



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 96 OF 2012

STEFA TRADING LTD. PLAINTIFF

VERSUS

FRIGOREX EAST AFRICA LTD. DEFENDANT

RULING

1. For the determination of the Court is the application by the Plaintiff brought pursuant to the provisions of **Section 6 (1)** of the *Arbitration Act*, **Rules 2 and 11** of the *Arbitration Rules*, **Order 45 Rule 5** of the *Civil Procedure Rules* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. the Applicant seeks for prayers inter alia:

“1. THAT the defendant’s counter claim and or the proceedings herein in regard to the Contract Reference Number 02-SL-EABL Cooler Service and Repair Contract (also known as the “Preventative and Maintenance Contract”) be referred to arbitration;

2. THAT upon reference to arbitration the said Counter Claim by the Defendant as regards the Preventative and Maintenance Contract be struck off and or stayed pending the filing of the arbitral award;

3. THAT the Court do appoint an arbiter among the following panel of competitive arbiters;

- a. **Kyalo Mbobu**
- b. **Kairu Gatembu.**

4. THAT in the alternative to prayer 3 hereinabove the Court does make the order that the Chairman of the Chartered Institute of Arbitrators do within 21 days of the receipt of the order appoint an arbitrator on behalf of the parties;

5. THAT the arbitral award be filed within 60 days of delivery of the same;

6. THAT the costs of this application be provided for”.

2. The application is predicated upon the grounds set out therein. It is averred that the Applicant and Respondent entered into a contract on 17th May, 2010 for the repair and maintenance of 6,500 coolers in various outlets and catering establishments in the Republic of Tanzania. It is contended

- that a dispute arose on or about September, 2011, to which Clause 14.12 of the said contract stipulated for the resolution by friendly negotiation, failing to which, the same would be Referred to a single arbitrator mutually agreed on by the parties. Further, it is contended that the Defendant was unwilling to resolve the dispute and negotiate an amicable settlement, hence the instant application.
3. The application is further supported by the Affidavit of **Stephen Mackenzie**, the Director of the Applicant Company, sworn on 12th June, 2012. It is deponed to therein, and in reiterating the contents of the grounds adduced, that the Applicant and Respondent entered into a contract on 17th May, 2010 in which Clause 14.12 provided for recourse of dispute resolution to an arbiter. It is contended that after the dispute arose between the parties on or about September, 2011, the Plaintiff, through its advocates, proposed a meeting vide letter dated 14th November, 2011 with a view to resolving the dispute. They wrote a further letter dated 2nd April, 2012 intimating and proposing to have the matter resolved by an arbitrator. It is further contended that the persistence by the Defendant to have the **“Preventative and Maintenance Contract”** (hereinafter “the Preventative and Maintenance Contract”) heard by the Court is an attempt to deny the Plaintiff an opportunity to have the dispute resolved, and that the same cannot be ventilated by way of Defence to Counterclaim but solely by arbitration.
 4. In opposition to the application, the replying Affidavit of **Mary Kuria**, the Sales Office Manager of the Respondent Company, sworn on 6th July, 2012, was filed on even date. The deponent contended that the application lacked merit, and that the parties entered into two contracts, i.e. **“Cooler Placement Warehousing Contract”** dated 25th January, 2011 and the **“Preventative and Maintenance Contract”** dated 1st May, 2010, which are co-dependent and related. One could not be litigated upon without reference to the other. It was further contended that the questions of law and fact that arise in the two contracts are common in that the two contracts were related. It would be tedious and a waste of time and resources to have two different trials for two co-dependent contracts. Further, it was averred that the Applicant waived its right to call for arbitration having failed to act on the same since November, 2011 and moving to Court on 17th February, 2012. Having unilaterally terminated the contract, the Respondent contends that there was no dispute to be referred to arbitration as provided under Clause 14.12 of the **“Preventative and Maintenance Contract”**.
 5. From the foregoing, it is established that there were two contracts, i.e. **“Preventative and Maintenance Contract”** and **“Cooler Placement and Warehousing Contract”** dated 1st May, 2010 and 25th January, 2011 respectively. The Applicant’s contention is that the two being distinct, the Defence to the Claim filed by the Respondent refers to and is premised on a contract that has an arbitration clause i.e. the **“Preventative and Maintenance Contract”** and that the Applicant promptly moved to Court before taking any further steps in the proceedings. It was submitted that disputes arose in both the contracts, and in a letter dated 1st November, 2011 marked as “SM-B”, the Applicant informed the Respondent as such. It was further submitted that the **“Preventative and Maintenance Contract”** was generated by the Respondent, and contained the Arbitration clause, and accordingly, the Respondent should not be allowed to abrogate the provisions of its own contract.
 6. The Respondent submitted that the application was filed on 15th June, 2012 after the suit had been filed on 17th February, 2012. It contended that the Applicant failed, neglected and/or refused to articulate and give particulars of its alleged dispute despite requests by the Respondent. It also contended that the appointment of the arbitrator should be made within seven (7) days of reference of the dispute, and that the Applicant failed to proceed as per the provisions of **Clause 14.12** of the **“Preventative and Maintenance Contract”**. The Respondent relied on the cases of **Niazsons (K) Ltd v China Road and Bridge Corporation Kenya (2001) KLR 12** and **Lofty v Bedouin Enterprises Ltd (2005) KLR 227**.
 7. **Section 6(1)** of the *Arbitration Act* provides as follows:

