



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 348 OF 2010**

EUNICE SOKO MLAGUI.....**PLAINTIFF**

**VERSUS**

SURESH PARMAR..... **DEFENDANT**

**RULINGS**

1. By a Chamber Summon application dated 28<sup>th</sup> February 2013 and filed on 11<sup>th</sup> March 2013, the Plaintiff sought orders for a stay of the proceedings herein to enable the dispute between the parties be referred to arbitration.
2. In her Supporting Affidavit sworn on 28<sup>th</sup> February 2013, the Plaintiff annexed a copy of the Memorandum and Articles of Association of Software Applications

(Kenya) Ltd (herein after referred to as “the Company”) which contained an arbitration clause. The said clause stipulated as follows:-

**“Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or otherwise relating to the premises, or to these Articles, or to any statutes affecting the company, or to any of the affairs of the company, every such difference shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.”**

3. She stated that it was necessary for the matter to be referred to arbitration as the parties were bound by the said arbitration clause and that her health was not good making it difficult for her to prosecute the matter herein with the vigour and tenacity that was required.
4. She also stated that she filed suit to enable her preserve and protect some assets in form of money that were in danger of being utilized by the Defendants.
5. The 3<sup>rd</sup> Defendant swore a Replying Affidavit on 26<sup>th</sup> March 2013 on his own behalf and that of the 4<sup>th</sup> Defendant.
6. The 3<sup>rd</sup> Defendant denied existence of an arbitration between the Plaintiff and all the Defendants herein and that in any event the power to stay proceedings and refer matters to arbitration under Section 6 of the Arbitration Act (hereinafter referred to as “the Act”) could only be exercised at the

- option of a defendant. He further argued that once a defence was filed, the court had no jurisdiction to stay the proceedings and refer a matter to arbitration unless all parties agreed.
7. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants were categorical that there was no dispute between themselves and the Plaintiff capable of being arbitrated upon and that the Plaintiff did not disclose any course of action against them. It was therefore their case that this court lacked jurisdiction to grant the orders sought by the Plaintiff.
  8. In her Further Affidavit filed on 2<sup>nd</sup> May 2013, the Plaintiff contended that the 4<sup>th</sup> Defendant, through the 3<sup>rd</sup> Defendant, wound up the company without her authorisation, which action had criminal ramifications which she intended to prosecute.
  9. She averred that there was nothing under Order 46 Rule 20(1) & (2) of Civil Procedure Rules, 2010 that precluded the court from adopting on its own motion, appropriate means of dispute resolution, including mediation. She also stated that Article 159 of the Constitution of Kenya, 2010 mandated the court to promote alternative dispute resolution.
  10. When the matter came up in court on 23<sup>rd</sup> May 2013, Mr Wanyama counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants informed the court that they were not opposing the Plaintiff's application. They did not therefore file any Replying Affidavit or written submissions herein.
  11. The Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their respective submissions on 13<sup>th</sup> May 2013 and 6<sup>th</sup> May 2013 respectively. Miss Dawai and Mr Njuguna subsequently orally highlighted the said submissions when they appeared in court on 6<sup>th</sup> June 2013.
  12. It was the Plaintiff's submission that since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had accepted that the dispute could be referred to arbitration, then it was only just that the court stays the proceedings herein.
  13. On their part, the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's submitted that Section 6 of the Arbitration Act required that there be an arbitration clause between the parties to the dispute. They asked the court to consider the case of **Niazsons (K) Ltd vs China Road & Bridge Corp (2001) KLR 12** where the court held that before staying proceedings, the court had to consider whether the applicant had taken any steps in the proceedings other than the steps allowed by the said Section, whether the arbitration agreement was capable of being enforced and whether the suit concerned a matter that could be referred to arbitration.
  14. They also relied on the case of **HCCC No 236 of 2001 TM AM Construction Group (Africa) vs A.G Milimani** (unreported) where the court dismissed an application for stay of proceedings under Section 6 of the Arbitration Act as there was no evidence of existence of a dispute between the parties.
  15. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also relied on the case of **HCCC No 368/05 Pamela Akora Imenje vs Akoro ITC International Limited & Another** (unreported) where the court held that the Plaintiff therein, having chosen to file suit, could not purport to later have recourse to Section 6 of the Act.
  16. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants therefore argued that the Plaintiff lacked the *locus standi* to apply for a stay of proceedings under Section 6 of the Act and that in the event the court was inclined to proceed under Order 46 Rule 29(1) and (2) of Civil Procedure Rules, 2010, then the Plaintiff ought to bear the costs of the application herein as she was the one who rushed to court in the first place.
  17. It was evident that during the oral highlighting of the submissions by Miss Dawai, counsel for the Plaintiff that she relied heavily on the Further Affidavit which had introduced new facts to the detriment of the 3<sup>rd</sup> & 4<sup>th</sup> Defendants. The court will not attach any weight to the new facts that there were introduced therein as what was before the court was the application for a stay of proceedings to enable parties proceed for determination of the dispute herein through arbitration and not to look at the merits or demerits of the case herein. Considering the facts of the case at this point would be akin to hearing the dispute on the basis of affidavit evidence which as has been observed above would be prejudicial to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as they were only responding to the Plaintiff's said application.
  18. The court wholly agrees with the Plaintiff's submission that the court must honour the intentions

of parties to refer a matter to arbitration where there is an arbitration clause. The case of **Dharma Prathishthalnam vs Medhok Construction (P) Ltd (2005) 95cc 686** and Section 24 of the Pakistan Arbitration Act of 1940 cited by the Plaintiff indeed set out the correct position of the law.

