clause in contract between the parties is considered as independent, separate and severable from the main contract. The doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract and vice versa. Therefore the illegality or termination of the main contract does not affect the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract. The obligation to resolve all disputes by arbitration continues even if the main obligation or indeed the contract expires or is vitiated.

20. Thus separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the party's intention to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal.

21. In the same vein, Article 16 of the Model Law and Section 17(a) of the Arbitration Act of No. 4 of 1995, clearly states that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". I therefore concur with the submissions of the Applicants that, the termination of the MLAs herein has no legal effect on the arbitral clauses therein.

22. That leads me to the issue of the 2<sup>nd</sup> Defendant/Respondent who is not a party to the subject MLAs herein, and in particular whether they can be forced to go to arbitration. The Plaintiffs/Respondents argued that the 2<sup>nd</sup> Defendant/Respondent is a necessary party in this proceedings as evidenced by the reliefs sought against it. Reference was made to the cases of; *Srivenkateswara Constructions vs The Union of India (AIR) 1974 at page 278* and *Cakoo vs Asian Refractories Ltd (1969)*.

23. However, the 1<sup>st</sup> Defendant/Applicant argued that, first and foremost, the 2<sup>nd</sup> Defendant/Respondent is not opposed to the application for referral of the dispute to arbitration and secondly, the mere joinder of a third party does not in itself automatically defeat the operation of the arbitration clause. Reference was made to the cases of; *Srivenkateswara Constructions (supra)* and *John Halland Property Ltd vs Kellong Brown & Root Property Ltd (2015) NSWSC 451*.

24. It was argued that, the reliefs against the 2<sup>nd</sup> Defendant/Respondent are purely a matter of an opinion from the 2<sup>nd</sup> Defendant/Respondent, which is not binding on anyone. Further, the claims against the Defendants are "milestones apart in fact heaven and earth". Thus, the same cannot prevent the stay of the proceedings and/or referral of the dispute to arbitration. Reliance was placed on the case of; *Harbour Assurance Company (UK) vs Kansa General International Insurance Company Ltd (1993) QB 701 at 726*.

25. I have considered the arguments on the subject issue and I find that, indeed the 2<sup>nd</sup> Defendant/Respondent opted not to participate in the hearing and determination of this application. Therefore, whether, they support or oppose the application is not clear. Be that as it may, it is not in dispute that indeed, the 2<sup>nd</sup> Defendant/Respondent is not a party to the MLAs executed by the Plaintiffs and the 1<sup>st</sup> Defendant. Therefore, they are not subject to the arbitral clause therein.

26. The nature of an arbitration process is such that, the parties thereto must have voluntarily agreed to refer their dispute to arbitration. "Domke Commercial Arbitration defines Arbitration as: a process by which parties voluntarily refer their dispute to an impartial third person an arbitration...." Indeed an arbitration agreement is the foundation of almost every arbitration. There can be no arbitration between parties who have not agreed to arbitrate their dispute. The contract nature requires the consent of each party for an arbitration process to take place.

27. It is noteworthy that the courts derive their jurisdiction either from statutory provisions or jurisdiction agreement. In contrast, the arbitration tribunal's jurisdiction is based solely on an agreement between two or more parties to submit their existing or future dispute to arbitration. It therefore follows that, the 2<sup>nd</sup> Defendant cannot be subjected to an arbitral agreement, to which it is not a party to. The Applicants invited the court to consider the reliefs sought for as against the 2<sup>nd</sup> Defendant/Respondent, terming the same as mere "matters of opinion". With utmost respect, the court cannot delve into the merits of the case now. The issue under consideration is merely whether, the court has jurisdiction to hear and determine the dispute herein. Therefore, the court will restrict itself to the same.

28. Further, I find that, whether, the Plaintiffs have a substantive claim against the 2<sup>nd</sup> Defendant or not, and whether the 2<sup>nd</sup> Defendant/Respondent is a necessary party to these proceedings, cannot be determined in this application. These are issues that can only be determined between the Plaintiffs/Respondents and the 2<sup>nd</sup> Defendant/Respondent in the arbitral tribunal process.

29. Be that as it were, I find and rule that, the mere joinder of the 2<sup>nd</sup> Defendant/Respondent who is not a party to the Arbitral Agreement to the proceedings will not defeat the arbitral clause. In conclusion, I find that the court lacks jurisdiction to hear and determine the dispute herein in view of the arbitral clause in the contract between the parties.

30. The upshot of all these is that, I find the subject application has merit and I allow it in terms of prayer (1) and (2), the costs thereof, to abide the outcome of the arbitration process.

31. Ordered accordingly.

**Dated, delivered and signed in an open Court this 26<sup>th</sup> day of November 2018.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Ndumia for Mr. Onindo for the Plaintiff

Mr. Githumi for the 1<sup>st</sup> Defendant/Applicant

No appearance for the 2<sup>nd</sup> Defendant

Dennis -----Court Assistant