“A court before which proceedings are brought in a matter which is the subject of an Arbitration Agreement shall, if a party so applies no later than the time that party enters an appearance or files any pleadings or takes any steps in the proceedings, 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;**
- b. **That there is in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration”.**

In Niazsons (K) Ltd v China Road and Bridge Corporation Kenya (supra) the Court of Appeal held that the Court will consider whether the application is filed on time, whether there are any legal impediments to the validity, operation or performance of the arbitration agreement and whether there exists a dispute capable of being referred to arbitration. This was a similar finding to the Court of Appeal’s interpretation of **Section 6 (1)** in Lofty v Bedouin Enterprises Ltd (supra).

8. The Respondent contended that the Applicant terminated the two contracts on or about November, 2011 with disputes having arisen in relation to both on or about September, 2011. Having terminated the contracts, the Respondent alleged that there was therefore no dispute arising that was subject to arbitration between the parties. At **Clause 14.12** referred to in the application, and in its subsequent affidavit and submissions, the Applicant reiterates that as parties in the **“Preventative and Maintenance Contract”** any dispute was subject to reference to arbitration. The said clause in that contract dated 1st May, 2010 reads:

“All dispute and differences arising hereof shall be sought to be settled through friendly discussion and negotiation, which the parties undertake to conduct for at least a period of ten days from the date of receipt of such notice of such dispute from the aggrieved party, and if that fails, then through sole arbitration by a sole arbitrator to be mutually appointed by the parties hereto”.

Further at **Clause 14.12.1**, it was agreed that such appointment was to be made within 7 days of the reference of the dispute. The Respondent contended that the Applicant was also in breach of this provision having filed its reference on 15th June, 2012 pursuant to **Section 6(1)** of the *Arbitration Act*. Two questions therefore arise from the foregoing: 1) whether there was a dispute that was to be referred to arbitration and 2) whether the dispute, if any, was lodged within the provisions of **Clause 14.12.1** of the **“Preventative and Maintenance Contract”**.

9. According to the Black’s Law Dictionary Ninth Edition at pg. 540, the definition of a dispute is given as:

“A conflict or controversy especially one that has given rise to a particular lawsuit”.

The Respondent claims that by the letter dated 1st November, 2011 the Applicant terminated the two contracts. The letter reads in part:

“TAKE NOTICE that our express instructions are to convey our client intentions to repudiate contract Ref No. 03-STL – Cooler Placement and Warehousing Contract, and we hereby do formally repudiate the same on our client’s behalf without prejudice to its rights and entitlements under the said contract.

TAKE FURTHER NOTICE that we also do have instructions to formally notify you that you have committed material breaches in respect of contract Ref No. 02-SL-EABL Cooler Service and Repair Contract and as such there exists a dispute between the parties to the said contract. Consequently, on behalf of our client we invoke Clause 14.2 of the contract and hereby demand for the constitution of a dispute resolution panel between the parties to the said contract strictly adhering to the timelines in that clause, failure to which we shall proceed in line with clause 14.12.1 of the said agreement”. (Emphasis added).

