REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.22 OF 2014

RILEY FALCON SECURITY SERVICES LIMITED.....PLAINTIFFS

VERSUS

MASENO UNIVERSITY.....1ST DEFENDANT

BEDROCK HOLDINGS LIMITED ….....2ND DEFENDANT

R U L I N G

1. The first defendant's application dated 22/7/14 prays that this suit be stayed and the disputes herein be referred to arbitration. The same is grounded upon the fact that paragraph 141 of the agreement dated 1.4.2013 states that in the event of any dispute between the parties the only available avenue for resolution shall be an arbitration process. Professor Dominic Markawiti, the Vice Chancellor and Chief Executive has sworn the supporting affidavit.

2. On the other hand Tobias See the plaintiffs/respondents director has filed a replying affidavit in opposition to the application. The substance of the said response is that having failed to file the application at the time of filing the memorandum of appearance the applicant is now precluded as it was contrary to the Arbitration rules section 6(1)(1) of the Act.

3. The 2nd respondent did not file any response but Mr. Mwamu notified the court that his client did not oppose the application. For record purposes at the time of hearing the application the 1st defendant/applicant was unrepresented pursuant to this court's ruling of 27.11.14 which ordered the firm of Wasuna & Company Advocates off record on behalf of the plaintiff. Apparently the plaintiff did not deem it to employ another counsel.

I have perused the application together with the 1t defendant's lengthy submissions. The gist of the application is contained under paragraph 14.1 of the agreement dated 1.4.2003, the subject of this suit. The same states as follows:

> **"Both parties shall endeavour to settle amicably any dispute or difference of any kind but should such differences or dispute persist then these shall be settled with the Arbitration Act 1999."**

The implication and the intention of the parties was to refer any dispute for arbitration. In this instance the plaintiff felt shortchanged on how the contract was terminated and awarded to the 2nd defendants. It was the 1st defendant argument that they were forcefully evicted by the 1st defendant and that the contract was illegally and fraudulently awarded to the 2nd defendant. For now that is a subject of discussion in another forum.

What is the fate of the current application? The respondent has argued that this application is time barred by virtue of the provision of Section 6(1) of the Arbitration Act 1995 which was amended by Section 5 of the Arbitration (Amendment) Act 2009, and which states:

"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

acknowledge the claim against which the stay of proceeding 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."

From the record of pleadings herein it appears that the 1st defendant did enter appearance on 2nd July 2014 some 20 days after the suit was filed. Essentially the drafters of the afore quoted Act expected that prior to or at the time of entering appearance a party ought to make an application for the matter to be referred to arbitration. The phrase **"...if a party so applies not later than the time when that party enters appearance..."**

meant that the affected party shall contemporaneously with entering appearance file such an application.

The authority of **CHARLES NJOGU LOFTY VERSUS BEDOMIN ENTERPRISES LIMITED (2005) eKLR** relied on by the respondents is worth reproducing here.

The Court of Appeal stated as follows:

"We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of

Section 6(1) are satisfied the court would 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 an appearance or if no appearance is entered, at the time of filing any pleading or the time of taking any steps in the proceedings."

Without going into the rest of the legal arguments raised by the respondent in opposition to the application, I find that the failure of the applicant to file the current application prior to entering appearance or at the point of entering appearance fatal. The provisions of the Act are clearly spelt out. In the premises I do disallow the application to refer this matter to arbitration. In any event there are other weighty issues raised herein which this court would competently deal with. The application is dismissed with costs to the plaintiff.

Dated and delivered this.25th day of May 2015

H. K. CHEMITEI

J U D G E

In presence of

….....counsel for applicants

….....counsel for respondent