



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 334 of 2011

GREATPHONE COMMUNICATIONS LIMITED 1ST PLAINTIFF

TANA COMMUNICATIONS LIMITED 2ND PLAINTIFF

MODERN CONNECTIONS LIMITED 3RD PLAINTIFF

VERSUS

SAFARICOM LIMITED.....DEFENDANT

R U L I N G

1. This is a Chamber Summons application by the Defendant dated 1st September, 2011 seeking the stay of these proceedings and reference of the dispute to arbitration. It is expressed to be brought under Section 6 of the Arbitration Act and Rule 2 of the Arbitration Rules. It is supported by the Affidavits of Fellicine Oriri sworn on 1st September, 2011 and 25th April, 2012, respectively.

2. The Defendant contended that the dispute between the parties related to the dealership agreements between the parties. that under clauses 22.1 and 22.2 of the said dealership agreement, the parties had agreed on the mode of settlement of disputes to be through arbitration, that the Plaintiff had through correspondence elected to refer the dispute to arbitration which the Defendant had agreed to vide its letter dated 25th August, 2011. The Defendant relied on the decisions in **Mara Conservancy –vs- County Council of Transmara HCCC No. 110 of 2009 (UR)**, **Stephen Okero Oyugi –vs- LSK & Anor (2005) I KLR 463** and **University of Nairobi –vs- NIK Bros CA No.309/02 (UR)** on its contention that in matters arbitral, a suit filed in court cannot be proceeded with. Mr. Ismail, learned Counsel for the Defendant urged that the application be allowed.

3. The Plaintiffs opposed the application vide Grounds of Opposition dated 2nd April, 2012 and written submissions filed in court on 18th June, 2012. The Plaintiff contended that the dispute between the parties is not a dispute contemplated in the Dealership Agreement between the parties, that the said agreement did not contemplate a situation where the Defendant's staff are allegedly involved in fraud against it and the fraud imputed upon the Plaintiffs, that the agreement contemplated disputes arising out of good faith. The Plaintiff contended that the Defendant is a dominant and major player in the telecommunications sector with the ability to influence a tribunal by its sheer presence, that when the Respondent had earlier on alluded to arbitration, the issue of fraud had not been addressed, that the agreement provides for a single arbitrator over whom the Defendant might have influence over, that fraud

is not a matter for arbitration but adjudication by a court of law and that it will be a dereliction of duty for the court to refer the parties to arbitration on an issue of fraud. Mr. Kamau, learned Counsel for the Plaintiff therefore urged that the application be dismissed with costs.

4. I have carefully considered the Affidavits on record, the written submissions, oral hi-lights by Counsel and the authorities referred to.

5. The agreement, the subject matter of the suit was entered into in or about 24th July, 2009. Although there are three (3) Plaintiffs in this suit, the only agreement produced in the bundle of documents accompanying the Plaintiff was the one between Greatphone Communications Ltd (the 1st Plaintiff) and the Defendant. The Agreements for the other Plaintiffs were not produced. However, from the record, in an application for injunction filed on 24th August, 2011 the court saw an agreement between Tana Communications Ltd (2nd Defendant) and the Defendant. The same was similar to the one between the 1st Plaintiff and the Defendant. The court will therefore consider the Agreement between the 1st Plaintiff and the Defendant to be the same as those of the other Plaintiffs. In any event, Clause 22.1 and 22.2 of that agreement which was set out in the body of the summons was not denied by any of the Plaintiffs.

6. The existence of the agreements and the arbitral clauses therein is not denied. What is contended is that the said agreements did not contemplate the existence of fraud in the disputes to be referred to arbitration, that fraud is not an issue for arbitration but for adjudication by a court of law and that the Defendant has a dominant and influential position in the telecommunications sector with the ability of denying the Plaintiff any fairness before a single arbitrator.

7. I have perused the subject agreement. Clause 22 provides for Dispute Resolution. The same provides:-

“22.1 Amicable settlement

The parties shall use their best efforts to settle amicably any dispute arising from or in connection with this Agreement or the interpretation thereof.

