



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 2983 OF 1989

VALENTINOS FOOTWEAR

MANUFACTURERS LIMITED.....PLAINTIFF

VERSUS

DEVELOPMENT FINANCE

CO OF KENYA LIMITED.....DEFENDANT

R U L I N G

1. The Plaintiff has sought by **notice of motion dated 10th February 2012** the main order that the dispute between the parties in this suit be referred to arbitration by a sole arbitrator. Other necessary attendant orders are also sought.
2. The Defendant has opposed the application.
3. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 13th September 2012 while those of the Defendant were filed on 18th September 2012. The Plaintiff filed a reply to the Defendant's submissions on 10th June 2013. I have considered the submissions, including the cases cited. I have also read the affidavits in support of and in opposition to the application.
4. The contract between the parties that gave rise to this old suit contained an arbitration clause in the following terms –

“8.01 Any dispute or difference arising between the parties hereto concerning this agreement or the construction meaning operation or effect or any part thereof or the parties' respective rights duties obligations or liabilities under or by virtue of this agreement or otherwise relating to the subject matter hereof shall be referred to a single arbitrator to be agreed upon by the parties hereto or failing such agreement to a single arbitrator to be appointed by the chairman for the time being of the Law Society of Kenya. The award or finding of any such arbitrator shall be final and binding to the parties hereto.”

5. It is apparent from the material before the court that the parties were unable to agree on a sole arbitrator. Neither of them forced the issue by approaching the chair of the Law Society of Kenya for

appointment of a sole arbitrator. The Plaintiff then came to court thereby waiving its right to arbitration. Similarly, the Defendant waived its right to arbitration by filing defence in the suit. The suit has remained unprosecuted to date.

6. The main legal issue to be determined in this application is whether the court has jurisdiction to refer the dispute in this suit to arbitration without the consent of both parties.

7. I had occasion recently to consider the same issue in the case of ***William Charles Fryda vs John Cardinal Njue & Another Nairobi HCCC No. 423 of 2012 (unreported)***. I expressed myself as follows in a ruling dated 18th and delivered on 19th April 2013 –

“...Article 159(2)(c) of the Constitution provides as follows –

“159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

- a.
- b.
- c. (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted....”

The Constitution merely imposes upon the court the obligation to promote arbitration and other alternative forms of dispute resolution. That means that such alternative dispute resolution mechanisms must otherwise be provided for by law.

Section 59 of the Civil Procedure Act provides as follows –

“59. All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.”

Rules relating to arbitration are to be found in Order 46 of the Civil Procedure Rules. Rule 1 of that Order provides as follows –

"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."

The wording of this rule is clear. The court has no jurisdiction to refer any matter in difference between the parties to arbitration except by consent of all the parties.

Sections 59B and 59C of the Civil Procedure Act provide as follows –

"59B. (1) The Court may–

- (a) on the request of the parties concerned; or
- (b) where it deems it appropriate to do so; or
- (c) where the law so requires, direct that any dispute presented before it be referred to mediation."

"59C. (1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral."

Under these provisions, the court has jurisdiction to refer any matter in dispute to alternative dispute resolution mechanisms other than arbitration without the consent of the parties."

8. In the present case as well, the court clearly does not have jurisdiction to refer the matters in dispute in this suit to arbitration without the consent of the parties.

9. Having decided on the issue of jurisdiction then, I need not decide on any of the other issues raised. The suit must be canvassed and determined in court.

10. In the result I must refuse the application by notice of motion dated 10th February 2012. It is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2013