



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 158 OF 2014**

**DANKI VENTURES LIMITED.....PLAINTIFF**

**• VERSUS -**

**SINOPEC INTERNATIONAL PETROLEUM**

**SERVICES LIMITED.....DEFENDANT**

**RULING**

1. The application before me seeks the stay of the proceedings which are before this court, and also asks the court to refer the dispute to arbitration.
2. It is the contention of the defendant that the dispute between the parties herein arises from the contract dated 4<sup>th</sup> June 2013.
3. It is the defendant's further contention that the contract in issue expressly provides that any disputes, controversies or differences which might arise between the parties would be settled by arbitration.
4. When canvassing the application, Mr. Awele, the learned advocate for the defendant, submitted that the contract in question did not have any provisions on items upon which the plaintiff had founded its claims.
5. The only item which had been provided for in the contract, according to the defendant, was the charges in respect to Mobilization and Demobilization.
6. Therefore, as far as the defendant was concerned, the contract did not contain provisions in respect to charges either for working or for having the plaintiff's vehicles and equipment on standby.
7. But even in relation to the claim for Mobilization and Demobilization, the defendant submitted that the plaintiff's claim of Kshs. 65,968,000/- was denied. Following the denial of that claim, the defendant argues that that constituted a dispute, which should therefore be referred to arbitration.
8. According to the defendant, it had already paid to the plaintiff the sum of Kshs. 15,000,000/-, which was in respect to the Mobilization and the Demobilization.
9. It was the defendant's further contention that the actual costs for the hire of the plaintiff's equipment would only become due at the end of the period of Lease.
10. However, the plaintiff had raised invoices during the currency of the Lease period. Such claims were deemed, by the defendant, to be premature.
11. Furthermore, the Delivery Notes which the plaintiff had cited, had either not been received by the defendant, or had been disputed.
12. As it was the understanding of the defendant that the parties would carry out the reconciliation of the accounts at the end of the lease, the claim herein was described as premature.
13. The defendant emphasized that there was a dispute over the facts, as perceived by the two parties, and that therefore, the court should refer the said dispute to an arbitrator, as that was the medium

- which the parties had chosen, for resolving disputes.
14. Mr. Mwangi, the learned advocate for the plaintiff, submitted that this matter cannot be referred to arbitration because the Arbitration clause in the contract was inoperative.
  15. Secondly, the plaintiff submitted that there was no dispute, in any event.
  16. The plaintiff's reasoning was that because the defendant had admitted that it owed Kshs. 44 million to the plaintiff, there cannot be a genuine dispute between the parties.
  17. Initially, the plaintiff had indicated to this court that apart from the admitted claim for Kshs. 44 million, the balance of the claim could go to arbitration.
  18. However, the plaintiff later submitted that the claim could not be taken to arbitration because the Arbitration clause in the contract was so incomplete that it was incapable of being performed.
  19. In that regard, the defendant made a small concession. It said that although the Arbitration clause appeared to be incomplete, the court should appreciate that the parties had, in principle, agreed to go to arbitration. Therefore, if the matter was referred to arbitration, the defendant believes that the court would have given business efficacy to the commercial contract.
  20. As both parties agree that the Arbitration clause was incomplete, this court would have to determine whether or not the said clause was capable of being performed.
  21. It was appreciated by both parties that the Arbitration clause could only be performed if the court wrote into the said clause, the identity of the person who would be the arbitrator.
  22. On the one hand, the defendant believes that by writing into the Arbitration clause the identity of the arbitrator, the court would simply be giving effect to what was already agreed between the parties.
  23. But, on the other hand, the plaintiff's submission was that an attempt to write into the Arbitration clause, the identity of the Arbitrator would constitute an imposition, by the court, on an issue which the parties had not agreed upon.
  24. In determining this application, the court needs to ask itself whether or not there was a dispute between the parties. Secondly, if there was any dispute, should it be referred to arbitration? In answering that second question, the court will bear in mind the incomplete nature of the Arbitration clause and ask itself whether or not the arbitration agreement was inoperative or was incapable of being performed.
  25. The foregoing constitutes my summary of the provisions of Section 6 of the Arbitration Act 2010.
  26. I will now summarize the facts giving rise to this matter.
  27. According to the plaint, a contract was signed on 4<sup>th</sup> June 2013. At paragraph 5 of the Plaint, it was asserted as follows:

