



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 354 OF 2014**

**YOUTH ENTERPRISE DEVELOPMENT FUND BOARD.....PLAINTIFF**

**K-REP DEVELOPMENT AGENCY.....DEFENDANT**

**RULING**

1. The application dated 6<sup>th</sup> October 2014 was filed by the Defendant, who is seeking a reference of the dispute between the parties to this suit, to Arbitration.
2. As a prelude to the said reference to arbitration, the defendant asks the court to stay the proceedings before court.
3. Ms. Ouma, the learned advocate for the defendant, submitted that Clause 11 of the Agreement between the parties herein, stipulates that any dispute arising between the parties would be referred to arbitration.
4. According to the defendant, there had now arisen a dispute between the two parties. Therefore, the defendant believes that these proceedings should now be stopped, so that the dispute could be resolved through arbitration.
5. But the plaintiff expressed the view that the application was brought late. It was the understanding of the plaintiff that if the defendant had intended to apply for the matter to be referred to arbitration, it ought to have made that application at the time when its advocates were entering appearance.
6. However, the defendant emphasized that the application was filed only some eleven (11) days after the Memorandum of Appearance.
7. Considering that the defendant was a corporation, Ms. Ouma said that there was need to appreciate that only specific people in the corporation who had the requisite authority to swear affidavits.
8. In this case, the defendant had not yet filed its Defence. If a Defence had been filed, the defendant believes that that would be deemed to constitute a waiver of the defendant's right to ask that the dispute be referred to arbitration.
9. At the same time, the defendant submitted that the absence of a Defence cannot be construed to constitute an admission of the plaintiff's claim.
10. But just what is the dispute which the defendant seeks to have referred to arbitration?
11. The plaintiff said that there was no dispute which could be referred to arbitration. But the defendant's view was that when a contention arises concerning how a clause in the Agreement is to be interpreted, then that was a dispute.
12. In this case, the defendant asserted that there was no consensus about the quantum of the plaintiff's claim. The lack of consensus is said to arise because the parties failed to agree on the issue of "*Penal Interest*".
13. As far as the defendant was concerned, it had paid Kshs. 27,000,000/- out of the loan amount of Kshs. 50,000,000/-. In that regard, the parties are in agreement.
14. In effect, the balance of the loan amount was Kshs. 23,000,000/-.

15. The plaintiff had loaded to that balance, the “*Penalty Interest*” of Kshs. 50,000,000/-, thus arriving at an outstanding balance of Kshs. 73,000,000/-.
16. However, the defendant’s contention was that the total claim could never exceed Kshs. 50,000,000/-, even if interest was added to the principal amount.
17. The issue that the defendant appears to be suggesting as the dispute, relates to the question whether the defendant’s liability was capped at Kshs. 50,000,000/- or if it was not capped at all.
18. In answer to the application, Miss Nyonje, the learned advocate for the plaintiff urged the court to, first, shut out the defendant’s further affidavit. That affidavit was said to raise things which were not pleaded in the original application.
19. In the case of **IMMANUEL MASINDE OKUTOYI & OTHERS VS THE NATIONAL POLICE SERVICE COMMISSION & ANOTHER, JUDICIAL REVIEW MISC. APPLICATIONS NOS. 11 & 12 OF 2014**, Odunga J. expressed himself thus;

*“First, I would like to associate myself with the sentiments expressed by the Respondents that the Applicants attempted to introduce new matters in the further affidavit sworn in support of their case. I must say that the conduct of introducing new grounds in a supplementary affidavit not grounded on either the petition or the statement in support of judicial review is a highly irregular practice that ought not to be tolerated. It is a practice which ought not to be countenanced as it amounts to ambushing the other party and amending pleadings by way of supplementary affidavits”.*

20. I have no doubt that the learned Judge did summarize the law correctly. I therefore do concur with his stated view on the matter.
21. In this case, the defendant sought and was granted leave to file a further affidavit. Having been granted leave to do so, it would be improper for the court to then shut out the very affidavit which it had permitted the defendant to file.
22. Secondly, the plaintiff has not indicated any particular aspect of the said affidavit which either introduced new things or which constituted an ambush to the plaintiff.
23. I therefore reject the plaintiff’s request, to exclude the further affidavit.
24. Meanwhile, as regards the time when an application to have a dispute referred from the court to arbitration, I note that the defendant cited authorities which pre-dated the amendments to Section 6 (1) of the Arbitration Act.
25. Prior to that amendment, a party could apply for a stay of the court proceedings;

*“...at any time after appearance, and before delivering any pleadings or taking any steps in the proceedings...”*

26. I believe that that was why the defendant was emphasizing that it had not yet filed a Defence.
27. However, if the defendant took a second look at the current provisions of Section 6 (1) of the Arbitration Act, it would have become clear that;

*“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...”*

28. In the case of **CHARLES NJOGU LOFTY VS BEDOUIN ENTERPRISES LTD CIVIL APPEAL NO. 253 OF 2003**, the Court of Appeal had occasion to make a pronouncement on the current provisions of Section 6 (1) of the Arbitration Act. This is what the learned Judges of Appeal said;

*“Section 6 (1) of the Arbitration Act 1995 has changed the law as it does not permit an application for stay of proceedings to be made after entering appearance”.*

29. That pronouncement is binding on me. In effect it is not open to the court to exercise a discretion

in the matter regarding the time within which a party seeking stay of court proceedings can ask the court to refer the dispute to arbitration. Therefore, regardless of whether or not the applicant filed the application only a short while after entering appearance or even if there was no apparent prejudice that would be caused to the other party by the short delay, the court cannot extend the time for filing an application under Section 6 (1) of the Arbitration Act.

30. Accordingly, the defendant's application dated 6<sup>th</sup> October 2014 is dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>th</sup> day of December 2014.**

**FRED A. OCHIENG**

**JUDGE**

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

Miss Nyonje for the Plaintiff.

Ms. Ouma for the Defendant.

Collins Odhiambo – Court clerk.