REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 556 OF 2013

MANPOWER SERVICES (K) LIMITED……..……...PLAINTIFF

-VERSUS -

AL JAZEERA SATELLITE NETWORK …….....DEFENDANT

RULING

1. The defendant prays that this suit be stayed pending arbitration of the dispute. By a chamber summons dated 31st January 2014, the defendant contends that clause 22 of the contract between the parties provides for arbitration. The summons were filed simultaneously with the memorandum of appearance and before filing of any defence.
2. There is a deposition sworn by Bessy Muthuri on 31st January 2014. She deposes that the dispute between the parties arises out of a recruitment services contract dated 6th July 2011. A copy is annexed at pages 25 to 38 of the plaintiff's bundle of documents. The claim in the plaint is for US$ 100,000 being the recruitment fees for senior staff of the defendant. The plaintiff claims to have placed advertisements, conducted interviews and shortlisted six candidates. Two of those candidates were employed as managers of the defendant. In a synopsis, the defendant's case is that the dispute over fees should be referred to arbitration.
3. The motion is contested by the affidavit of Francis Githui. He avers that the defendant did not respond to the plaintiff's pre-suit letter of demand; and, that there is no dispute contemplated by clause 22 of the agreement. Neither the plaintiff nor the defendant has issued a dispute notice or made any reasonable endeavours to resolve the matter. To the plaintiff, the present application is a stratagem contrived to delay fair determination of the suit.
4. On 17th February 2014, the parties agreed to have the application determined by written submissions, the pleadings and depositions on record. The plaintiff's submissions were filed on 4th March 2014; those of the defendant on 24th February 2014. I have carefully considered the pleadings, depositions and rival submissions.
5. It is common ground that the plaintiff and the defendant executed a recruitment services contract on 6th July 2011. The purpose was to "*engage Manpower* [the plaintiff] to *recruit management staff for specified positions for Al Jazeera's Kiswahili project*". Under clause 4.12 the fees to the plaintiff were to be the "*equivalent to the successful candidate's one month's gross salary plus VAT for any candidate selected from the shortlist submitted by Manpower*". Those are the fees now claimed at paragraphs 5 to 10 of the plaint.
6. Clause 22 of the agreement is material to the application before me. I will set it out *in extenso* –

"*22. Dispute Resolution*

22.1 If at any time any question, dispute or difference shall arise between the parties as to any matter or thing of whatever nature arising under or in connection with this contract (a "Dispute"), then either party may give to the other notice in writing as to such dispute (a "Dispute Notice") and upon receipt of such notice the appropriate representative of the parties must, prior to resorting to arbitration or other form of formal dispute resolution, use their reasonable endeavours to resolve such dispute in good faith by referral as provided in clause 22.1.

22.2 Nothing in clauses 22.1 or 22.2 shall prevent either party from having recourse to a court of competent jurisdiction for the sole purpose of seeking a preliminary injunction or such other provisional relief as it considers necessary to avoid irreparable damage. For these purposes, the parties irrevocably submit to the non-exclusive jurisdiction of the Kenyan courts".

7. Section 6 of the Arbitration Act (As amended by Act 11 of 2009) is in the following terms –

"6. (1) 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 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 agreed 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 undetermined.

(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."

8. Article 159 (2)(c) and (d) of the Constitution now provide that in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) Justice shall be administered without undue regard to procedural technicalities".

9. I stated earlier that the defendant filed the summons for stay contemporaneously with its memorandum of appearance on 31st January 2014. The application has in the circumstances been brought without delay and before taking any other action to defend the suit. I find that the application is properly before the Court and complies with section 6 of the Arbitration Act. See generally *Niazsons (K) Limited Vs. China Road & Bridge Corporation Kenya* [2001] KLR 12, *TM AM Construction Group Africa Vs Attorney General* Nairobi High Court case 236 [2001] 1 EA 291, *Westmont Power Kenya Limited Vs Kenya Oil Company Limited* Nairobi, Court of Appeal, Civil Appeal 154 of 2003 (unreported), *Corporate Insurance Company Limited Vs Loise Wanjiru Wachira* [1995] LLR 394 (CAK).

10. The crux of this matter then is whether clause 22 was an express or valid arbitration clause. That is a matter I am duty bound to decide at this stage. In *Niazsons (K) Limited Vs China Road & Bridge Corporation Kenya* [2001] KLR 12 Bosire J.A, with whom O'Kubasu J.A concurred, stated as following at page 21-

"Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly".

11. First, I accept the defendant's proposition that the contested claim for fees is a *dispute* contemplated by clause 22. Clause 22 then requires that upon the dispute –

> **"***either party may give the other a notice in writing……and upon receipt of such notice the appropriate representatives of the parties must, prior to resorting to arbitration or other form of formal dispute resolution use their reasonable endeavours resolve such dispute in good faith by referral as provided in clause 22.1"* (emphasis added).

12. Three important matters arise. First, the draftsmanship is poor. The cross-reference to clause 22.1 in the very text of clause 22.1 is misleading. Secondly, the entire clause is not a *mandatory* arbitration clause. It does not in any manner make arbitration a *pre-condition* to suit or other formal dispute resolution. All that the clause does is to require the parties, *prior* to resorting to arbitration or other formal dispute resolution, to use reasonable endeavours to resolve the dispute. It is important then to distinguish the clause from one that provides that a dispute shall be referred to arbitration or that parties must go into arbitration before suit. Thirdly, the present suit is a *formal dispute resolution* method.
13. From a plain reading of clause 22.1, the parties were at liberty to go either into *arbitration* or *other formal dispute resolution* forum. The only condition precedent was that before *resorting* to either forum, they were to use their reasonable endeavours to resolve the dispute. I find that clause 22.1 does not *bar* the suit. I can not then say that this suit was commenced in *breach* of an arbitration agreement.
14. The defendant concedes that it received pre-suit demand from the plaintiff. It did not respond to it. The defendant disputes the debt. I agree with the defendant that its *silence* did not connote *consent* to this action. *Halki Shipping Corp Vs. Sopex Oils Limited* [1998] 2 All ER 23. But by its silence, the defendant cannot be said to have used its reasonable endeavours to resolve the dispute. The plaintiff on the other hand having issued the pre-suit demand, and received no response, became entitled under clause 22.1 to resort to *formal dispute resolution* either through the court or by *arbitration*. It elected the former. I am thus unable to impeach the court action as a breach of clause 22.1 of the contract. I am fortified in that decision because clause 22.2 granted Kenyan courts non-exclusive jurisdiction to determine any dispute between the parties.
15. It must follow as a corollary that since the plaintiff did not breach clause 22.1 of the agreement, the application to stay the suit is on a legal quicksand. See *Russell on Arbitration* 23rd edition, Sutton J *et al*, Sweet & Maxwell, paragraph 7 – 010, page 348. In a nutshell, the present court action has not been commenced in breach of an arbitration agreement.
16. In the result, the defendant's chamber summons dated 31st January 2014 is devoid of merit. It is dismissed. The costs shall be in the cause. In the interests of justice, and notwithstanding the absence of a prayer for enlargement of time, I order further that the defendant shall have leave to file a statement of defence within fourteen days of today's date. The plaintiff will be at liberty to reply to the defence within a further fourteen days. I direct the parties to comply thereafter with order 11 of the Civil Procedure Rules 2010 and to set down the suit for hearing.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 25th day of March 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. E. N. K. Wanjama for the plaintiff instructed by Wanjama & Company Advocates.

Ms. T. A. Otamba for the defendant instructed by Coulson Harney Advocates.

Mr. C. Odhiambo, Court clerk.