REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 344 OF 2014

("FAST TRACK")

TELKOM KENYA LIMITED ……..... PLAINTIFF

Versus

RAPID COMMUNICATIONS LIMITED …….. DEFENDANT

RULING

Referral to arbitration and stay of proceedings

[1] The Defendant has applied under section 6 of the Arbitration Act for these proceedings to be stayed and the dispute referred to arbitration for determination. The Defendant was served with the plaint on 22.9.2014, and simultaneously filed a Memorandum of Appearance and a Chamber Summons on 6.10.2014 as required by Section 6 of the Arbitration Act, Cap 49 of the Laws of Kenya. The Defendant was of the view that this matter ought to be determined by arbitration and, therefore, filed a Chamber Summons simultaneously with the Memorandum of Appearance as required by Section 6 of the Arbitration Act, Cap 49 of the Laws of Kenya. The application is supported by the Supporting Affidavit of Anwar Hussein, a Director of the Defendant Company, sworn on 6.10.2014.

[2] The Defendant stated that the Plaintiff and the Defendant entered into an agreement dated 27.6.2009 for purchase of CDMA phones (hereafter the Purchase Agreement). The parties provided in Clause 7 of the Purchase Agreement for "*Arbitration and Dispute Resolution*". According to the Defendant, a dispute has arisen and ought to be referred to arbitration pursuant to Clause 7 of the Purchase Agreement. The Defendant borrowed the definition of Dispute in Black's Law Dictionary to be "*a conflict or controversy, especially one that has given rise to a particular lawsuit*". The Defendant decried the fact that the Plaintiff is trying to down-grade the controversy between the parties hereto as being made of just USD 80,000. The Defendant urged that the application for stay of proceedings and referral of the dispute to arbitration is apt especially because these proceedings have been commenced by the Plaintiff, who is a party to the arbitration agreement. The Defendant claimed there are sufficient reasons why the matter should be referred to arbitration in accordance with the arbitration agreement between the parties. First, the Defendant was at the time when the proceedings were commenced, and still remains ready and willing to do all the things necessary towards proper conduct of arbitration of the dispute herein. There are six (6) grounds which form the basis of the dispute and the reasons why the

matter ought to be determined through arbitration. According to the Supporting Affidavit of Anwar Hussein, the Defendant had two years under the Purchase Agreement dated 7.11.2007 to supply CDMA mobile phones. See annexure "**AH-2**" in the Supporting Affidavit. They also annexed exhibit "SGW-2" containing the Index copy of the Framework Agreement dated 7.11.2007.

[3] The Defendant averred that the Plaintiff took delivery of the phones valued at USD 8,584,000. They annexed copies of the Plaintiff's Local Purchase Orders Nos. 10290541, 10290542 and 10292920 dated 7.1.2008, 7.1.2008 and 14.1.2008 for the sum of USD 4,070,000, USD 1,480,000 and USD 1,850,000 and marked "SGW-3, 4 and 5" respectively. The Defendant argued that these purchases by the Plaintiff from the Defendant were supported by the Plaintiff's bankers, M/s Kenya Commercial Bank Limited, who had issued unconditional and irrevocable Guarantee to the Defendant vide its letter of 18.1.2008 marked "SGW-6".

[4] The products sold via the Purchase Agreement dated 27.6.2009 which emanated from the Framework Agreement dated 7.11.2007 between the parties, the Plaintiff cannot be heard to say that it did not envisage any dispute resolution via arbitration as both agreements provide for the same. Article 17 of the Framework Agreement indeed provides for ***"The Applicable Law and Resolution of Disputes".*** **All these agreements were drawn** by the legal department of the Plaintiff. They therefore knew of the implication with regard to resolution of disputes emanating therefrom. The demand letter dated 14.9.2009 from the Defendant's lawyers to the Plaintiff specifically required the Plaintiff to engage the Defendant in arbitration on an amount of Kshs. 1,044,000,000/=. The letter is *marked "SGW-7.* In the circumstances, the Defendant is convinced that the dispute should be given a chance of resolution through arbitration.