*“5. Sometimes on the 4<sup>th</sup> June 2013 or thereabouts, the Plaintiff and the Defendant entered into and signed a Contract drawn on 16<sup>th</sup> May 2013 under which the Plaintiff was to supply transportation services and crane services for Drill Rigs and other equipments at the Defendant's sites at Ol Karia and Moda Gashi”.*

28. According to the plaintiff, the parties did agree on the rates for charges for Mobilization and Demobilization; working charges; standby charges; and transportation charges on trailers and lowbed trucks.
29. It was the plaintiff's contention that the Defendant would make payment within one month of invoicing.
30. The plaintiff's case is that it performed its part of the contract. It provided trucks and trailers which transported equipment to both Ol Karia and Moda Gashi.
31. However, there developed a dispute between the defendant and the local community at Moda Gashi. Pending the resolution of that dispute, the defendant is said to have instructed the plaintiff to re-direct the trucks from Isiolo to the plaintiff's yard along Mombasa Road.
32. The plaintiff complied with the defendant's said instructions.
33. It was the plaintiff's case that the two parties agreed that the load would incur storage charges of Kshs. 15,000/- per day, per truck-load, excluding 16% VAT.
34. The number of trucks being stored at the plaintiff's yard was said to be four.
35. Therefore, the plaintiff had raised invoices for a sum of Kshs. 80,968,000/-, as at 31<sup>st</sup> March 2014.
36. The plaintiff had given credit for Kshs. 15,000,000/- which the defendant had paid. That therefore left the balance of Kshs. 65,968,000/-, which the plaintiff was claiming from the defendant.

37. The plaintiff's further claim was for storage charges at Kshs. 60,000/- per day, from 1<sup>st</sup> April 2014, until the equipment is collected by the Defendant.
38. In answer to the Plaintiff, the defendant has brought the current application, asking the court to refer the whole dispute to arbitration.
39. It is the defendant's contention that all the allegations in the Plaintiff are denied, and that it is therefore entitled to an opportunity to defend itself before an Arbitrator, as that was the mechanism which the parties had chosen to resolve any disputes between them.
40. There is no doubt at all that the parties had, in principle, expressed a desire to use the medium of arbitration to resolve any disputes as may arise between them. I say that there is no doubt about that fact because the parties willingly and consciously executed an Arbitration Agreement.
41. However, before the court can decide to refer the matter to arbitration, it must be demonstrated by the party seeking to have the matter referred to arbitration that there was a dispute.
42. In this case, it is said that there was no dispute because the defendant was simply refusing to pay a debt.
43. If there was a clear debt that was due and payable by the defendant, the court would not refer the matter to arbitration just because the defendant had refused or failed to pay the said debt.
44. However, if the defendant demonstrated that it had a reasonable basis, either in law or in fact, for disputing the plaintiff's claim the court could then make a finding that there was a dispute that could be referred to arbitration.
45. In this case, the defendant has asserted that:

*"While the rates for mobilization, demobilization, working and standby charges for cranes and transportation charges for trucks are well stipulated in the contract, the Defendant denies that the sums claimed by the Plaintiff are due and/or payable to the plaintiff".*

46. That is the deposition at paragraph 9 (a) of the affidavit of LUO LONGKAI, the Defendant's Managing Director.
47. That deposition is at complete variance with the submissions of the defendant's advocate, who said that;

*"Storage and standby charges were not agreed upon in the contract".*

48. In any event, the contract documents expressly makes reference to "Mobilization/Demobilization", "working" rates; "standby" rates; "Transportation" rates.
49. Secondly, the defendant concedes that there developed some unrest on the part of the local community. Whereas the said protests and civil unrest were not attributable to the defendant, the defendant had not denied the plaintiff's contention that because of the unrest, the defendant requested the plaintiff to keep some equipment at the plaintiff's premises, to await the return of calm.
50. In other words, the defendant appears to suggest that the claim for storage charges was not sustainable because the defendant was not to blame for the unrest.
51. With the utmost respect to the defendant, I think that it has mis-apprehended the particular claim. I say so because the plaintiff is not laying the claim on the basis of the defendant's wrong-doing. The plaintiff is simply saying that because of the unrest, the defendant instructed the plaintiff to store some equipment and machinery, until such time as when calm returned. Following that request from the defendant, the plaintiff says that it is entitled to recover from the defendant the costs for storage.
52. But did not the payment of Kshs. 15,000,000/- cover all hire and demobilization services which the plaintiff was to provide between May 2013 and the date of demobilization, as the defendant's Managing Director asserted in his affidavit?
53. In the contract dated 4<sup>th</sup> June 2013, there was a provision that dealt with the issue of payments. It provides as follows:

