

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 328 OF 2014

EDON CONSULTANTS INTERNATIONAL LIMITED. APPLICANT/APPELLANT

VERSUS

AGRO-CHEMICAL AND FOOD COMPANY LIMITED. RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 30th July, 2014 seeking an order of stay of proceedings in the Chief Magistrate’s Court Civil Case No. 1594 of 2014 pending the hearing and final determination of this appeal.

The facts behind the appeal are as follows: -

The parties entered into a contract for consultancy services in respect of the design construction and supervision of the office building for the Respondent at Muhoroni.

Pursuant to a provision of an Arbitration Clause 7.2 of the said contract, the contract provided that any dispute arising between the parties **MAY BE REFERRED TO ARBITRATION**.

Notwithstanding the above clause, the appellant filed the above cited suit in the lower court. The Respondent filed a Preliminary Point of Objection seeking to strike out the suit or refer it to arbitration. The trial court sustained the objection and that is what aggrieved the Plaintiff/Appellant who then filed this appeal.

I have carefully perused the appeal record and this application. The main issue in the appeal is whether or not the contract provided for the arbitration mandatorily or permissively. The contract uses the word **“may”** and not **“shall”** in reference as to whether the dispute should be referred to arbitration. The Appellant’s position is that the word **“may”** used in their contract was permissive and was not mandatory. The Respondent exactly the opposite position and that is the only issue in the pending appeal. Both parties have cited legal authorities both local and international and there is no doubt in my mind that there is a issue to go to trial during the appeal.

The legal position accordingly is that if a stay is refused at this stage, the fate of the appeal will have been sealed as against the Appellant and thus the trial court will proceed to send the suit to arbitration even if there might be a chance that the court may have jurisdiction to try the suit.

In the above circumstances it is the view and decision of this court that the prayer for stay of proceeding in the lower court is justified and should be and is hereby granted pending the final determination of the appeal. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of July, 2015.

D A ONYANCHA

JUDGE