That letter does not, in my view, terminate the **“Preventative and Maintenance Contract”** as

alleged by the Respondent. The letter acknowledges that there exists a dispute between the Applicant and the Respondent, and that the Applicant was proceeding to invoke Clause 14.12 as provided in the Contract. It being that the contract was not terminated or repudiated, the same constituted a dispute as under the contract, and properly defined as such as per the Black's Law Dictionary definition. Nonetheless, even if the Contract had been terminated, such would also constitute a dispute as to the contract, the most likely outcome of which would be to institute arbitral proceedings against the other party.

10. The second question is whether the reference was filed within the stipulated time lines as provided under Clause 14.12. It is provided that the parties would resolve to settle disputes through discussions and negotiations:

“at least a period of 10 days from the date of receipt of such notice of such dispute from the aggrieved party.”

The notice was issued tentatively in the letter dated 1st November, 2011. In subsequent correspondences dated 2nd November, 2011, 3rd November, 2011, 14th November, 2011 and culminating in 16th November, 2011, the parties expressed interest in the amicable settlement of the dispute. Indeed by the letter dated 14th November, 2011 the Applicant, through its advocate, invited the Respondent for a meeting with a view of **“thrashing out all contentious issues”**. By 2nd April, 2012 no amicable resolution had been achieved by the parties. As a result, the Applicant forwarded two names for consideration by the Respondent as possible arbiters. From the foregoing, it can be discerned that the parties failed to settle the matter within the period of ten days as per Clause 14.12 and thereafter reverted to refer to Clause 14.12.1 for the mutual appointment of an arbitrator within seven (7) days. However, the Respondents failed to comply with the said provisions, even after the letter by the Applicant dated 2nd April, 2012. The Respondent has failed to show that it made any attempt to respond to the letter dated 2nd April, 2012, as a result, the Applicant proceeded to file the instant application on 15th June, 2012 so as to compel the Respondent to arbitration.

11. By the Respondent failing to agree on a mutually appointed arbitrator within the provisions of Clause 14.12.1 of the Contract, the Applicant was at liberty to pursue Clause 14.12.3 which reads:

“Any breach of this undertaking by a party shall be deemed to be a material breach of this agreement and the non-breaching party shall be entitled to all remedies available to it whether under this agreement, contract, law or equity and each such remedy shall be independent of the other”.

Under **Section 6(1)** of the *Arbitration Act*, the Court will only refuse parties to proceed to arbitration unless as provided under **Section 6(1) (a) and (b)**. The *Constitution* also provides at *Article 159(2)(c)* for Courts to allow for alternative forms of dispute resolution. **Section 1A and 1B** of the *Civil Procedure Act* provides for the equitable, just, expeditious and fair determination of matters by the Court, whether as provided by the law, or in exercise of its inherent jurisdiction as provided for under **Section 3A** of the same Act. Whichever recourse the parties agree upon, and which was specifically provided under Clause 14.12 of the Contract, this Court will not interfere or impede the litigants' choice of dispute resolution. It therefore behoves the Court to assist the parties in amicably resolving any dispute, and to allow for the parties to proceed to arbitration under the Preventative and Maintenance Contract as there is no impeding or debilitating issue on the validity and operation of the arbitration agreement as per **Lofty v Bedouin Enterprises Ltd** (supra) and further in **Niazsons (K) Ltd v China Road and Bridge Corporation Kenya** (supra).

12. The upshot is that the application is allowed in terms of prayers (1), (2) and (4). The proceedings herein are hereby stayed pending the hearing and determination of the dispute before an arbitrator. Prayer (3) of the application is hereby set aside as the parties have failed to mutually appoint an arbitrator from the two listed. It is also hereby directed that the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) will appoint an arbitrator (other than the two listed under Prayer

(3)) within twenty one (21) days of the date of this Ruling, for the hearing and determination of all the disputes between the parties. Costs of the Application shall be the costs in the Arbitration.

DATED and delivered at Nairobi this 18th day of June, 2014.

J. B. HAVELOCK

JUDGE