**"Payments:**

1. *Client will pay 15 million Kshs Kenya shillings after sign of the contract.*
  2. *Actual Hire and demobilization costs to be paid within 4 weeks after presentation of query free invoice at the end of the Lease period.*
  3. *In the case of any inquiries, the undisputed part of the invoice to be settled within 30 days, while any disputed/queried invoice is resolved”.*
54. The contract does not specify that the sum of Kshs. 15 million was in respect to Mobilization and Demobilization. The contract simply says that the client would pay that sum after the contract was signed.
55. By expressly stipulating that *the “Actual Hire and Demobilization costs”* would be paid within the prescribed period, the contract is making it clear that the sum of Kshs. 15 million was not to be deemed as payment for the Hire charges and Demobilization. The reason for that is not difficult to discern, as there were specific rates for calculating the actual costs, for the different pieces of equipment.
56. The parties do not appear to have anticipated the protests and unrest from the local community. Therefore, there was no provision in the contract for the rates at which the defendant would be charged for the services of storage.
57. It therefore appears to me that the plaintiff would have to lead evidence to prove the rate for the calculation of storage charges. That would constitute a dispute.
58. Meanwhile, although the defendant’s advocate insinuated that **QIYU TANG**, who sent emails to the plaintiff, was not the defendant, this court notes that the said Qiyu Tang indicated that he was communicating with the plaintiff, from the Defendant Company.
59. Of course, I appreciate the fact that just because a person purported to be writing for and on behalf of a particular company, does not necessarily mean that that was factually correct.
60. But in this case, although the emails in question had been made available to the defendant, it is glaringly outstanding that the Managing Director of the Defendant, Mr. **LUO LONGKAI**, did not disown **QIYU TANG**. If Qiyu Tang was not authorized to write on behalf of the Defendant, the easiest thing would have been for Luo Longkai to expressly say so in his affidavit. But he did not do so.
61. It would therefore appear to this court that if the matter was to be referred to arbitration, it could only be so in relation to the disputed part of the claim. There would be no need to refer to arbitration the portions of the claim which the defendant had admitted.
62. The next logical question is whether or not I should refer the matter to arbitration.
63. The relevant provision in the contract reads as follows:

#### **“ARBITRATION**

*Any disputes, controversies or differences which may arise between the parties hereto, in relation to this CONTRACT or for breach hereof, which cannot be resolved amicably by the parties within 28 days of the dispute, controversy or difference arising shall be settled by arbitration in Kenya upon the application of either party to the chairman of the Arbitration Act No. 4 of 1995. The Arbitration Award under this clause shall be final and binding upon the parties hereto”.*

64. As alluded to earlier, the said arbitration clause appears to be incomplete as it does not specify the person who should be appointed as the Arbitrator.
65. The Arbitration Act does not have a chairman. Therefore, even if there was a dispute that could be referred to arbitration, the party wishing to invoke the arbitration clause would not know the person who it should make an application to.

*According to Mr. Awele;*

*“.....Logically, for this kind of dispute, the chairman would be for the Chartered Institute of Arbitrators”.*

66. Whereas Mr. Awele advocate may be right, it does not follow that just because the Chairman of

- the Chartered Institute of Arbitrators would normally be the logical person to request that he should appoint the arbitrator, for the kind of dispute between the two parties herein, there is no evidence that the said parties intended to do that which is deemed normal.
- 67.If the parties wished to have that chairman as the person mandated to appoint the arbitrator, they could have said so expressly.
- 68.As the organization whose chairman could have appointed an arbitrator was not identified by the arbitrators, that renders the arbitral clause inoperative.
- 69.If the court wrote into the contract, so that it was the chairman of the Chartered Institute of Arbitrators who become mandated to appoint an arbitrator, then the court would have written into the arbitral clause a very substantive clause without knowing whether the parties would have wished to have that chairman or if the parties would have preferred the chairman of a totally different entity.
- 70.The court cannot impose on the parties either a particular arbitrator or a method for choosing the arbitrator.
- 71.In the event, as the arbitral clause is inoperative, I reject the defendant’s application to refer the case to arbitration. The defendant’s application dated 4<sup>th</sup> June 2014 is dismissed. The plaintiff is awarded the costs of the said application.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of September 2014.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

..... for the Plaintiff.

..... for the Defendant.

Mr. C. Odhiambo, Court clerk.