



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO. 321 OF 2011 (O.S)
IN THE MATTER OF THE ARBITRATION ACT, NO. 4 OF 1995
AND
IN THE MATTER OF AN ARBITRATION AGREEMENT

KENYA CANNERS SACCO SOCIETY LTD..... APPLICANT

VERSUS

CRAFT SILICON LTD..... RESPONDENT

R U L I N G

1. This ruling concerns the originating summons dated 26th July 2011. Three main orders are sought in the summons -

(i) That the court do direct the Law Society of Kenya or the Chartered Institutes of Arbitrators (Kenya Charter) to appoint an appropriate arbitrator to hear and determine the disputes between the parties.

(ii) That a reasonable time for making the award by the arbitrator be fixed.

(iii) That the costs of arbitration be borne by the unsuccessful party.

2. The grounds for the application include -

i. That the agreement between the parties have an Arbitration Clause, being Clause 15.1.

ii. That the Applicant, being dissatisfied by the services of the Respondent pursuant to their contract,

duly notified it of termination of the contract between them and demanded immediate refund of the sum of KShs 2,944,400/00 paid on account of the contract, which demand the respondent has refused or avoided to make good.

iii. That the applicant has on several occasions through its advocates requested the respondent to appoint an arbitrator to be approved by the applicant as per Clause 15.2 of the Contract, which request the respondent has failed to respond to.

iv. That the parties are therefore unable to agree on the appointment of an arbitrator to resolve the dispute due to the uncooperative attitude of the respondent.

v. That the contract was signed and performed in Kenya and that therefore this court has jurisdiction to grant the orders sought.

vi. That it is in the interest of justice that the order sought be granted.

3. There is a supporting affidavit sworn by one DAVID MWANGI KIOI the manager of the Applicant. To that affidavit are annexed various documents, including a Licensing Agreement dated 6th September 2006 between CR2 Limited and Kenya Cannery Sacco Society Ltd.

4. Clause 15 of the said License Agreement provides as follows –

“15. Law and Jurisdiction

15.1 This Agreement shall be governed by and construed in accordance with the Laws of England and the parties hereto submit to the jurisdiction of the English Courts. Any dispute or difference of any kind arising between the parties in connection with or arising out of Agreement shall be referred to arbitration as hereinafter provided.

15.2 Prior to reference to arbitration the parties shall promptly and in good faith negotiate with a view to settlement. Where settlement is not achieved by negotiation within thirty (3) days from the date on which the dispute or difference was notified as such (or any further period as may be mutually agreed in writing) then either party may by written notice require that the matter be referred for binding arbitration.

15.3 The arbitration procedure of the International Chamber of Commercial shall apply. Arbitration shall be conducted by a sole arbitrator selected by the mutual agreement of the parties. The arbitrator shall be a practicing lawyer of not less than ten years' standing with reasonable competence and expertise in the subject with reasonable competence and expertise in the subject area in dispute. Where the parties fail to reach agreement the arbitrator shall be appointed on the nomination of the then President of the Law Society of England and Wales following the written request of either party. Unless the parties agree otherwise the arbitration proceedings shall be conducted in London, England. The arbitrator will have no authority to award any damages that are excluded by the terms of conditions of

this Agreement.”

5. On 5th December 2011 the Respondent filed grounds of opposition and notice of preliminary objection. Both are identical in their grounds-

i. That the application is fatally defective.

ii. That the law purported to have been invoked does not support the application.

iii. That there does not exist a dispute which this court can refer to arbitration.

iv. That the court lacks jurisdiction to hear the application or to grant the orders sought.

v. That litigants in law cannot a probate and reprobate and must be bound by their own pleadings.

6. No replying affidavit was filed. The applicant however filed a supplementary affidavit (titled further supporting affidavit) on 9th December 2011. This supplementary affidavit is in essence a statement of the Applicant's complaints against the Respondent leading to the Applicant's termination of the contract between them.

7. The preliminary objection was canvassed by way of written submissions. The Applicant's submissions were filed on 25th March 2012 while those of the Respondent were filed on 30th May 2012. The learned counsels also highlighted their submissions orally on 7th March 2013. I have considered those submissions together with the cases cited.

8. To the Applicant's written submissions is annexed what is referred to in the submissions as the "correct agreement". This is a Software Agreement between the Applicant and the Respondent. It is simply dated 2008 without day or month. This "correct agreement" came up the first time in the aforesaid submissions. It has not been properly brought before the court as an annexure to an affidavit, as it should have.

9. As already pointed out the affidavit sworn in support of the originating summons exhibited a License Agreement dated 6th September 2006 between the Applicant and CR2 Limited. CR2 Limited is not the Respondent in this matter. That License Agreement annexed to the supporting affidavit therefore appears to be the wrong contract, though both the supporting affidavit and the supplementary affidavit are deponed upon the basis that the License Agreement annexed to the former is the contract between the parties. The Software Agreement exhibited in the submissions may well be the correct contract between the parties. Both parties made submissions upon it, and I will therefore look at it.

10. That "correct agreement" has a clause titled Dispute Resolution which provides as follows –

“DISPUTE RESOLUTION

If the parties are unable to resolve any dispute resulting from this agreement by means of joint co-operation or discussion between the individuals directly involved with the execution of this agreement, within 1(one) week after a dispute arise, or such extended period of time as the Parties may allow in writing, then such dispute shall be submitted to the most senior executives of the parties who shall endeavor to resolve this dispute within thirty (30) calendar days after it has been referred to them.

Should the dispute not be resolve in the aforesaid manner, then the dispute shall be determined by invoking arbitration procedures as per United Kingdom Arbitration Act, place of arbitration shall be Nairobi, Kenya.

The provisions of this clause constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or claim at any such proceedings that is not bound by such provisions.”

11. The Arbitration Clause in both agreements is more or less the same except that in the “correct agreement” the place of arbitration shall be Nairobi Kenya. There is no such provision in the Arbitration Clause of the License Agreement exhibited in the supporting affidavit. As already pointed out, that agreement is between the Applicant and another person who is not the Respondent in this matter. I will not make any further reference to it.

12. The “correct agreement” invokes the United Kingdom Arbitration Act. That statute of the United Kingdom has not been placed before this court. It may well contain provisions which this court could enforce against the parties as the contract does not appear to reserve interpretation or enforcement of the contract to the United Kingdom Courts (no such clause was brought to the attention of the court). It is also to be noted that the contract was entered into and performed in Kenya.

13. An Arbitration Act will normally contain elaborate provisions with regard to the powers and functions (and the limits thereof) of the court where there is an Arbitration Clause in the contract between the parties. By way of example see **sections 10 and 12** of our own **Arbitration Act, Cap 49**. For all I know we may have borrowed those sections from the English statute, but I would not know for sure without the English statute being placed before the court. Neither party has placed that statute before the court.

14. I will therefore invite the parties to place before the court the United Kingdom Arbitration Act mentioned in the Arbitration Clause of the “correct agreement” to enable the court to see if there is anything the court can do to assist the parties towards resolution of their dispute. The ultimate decision on this preliminary objection will therefore be reserved for now. That will be the order of the court.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2013