REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 166 OF 2014

AFRICA MANAGEMENT COMMUNICATIONS LIMITED........PLAINTIFF

VERSUS

AIRTEL KENYA NETWORKS LIMITED...............................DEFENDANT

RULING

1. The defendant's application dated 23rd February 2015 seeks orders to refer the dispute between the parties, to arbitration. The defendant also asks for a stay of further court proceedings until the arbitral tribunal had determined the dispute.

2. It is the defendant's case that the Agreement between the parties contained an arbitration clause. Therefore, the defendant deemed as premature, the plaintiff's decision to come to court before giving arbitration an opportunity.

3. The reason why the defendant deems the court case to be premature is that the **COMMUNICATIONS COMMISSION of KENYA** *(which is now the* **COMMUNICATIONS AUTHORITY** of **KENYA),** ought to have been given an opportunity to be the arbitrator. And the defendant contends that it was the obligation of the plaintiff, **AFRICA MANAGEMENT COMMUNICATIONS LIMITED,** to take steps to refer the dispute to the said arbitrator.

4. At any rate, if the dispute had been referred to arbitration, the defendant believes that it would have been served with *"statutory requirements",* to enable it appear before the arbitrator.

5. As no such notices were issued to it, the defendant submitted that the plaintiff's decision to file this case in court, was premature and was also a violation of the express terms of the contract.

6. It is common ground between the parties that clause 18 of the Agreement dated 29th April 2013 provided the procedures for dispute resolution.

7. The chosen system which the parties agreed upon, for the resolution of any disputes which may arise between them, was arbitration.

8. Therefore, the defendant submitted that the contract, as read together with Section 6 of the Arbitration Act, did not give to the court any discretion in the manner in which disputes would be resolved. As far as the defendant was concerned, all disputes had to be resolved through arbitration.

9. However, the plaintiff does not agree with the defendant. The position taken by the plaintiff was that

arbitration was an option, but only if taken up in accordance with the terms spelt out in the Agreement.

10. The plaintiff pointed out that the Agreement made it clear that if the parties did not mutually refer disputes to arbitration within the times specified in the Agreement, the parties were free to seek the court's intervention.

11. The plaintiff's further argument was that even when a party moved to court and the other party wished to have the dispute referred to arbitration, it was important that the provisions of the Arbitration Act be followed.

12. The understanding of the plaintiff was that the defendant should have made an application to refer the case to arbitration, at the time when the defendant entered appearance.

13. However, the defendant herein waited for 10 months after entering appearance, to make its application.

14. The court will have to determine whether or not the defendant's failure to come to court with the current application, at the time it entered appearance, was fatal.

15. The court will also have to determine whether or not clause 18 of the Agreement served as a platform from which each dispute between the parties would be relayed automatically to arbitration.

16. Finally, the plaintiff pointed out that the court had already entered judgement against the defendant. Therefore, until and unless the said judgement was set aside, the plaintiff submitted that there would be no outstanding dispute which could be referred to arbitration.

17. In determining this matter, I start by pointing out that the court file which I am using is a reconstituted file. The original court file is missing.

18. Therefore, the court has been unable to verify from the record of the proceedings whether or not judgement was granted by the court, on 30th June 2014 or at all.

19. But it is also noted that the plaintiff has provided a copy of a Decree which shows that judgement was entered on 30th June 2014, and also that the Decree was issued on 25th July 2014.

20. Also in the court file are copies of letters which the defendant provided to the court, when the defendant filed an application for the reconstitution of the court file.

21. It is significant that Mr. Ogembo, the learned advocate for the plaintiff, attended court on 28th September 2015, and consented to the reconstitution of the court file.

22. I say that is significant because the plaintiff was in possession of the letters from the defendant, in which the defendant had expressed frustration, when it had failed to trace the court file. Of particular note is the letter from **I.N. NYARIBO ADVOCATES,** dated 26th June 2015, which made it clear that the defendant was unaware of any judgement in this case.

23. By that letter, the defendant also pointed out that the court file had been missing for several months.

24. There is the contention that the Decree was never served upon the defendant until September 2015.

25. Those factors are consistent with the defendant's suspicion of mischief. I so hold because there does not appear to be any rhyme or reason to the fact that a Decree was extracted in July 2014, but it was not served on the defendant until September 2015.

26. Nonetheless, the existence of a Decree presupposes that the court had entered judgement in the case.

And for as long as the judgement remained on record, it would appear that there was already a determination of the issues raised in the plaint.

27. If the Decree remains on record, I am unable to see what issues the court could refer to arbitration.

28. On another note, both the parties have placed reliance upon Section 6 of the Arbitration Act. The said section 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 applies not later that the time when that party enter 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 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 undermined.***
>
> ***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".***

29. In this case the defendant entered appearance on 6th June 2014. Therefore, pursuant to Section 6 (1) of the Arbitration Act, the defendant should have moved the court not later than 6th June 2014, if it wished to have the dispute referred to arbitration.

30. However, the defendant quoted the following words of Havelock J. from an unspecified decision, to back its contention that even when a party had taken steps, such as by filing a Defence, the court ought to still refer the case to arbitration, if the contract in issue provided for arbitration.

> ***"I do not accept the submissions of both parties that by choosing to come before Court by plaint as the plaintiff has done, as well as the filing of a composite Defence and Counterclaim by the Defendant, that they have abandoned the arbitral process. It cannot be disputed that the contractual terms and conditions, as above, stipulated that any dispute between the parties to those contracts were to be resolved through arbitration. The Arbitration Act and the Arbitration Rules provide for both the substantive and procedural manner in which matters referred to arbitration are dealt with. The role of the court is only supervisory, and its jurisdiction may only be invoked in the very specific situations as stipulated in the Arbitration Act. Section 10 of the Act provides that 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. By this Section, the jurisdiction of the court is limited and restricted and may only be invoked in very clear and certain circumstances".***

31. My understanding is in line with the decision by the Court of Appeal in **LOFTY Vs. BEDOUIN ENTERPRISES LIMITED [2005] E.A. 122,** wherein the Court quoted, with approval, the following words of Githinji J. in **HCCC No. 1756 of 2000;**

> ***"In my view, section 6 (1) of the Arbitration Act of 1995, which the court is construing, means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other steps in the proceedings; so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of Section 6 (1) of the Arbitration Act of 1995, was, inter alia, to ensure that applications for stay of***

proceedings are made at the earliest stage of the proceedings".

32. Does that mean that it was only an application for stay of proceedings which cannot be made after the applicant had entered appearance, or was there also a bar to having the dispute referred to arbitration?

33. As Havelock J. stated *(above),* the Arbitration Act and the Arbitration Rules provide for both the substantive and procedural manner in which matters referred to arbitration are dealt with.

34. That implies that before a matter was referred to arbitration, the Arbitration Act and the Arbitration Rules did not govern the case.

35. However, after the case had been referred to arbitration, the court's jurisdiction was seriously curtailed; as provided for by Section 10 of the Arbitration Act.

36. It is my further understanding that although there was no express bar to the court referring a case to arbitration after a defence was filed or after the defendant took other steps after entering appearance, in practical terms, such a reference to arbitration would give rise to practical problems. I say so because the prospects of having a case proceeding in court, whilst it was simultaneously also before an arbitrator would give rise to a serious risk of inconsistent or contradictory determinations.

37. In the case of **LOFTY Vs BEDOUIN ENTERPRISES LIMITED [2005] 2 E.A. 122,** the Court of Appeal said;

> ***"We respectfully agree with those views, so that if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied, the court will 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 appearance, at the time of filing any pleadings or at the time of taking any step in the proceedings".***

38. The rationale for the court's entitlement to reject an application for stay of proceedings and of reference to arbitration after the applicant had filed a defence in the case was given by Bosire JA, in **NIAZSONS (K) LTD Vs CHINA ROAD & BRIDGE CORPORATION (KENYA), CIVIL APPEAL No. 157 of 2000,** when he said;

> ***"But the appellant cited section 6 (2) of the Arbitration Act, 1995, as permitting concurrent proceedings before both the ordinary courts and before a domestic tribunal. The wording of that sub-section is in effect analogous to a reference of disputes to arbitration under order 45 of the Civil Procedure Rules. It does not at all contradict the provisions of section 6 of the Civil Procedure Act. It merely clarifies to the parties concerned that should they wish to resolve the matters in dispute between them before a domestic tribunal they should feel free to do so notwithstanding that a suit is pending in court and provided that the reference is made by consent. If they decide to do that, the proceedings before the Court must of necessity be stayed. 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, (Civil Appeal No. 119 of 1997), upon the bringing of an application for stay of proceedings under rule 6 (1) of Arbitration Act, 1995, the respondent's duty to file a written statement of defence was suspended".***

39. In a nutshell, a party does not take steps to defend himself before the court, whilst simultaneously asking the court to refer the dispute to arbitration.

40. Having chosen to file a defence, albeit belatedly, the defendant may be deemed to have chosen to proceed with the case before the court.

41. But there is a serious problem; as the defence was apparently filed after the court had entered

judgement. Therefore, the defence, as it currently stands, is of no consequence at all. This decision is thus not premised on the fact that there was a defence on record.

42. The decision is premised on the fact that the application for stay of proceedings and also for referral to arbitration was made long after the defendant had entered appearance.

43. Furthermore, the court holds the considered view that clause 18.2 of the Agreement in question did not appear to create an automatic referral to arbitration, of any disputes which arose between the parties. The said clause reads as follows;

> ***"Any dispute arising between the parties in connection with this agreement and not resolved in accordance with the foregoing provisions of this Clause may if so agreed between the parties be referred to arbitration; where no agreement is reached on the proposed reference to arbitration within 14 days from the date of the first proposal to refer the dispute to arbitration within 14 days after the time given to amicably resolve the same has lapsed without any resolution thereto; then the High Court of Kenya or any other court of competent jurisdiction shall have jurisdiction to hear and determine the matter".***

44. The first option agreed upon by the 2 parties was *"amicable"* resolution in the spirit of mutual co-operation.

45. The parties said that if that option did not succeed in finding a solution, the parties may, if so agreed, refer the dispute to arbitration.

46. In effect, arbitration would only become an avenue for finding a solution if the parties agreed to go along that route.

47. Until the 2 parties agreed to go to arbitration, that route would be nothing more than a proposal. And the parties allowed themselves a period of 14 days within which to try and agree on the proposal.

48. If the parties failed to agree during those 14 days, **OR** if within the 14 days allowed for an amicable solution, the parties did not find a solution, the dispute could be determined by the court.

49. In this case, the defendant has not shown that the parties did agree to go to arbitration, as provided for in Clause 18.2 of the Agreement. It would therefore appear that the High Court has jurisdiction to hear and determine the disputes as set out in the pleadings.

50. For all the reasons above, the application by the defendant is without merit. Therefore, I reject the request to refer the dispute to arbitration. I also reject the application for stay of these proceedings.

51. The costs of the application dated 23rd February 2015 are awarded to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **26th day** of **April** 2016.

FRED A. OCHIENG

JUDGE

<u>Ruling read in open court in the presence of:</u>

Miss Chege for Ogembo for the Plaintiff

Muturi for Nyaribo for the Defendant

Collins Odhiambo – Court clerk.