REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 245 OF 2011

STEPUP HOLDINGS (K) LIMITED……..….PLAINTIFF

VERSUS

MT. KENYA UNIVERSITY……...……..……..DEFENDANT

RULING

The application before me raises a simple question namely, whether or not to stay the proceedings herein pending arbitration.

The parties in this dispute executed a Memorandum of Understanding (MOU) on 1st September, 2008 in which they agreed as follows:

"SETTLEMENT OF DISPUTES

1. the Chairman of Mr. Kenya University and the Chairman of Step Up Holdings retain the final say on any matter which calls for interpretation of this MOU and any other agreements related to, or incidental to this MOU;

2. the parties shall use their efforts to settle amicably all the disputes arising out of or in connection with this agreement or interpretations thereof;

3. any dispute, difference or question which may arise at any time between the parties which cannot be settled amicably within thirty (30) days after receipt by one party of the other party's request for such amicable settlement shall be referred to the decision of a single arbitrator to be agreed upon by the two parties or in default of agreement within fourteen (14) days of each party raising such disputes, shall write to the Chairman of the Chartered Institution of Arbitration, Kenya Branch in accordance with and subject to the provisions of the Arbitration Act Cap 49 Laws of Kenya or any statutory modification or re-enactment thereof for the time being in force;

4. any party not satisfied with the arbitration shall have the right to seek redress in a court of law."

It is pointed out at this stage that the foregoing clause in the MOU satisfies the requirements of a valid arbitration agreements under **Section 4** of the **Arbitration Act (the Act)** 1995.

The terms of the MOU set out above notwithstanding, the respondent, Stepup Holding (K) Limited instituted this action against the applicant, Mt. Kenya University. With the suit, the respondent filed an

application for temporary injunction. While that application is still pending, the applicant has brought the instant application for orders to stay these proceedings pending arbitration.

The court's jurisdiction to stay proceedings pending arbitration is provided for in **Section 6(1)** of the **Act** as amended by **Act No.11** of **2009**. It provides that:

"6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies <u>not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought</u>, 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 infact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

(Emphasis supplied)

The last underlined part was introduced by **Act No.11** of **2009**. The respondent has opposed the application mainly on the ground that the same has been brought after the entry of appearance and that due to the applicant's conduct the MOU has been rendered inoperative.

It is plain from the proceedings that there was a dispute between the parties. It is also common ground that this suit was instituted before parties resorted to the clause in the MOU that provides for reference to arbitration. The firm of Mirugi Kariuki & Company Advocates entered appearance on behalf of the applicant on 14th September, 2011 and followed it with this application on 25th October, 2011 approximately one month later.

According to the authorities cited by both counsel, in addition to the provision of **section 6(1)** aforesaid, the court will also grant a stay of proceedings if the applicant satisfies it, not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration.

See Halsbury's Law of England, 4th Edition Lord Hailshan Vol.2. **<u>Hon. M.M. Galgalo & 3 Others</u>** V. **<u>Hon. Musikari Kombo & Another</u>**, HCCC No.382 of 2006. While it is clear from the annextures, particularly the respondent's letter of 8th June, 2011, that the respondent appreciated that there was a dispute which called for settlement in terms of the MOU, the applicant, on the other hand in response by a text message, of 15th June, 2011 believed that there was no dispute. The respondent has averred without being challenged that even as this matter was pending, the applicant proposed an out-of-court settlement which apparently he was not keen to pursue. Secondly, in an undated affidavit filed on 14th September, 2011, the applicant has insisted that the MOU is incomplete.

Having categorically stated that there was no dispute and having expressed doubt as to the completeness of the MOU, the applicant clearly was not ready and willing to do everything to facilitate arbitration.

Turning to Section 6(1), where, like in this case, the applicant brings an application for stay of proceedings way after entering appearance, the right to rely on the arbitration clause is lost. See **<u>Niazsons (K) Limited</u>** V. **<u>China Road & Bridge Corporation (K)</u>**, (2001) KLR 12 and **<u>Peter Mweha Kahoro & Another</u>** V. **<u>Benson Maina Githethuki</u>** (2006) eKLR.

For the above reasons, I do not find any purpose in considering the respondent's second ground that the MOU has been rendered inoperative. Suffice to state, finally that the applicant has submitted to the jurisdiction of the court and must go the full length. The application is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 27th day of January, 2012.

W. OUKO

JUDGE