19. The court must therefore interrogate the arbitration clause to establish whether indeed there was such an intention to refer a matter to arbitration. According to the arbitration clause, it is clearly stipulated as follows:-

**“Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand.....”**

20. Section 4(3) of the Arbitration Act, provides that an arbitration agreement is in writing if it is contained in-

- a. **A document signed by the parties,**
- b. **An exchange continue,**
- c. **Continue party**

21. The Shareholders of the company were listed as Suresh Thakorbhai Parma, Eunice Soko Mlagui and Rajinderkumar Dadubhai Patel. The said Suresh Thakorbhai Parma is the 1<sup>st</sup> Defendant herein while P.C. Patel & Pramod Patel are the administrators of the Estate of Rajinderkumar Dadubhai Patel. From the documents presented by the Plaintiff, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants do not appear to have been either members, executors or administrators or assigns of any members of the company. This clearly shows that the arbitration clause would not bind the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in any manner as there was no arbitration agreement between the Plaintiffs and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. However, there is an arbitration agreement between the Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants. There cannot be in fact any dispute in existence between the Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as envisaged in Section 6(1) (b) of the Arbitration Act.

22. As was seen hereinabove, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in agreement that the matter could be referred to arbitration. It would therefore be important to interrogate whether or not the dispute herein between the Plaintiff and the Defendants can be referred for determination through the arbitration process.

23. There is no evidence that has been provided to this court showing that the arbitration agreement was null and void, inoperative or incapable of being performed as spelt out in Section 6(I) (a) of the Act. However, a pertinent issue that arises is whether indeed, despite fulfilling all the conditions set out in Section 6(1) (a) and (b), the proceedings herein can be stayed so that the dispute between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants can be referred to arbitration for determination.

24. Section 6 of the said Arbitration Act stipulates as follows:-

1. **A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a 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 unless it finds –**
  - a. **that the arbitration agreement is null and void, inoperative or incapable of being performed;**
  - or**
  - b. **that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration.**
2. **Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.**
3. **If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the brining of legal proceedings in respect of any matter is of no effect in relation to those proceedings.**

25. The operative and key words are “**not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.....**”
26. The essence of Section 6(1) of the Act is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to have filed an application for stay of proceedings at the time they were to file their Memorandum of Appearance and before taking any other step in the proceedings herein. From the court records, it does appear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file their Memorandum of Appearance but opted to file their Defence on 5<sup>th</sup> July 2012. This essentially invoked the jurisdiction of this court to determine the dispute between the parties herein. They therefore lost their chance to have the dispute resolved as had been envisaged in the arbitration clause.
27. The court is therefore in agreement with the holding in **Pamela Okora Imenje vs Akora ITC International Limited (Supra)** and finds that the Plaintiffs present application was misconceived as she could not institute proceedings in this court and thereafter purport to stay the same so that the dispute could be referred for arbitration. The Plaintiff’s argument that it would be more expedient to have this matter disposed through arbitration finds no favour with this court. The choice of the mode of settlement of disputes should not be at the whims of a party to suit his or her circumstances more so where there is an arbitration clause. The court therefore rejects the staying of proceedings as aforesaid as it is only the preserve of the Defendants to have applied for a stay of proceedings under Section 6 of the said Arbitration Act.
28. The court is aware of its obligation under Article 159 of the Constitution of Kenya, 2010 to promote resolution of disputes through Alternative Dispute Resolution. However, it must be within the confines of the law.
29. Under order 46 Rule 20(1) of Civil Procedure Rules, 2010, the court can only refer a matter to arbitration where all parties who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration if they apply to the court for an order of reference. In this case the dispute between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants can be referred to arbitration. However, in the absence of the consent by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to proceed to arbitration, the courts hands remain tied, in the circumstances foregoing, the court finds that it does not have jurisdiction to refer the dispute herein for determination through arbitration.
30. For the foregoing reasons, the court finds that the Plaintiff’s Chamber Summon application dated 28<sup>th</sup> February 2013 and filed on 11<sup>th</sup> March 2013 is misconceived. Being unmerited, the court hereby dismisses the said application with costs to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
31. It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2013**

**J. KAMAU**

**JUDGE**