[5] The Defendant argued further that the Honourable Court has to satisfy itself on the following matters:

> ***a) <u>THAT</u> the application seeking a stay of the proceedings with a view to having the matter referred to arbitration is presented to the court not later than the time when the applicant enters appearance ……; or***
>
> ***b) <u>THAT</u> the arbitration agreement is not null and void, inoperative or incapable of being performed; or***
>
> ***c) <u>THAT</u> there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.***

They cited the case of ***HCCC No. 487 of 2013, Nanchang Foreign Engineering Co. (K) Limited Vs Easy Properties Kenya Limited*** and ***Jadra Karsan Vs. Harman Singh [1953]20 E.A.C.A. 74*** (quoted at paragraph 16 of the Nanchang case) where it was held:

> ***"…there is no doubt that there is an inherent power of stay of proceedings where the ends of justice so require".***

[6] The Defendant averred that the Honourable Court ought to exercise its discretion in favour of the Applicant under its inherent jurisdiction. Contrary to the averments in the Replying Affidavit by Caroline Ndindi, there is a dispute herein which should be referred to arbitration. They saw a approbating and reprobating tendencies in these averments at paragraph 6 of the said Replying Affidavit:-

> ***"…that there is no dispute to be referred to arbitration arising from the Purchase Agreement……."***

But that:-

> ***"…the Defendant purported (sic) to pay consideration for the goods sold and made admission of the amounts claimed".***

The arbitral tribunal will determine whether or not the Purchase Agreement dated 27.6.2009 should be "tied" to the Framework Agreement dated 7.11.2007. Finally, Article 159(2) (c) enjoins the courts to pursue justice using alternative forms of dispute resolution including arbitration. The dispute should be referred to arbitration for determination.

The Plaintiff resisted referral

[7] The Plaintiff in opposition filed a Replying Affidavit sworn by Caroline Ndindi on 27.10.2014. The Plaintiff argued that it filed Plaint on 8.8.2014 simultaneously with a Notice of Motion Application dated 14.5.2014 under Order 13 Rule of the Civil Procedure Rules, Section 1A of the Civil Procedure Act and all other enabling provisions of the law. The relief sought in the motion is for judgment on admission to be entered against the Defendant for USD 80,000.00 together with interest as prayed in the plaint and costs. According to the Plaintiff, there is no dispute to be referred to Arbitration as its claim arises from the purchase agreement dated 27.6.2009 which at Clause 3.2 clearly stated the purchase price was USD 80,000. This fact is not disputed by the Defendant. The Plaintiff invoiced the defendant on 20.7.2009 for USD 80,000 as per annexure AH-4 page 52- a fact not disputed by the Defendant.

[8] Again, the Defendant on 31.10.2009 and 16.9.2009 issued the Plaintiff with two cheques for USD 40,000 each (see page 14 of the Plaintiffs bundle of documents. This fact is admitted at paragraph 6 of the Applicant's supporting affidavit sworn on 6th October, 2014. The rider that they were for comfort only is untenable in law not backed by any letter or email. The cheques were not presented due to central bank ruling on high denomination cheques a fact that was communicated to the Defendant with a request to replace them with EFT. See page 18 of the Plaintiff's bundle of documents. The Defendant wrote a letter dated 30.7.2010 to the Plaintiff proposing to pay in four installments of USD 20,000 each. See page 15 of the bundle of documents. Emails were exchanged between the parties on the matter and in none does the defendant deny or dispute it's indebtedness to the Plaintiff. There is no denial of the debt, admissions, attempts and proposals to pay by the Defendant. The Applicant is clinging to a framework Agreement dated 7.11.2007 entered into almost 2 years before the purchase agreement. The purchase agreement does not mention the framework agreement. It was the Plaintiff's submission that the two agreements are separate and distinct and the Plaintiff is at liberty to pursue any dispute it may have against the Defendant under the framework agreement. They urged the court to find that there is no dispute arising out of the purchase agreement, to be referred to Arbitration. The arbitration clause is applicable if there is a dispute to be arbitrated on. The Defendant has not discharged the burden that a dispute exists to warrant stay of proceedings and referral to Arbitration. They relied on the case of Nanchang Foreign Engineering Company (K) ltd Case (supra); A persuasive decision of Her Ladyship Justice J. Kamau delivered on 16.7.2014 on an Application similar to the one before court. On those reasons the Plaintiff urged the court to dismiss the application with costs as there is no dispute capable of being referred to Arbitration.

THE DETERMINATION

Is there in fact any dispute?

[9] The application for stay of proceedings and referral to arbitration has been made on time. Therefore, the issue which has arisen here is whether there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. This application is governed by Section 6(1) of the Arbitration Act which states as follows;

> ***"A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies <u>not</u> later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to the 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

[10] A stay of proceedings and referral to arbitration should be refused if the court finds*;**..that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration***.* The phraseology ***not in fact any dispute*** has been sufficiently addressed by the courts. See the cases of: 1) ***Addock Ingram East Africa Limited vs. Surgilinks Limited [2012] eKLR*;** and 2) ***UAP Provincial Insurance Company Ltd vs. Michael John Beckett [2013] eKLR*.** The dispute must relate to matters agreed to be referred to arbitration. The Defendant has stated that there is a dispute between the parties as demonstrated by the demand letter dated 14.9.2009 from the Defendant's lawyers to the Plaintiff which specifically required the Plaintiff to engage the Defendant in arbitration with regard to some amount of money in the sum of Kshs. 1,044,000,000/=. The letter is *marked "SGW-7.* The Defendant is relying on the arbitration clause in the Framework Purchase Agreement dated 7.11.2007 entered into almost 2 years before the purchase agreement. The Defendant sees a connection between these two agreements in the fact that they were drawn by the legal team of the Plaintiff's legal department who are expected to have been aware of the arbitration agreement in the framework agreement and that it would bind the parties in the Purchase agreement of 27th June 2009. Yet the subject of this proceedings entirely emanate from the Purchase Agreement dated 27th June 2009. Furthermore, the claim herein is for a sum of USD 80,000 which was the agreed purchase price in the purchase agreement itself. I agree with the Plaintiff that this fact is not disputed by the Defendant.

[11] Again, the Defendant on 31.10.2009 and 16.9.2009 issued the Plaintiff with two cheques for USD 40,000 each. I agree with the Plaintiff that this fact is admitted at paragraph 6 of the Applicant's supporting affidavit sworn on 6th October, 2014. The cheques were not presented due to Central Bank regulations on high denomination cheques, and the Defendant was requested to replace them with an EFT. The Defendant wrote a letter dated 30.7.2010 to the Plaintiff proposing to pay the money in four installments of USD 20,000 each. See page 15 of the bundle of documents. Emails were exchanged between the parties on the matter and in none does the defendant deny or dispute it's indebtedness to the Plaintiff. There is no denial of the debt. The cause of action is founded on the payment cheques and admission of the claim thereof and in fact the Plaintiff has applied for judgment on admission. In these circumstances, there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. It will, therefore, be inappropriate to invoke the arbitration agreement if any, and deny the Plaintiff an opportunity to be heard by this court.

[12] I am not also able to accede the argument by the Defendant that the framework Agreement dated 7.11.2007 is the foundation of the Purchase Agreement dated 27th June 2009. The Purchase Agreement of 27th June, 2009 described in Clause 1.7 that the Purchase Agreement meant the Purchase Agreement dated 27.6.2009 and variations which may be signed by the parties. It does not mention or imply the framework agreement dated 7.11.2007 or any of the terms thereof. Indeed, the Purchase Agreement dated 27.6.2009 has its own arbitration clause 17. These two agreements are separate and distinct. Therefore, arbitration agreement in the framework agreement is inoperative in so far as the Purchase agreement of 27th June 2009 is concerned. As long as the basis for asking for stay and referral to arbitration is the arbitration agreement in the Purchase Agreement dated 27.6.2009, there is absolutely nothing on which stay of proceedings or referral of the subject of this suit could be maintained in law or at all. The circumstances of this case impel the court to make some useful observation as a court of law. Before I close and make my final orders, I should state that Arbitration as an alternative dispute resolution mechanism enjoys quasi-judicial authority and it should be used only to promote the overriding objective of the law and the principles of justice in the Constitution. That is why the Constitution in article 159 recognizes and augments ADR as a matter of adjudication of cases to the point where it expressly requires courts of law to promote ADRs in resolution of disputes. Therefore, ADR should never be used as a ploy or mechanism to delay resolution of disputes especially where there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration, like is the case here. Section 6 of the Arbitration Act is couched in a manner that it abhors any dilatory or deliberate behaviour that runs counter to the overriding objective. In such case as this, I would only state that the request for stay of proceedings and referral of the subject of the suit to arbitration is a comedy of extravagant humour and an

attempt to delay this case. This case is such that the court should straight away hear and finalize it. Accordingly, I dismiss the application for stay of proceedings and referral of the subject of the suit to arbitration. I also direct that the Motion Application dated 14.5.2014 be listed for hearing as one way of fast tracking this case in accordance with the overriding objective of the law to dispose of cases in proportionate, just, fair and expeditious manner. It is so ordered.

Dated, signed and delivered in court at Nairobi this 27th day of February 2015

F. GIKONYO

JUDGE