22.2 Arbitration

a) If the dispute has not been settled pursuant to the amicable settlement process in Clause 22.1 above within 30 days or such longer period as the Parties may agree the, any party may elect to commence arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute, the arbitrator shall be appointed, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.

b) Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.

c) To the extent permissible by Law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.

d) Pending final settlement or determination of a dispute, the parties shall continue to perform their subsisting

e) Nothing in this Agreement shall prevent or delay a party seeking injunctive or interlocutory relief in a court having jurisdiction.”

8. I have carefully examined the said clauses. I do not see any indication whatsoever where the parties agreed as to the nature of the dispute that was to be referred to arbitration. The agreement only talks of **“any dispute arising from or in connection with this Agreement.....”**. My understanding of this is that all disputes of whatever nature touching on the agreement were to be referred to arbitration. The

clause does not differentiate between disputes arising out of good faith or bad faith, disputes of a fraudulent nature or otherwise. A dispute is a dispute and in so far as the Agreement did not give a classification or nature of disputes that were referable to arbitration, my view is that all disputes regardless of their nature were not exempted from the application of Clause 22 of the Agreement.

9. The Plaintiff contended that fraud is not an arbitral dispute but one which can only be adjudicated by a court of law and that the court will be abdicating its duty if it referred this dispute, which is based on fraud, to arbitration. The court was not referred to any authority in support of this contention. Section 6 of the Arbitration Act Chapter 49 Laws of Kenya provides:-

“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 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 matters agreed to be referred to arbitration.”

When considering what a dispute is and whether a claim based on defamation is a dispute for resolution by arbitration, Hon. Ojwang J (as he then was) held in **Stephen Okero Oyugi –vs- Law Society of Kenya & Anor (2005) e KLR** that:-

“The term “dispute” is of a general scope and need not relate always to the legal domain. It is defined in “BLACKS LAW DICTIONARY,” 7th Edition (1999) (Page 485) as:-

“A conflict or controversy, especially one that has given rise to a particular lawsuit. Counsel for the Plaintiff submitted and I think quite justifiably, that arbitration issues are essentially contractual matters – disputes over things in respect of which the parties may compromise on their own interests. Matters which in legal thinking, belong to the sphere of compromises and bargains among those affected. As the law, in such a private domain, primarily seeks to effectuate private choice, it is a matter of public interest and of judicial policy, that the parties in dispute be accorded wide opportunities for seeking solutions outside the restrictive procedures of judicial process. I have no doubts in my mind that such is a wise policy; but I also would agree that the main sphere in which arbitration applies is contract.”

In the case of **University of Nairobi –vs- N.K. Brothers CA No. 309 of 2002 (UR)** the Court of Appeal was of the view that where an issue of conspiracy to defraud had been raised in a claim under a building contract, it was a proper case to go for investigation by way of arbitration.

10. In view of the foregoing, and for the reason that the dispute herein arises out of a contractual relationship between the parties, I am unable to agree with the Plaintiffs that the issue of fraud cannot be adjudicated upon through arbitration. At least, neither case law nor statute bars that course of action.

11. The Plaintiffs also objected to reference to arbitration on the grounds of the Defendants perceived economic muscle, or influence and dominance in the communications sector and that its mere presence may influence the arbitral tribunal. I am not aware of any authority to the effect that where one of the parties to a contract is economically strong, a contract with an economically light weight cannot be referred to arbitration. To my mind, that cannot be a basis of a court intruding into the people’s private contract where they have by their own act agreed to settle disputes in a known legal way. I believe the Arbitration Act has provisions safeguarding a party where the arbitrator misbehaves. Accordingly, I reject this ground.

12. I therefore allow the Defendants Chamber Summons dated 1st September, 2011 in terms of prayer

1 thereof. I direct the parties to forthwith appoint an arbitrator in terms of the respective agreements within 30 days of this ruling. The costs of the application will abide the outcome of the arbitration.

It is so ordered.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE