REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 499 of 2012

SAFARICOM LIMITED.....PLAINTIFF

VERSUS

FLASHCOM LIMITED.....DEFENDANT

R U L I N G

1. The Application before me is by way of Notice of Motion dated 3rd September 2012 seeking an order to strike out the suit on the basis, inter alia, that the court has no original jurisdiction to hear the matter by virtue of the arbitration clause contained in the Interconnection Agreement dated 10th December 2010 between themselves and the Plaintiff. It is supported by the Supporting Affidavit of Julius Kinyua sworn on 3rd September, 2012. The defendant contends that the suit is scandalous, frivolous and amounts to an abuse of the court process.

2. The circumstances leading to this application are that the parties hereto entered into an Interconnection Agreement under which they agreed to connect and keep connected their telecommunication systems in accordance with their respective licenses. A dispute arose over charges for interconnection, as well as the billing and payment of the aforesaid charges under the agreement. The Plaintiff claims against the Defendant Kshs. 5,072,676.72 in unpaid interconnection fees vide a Plaint dated 2nd August 2012. It is the contention of the Defendant that the interconnection agreement dictated that in the event of a dispute, the parties herein shall refer such a dispute to Arbitration before the Communication Commission of Kenya. It is on this basis that the defendant through the Notice of Motion now wishes the suit brought by the Plaintiff to be struck out.

3. In opposition to the motion, the Plaintiff filed grounds of opposition dated 6th September 2012. The Plaintiff contended that the application is misconceived, as the defendant had, on its own volition, submitted to the jurisdiction of the High Court, by entering appearance and filing a defence as well as a counterclaim. In doing this, the Plaintiff contends that the Defendant had in essence waived any right to rely on the arbitral clause. Moreover, it was the submission of the Plaintiff's counsel that there was no plausible ground for striking out the suit as disclosed within the meaning and tenor of the provisions of Order 2 Rule 15 of the Civil Procedure Rules 2010 which relates to striking out of pleadings. It was therefore urged that this court should be dismissed with costs

4. I have carefully considered the Affidavits on record and the oral submissions of counsels to the respective parties. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issues for determination by the court are twofold. First, whether the court has

jurisdiction to hear this matter and second, whether the Applicant has submitted to the Jurisdiction of this court by entering appearance and filing a defence and counterclaim thereby waiving it's right to rely on the arbitral clause

5. As regard the first issue, it is the defendant's contention that the court has no jurisdiction to hear this matter as the parties mutually agreed to refer any disputes arising between them to the Communication Commission of Kenya, or through arbitration. Looking at the Interconnection agreement dated 10th December 2010, Clause 21 of the agreement stipulates as follows;

"…it is understood and agreed that the parties shall carry out this agreement in the spirit of mutual co-operation and good faith and shall seek to resolve amicably any dispute arising between them. If the parties fail to agree, at the request of either Party the Commission shall arbitrate the dispute in accordance with the duties under the Act and any requirements under the relevant conditions in either Party's License or the Regulations…." (Emphasis supplied)

The term "The Commission" was used to mean the Communications Commission of Kenya. Further under clause 34.2 under the header **GOVERNING LAW, JURISDICTION AND LANGUAGE** states that;

"…..This Agreement is without prejudice to any statutory rights which the Commission may have in the proper exercise of its functions to resolve disputes between Parties. Subject to this, any dispute or difference between the Parties relating to the rights or obligation of the Parties under this Agreement shall save as herein specifically otherwise provided (clause 7.3) be referred to and finally determined by arbitration in Nairobi." (Emphasis supplied)

6. The question that arises therefore is whether by virtue of these clauses, the court has any jurisdiction to hear this matter. According to the Defendant, the Court has no jurisdiction by virtue of the aforesaid clauses. I respectfully disagree with this assertion. This submission suggests that the clauses oust the jurisdiction of this court. My view is that the arbitral clause in the Agreement dated 10th December 2010, does not in any way limit or oust the jurisdiction of this court to entertain or grant the reliefs sought in the Plaint. What they have done is to provide an alternative mode of dispute resolution in the event of a dispute arising. In the case of **INDIGO EPZ LIMITED –V-EASTERN AND SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK NAIROBI HCCC No.1034 of 2002 1KLR 2002** the court held that:-

"In any case…. (there) is a well settled general rule recognized (even) in the English courts which prohibits all agreements purporting to oust the jurisdiction of the court"

Further,

"…..where parties have agreed to refer disputes to arbitration the position is that the jurisdiction to deal with substantive disputes and differences is given to the arbitrator and the Kenyan Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes or differences are dealt with in the manner agreed between the parties under the agreement"

From the foregoing, what the arbitral clause did, in my view, was only to give an alternative mode of dispute resolution which the parties would have chosen instead of coming to this court in case of a dispute. Since this is an agreement the parties, they have to be bound by their agreement as to dispute resolution but in accordance with the law.

7. The second issue for determination is whether the Defendant has submitted to the Jurisdiction of this court by entering appearance and filing a defence and counterclaim. The Plaintiff cited several authorities regarding to this issue. In the case of **CORPORATE INSURANCE CO. –VS- WACHIRA (1995-1998) 1EA 20** it was held that the arbitral clause in the contract in question was in the nature of a *Scott-v-Avery* clause which provides that disputes shall be referred to arbitration. The Court went to on to hold that;

"In the present Case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause."

In the case of **FAIRLANE SUPERMARKET LIMITED –Vs-BARCLAYS BANK LIMITED NAI HCCC No. 102 of 2011** Odunga J held that:-

"The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE CO. VS. WACHIRA (1995-1998) 1EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence……any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration"

8. I associate myself fully with these findings in law. The Plaintiff has argued and in my considered opinion, rightly so, that the Defendant has acceded to the jurisdiction of this court by filing a defence and counterclaim after entering appearance. As such, the defendant has waived its right to refer the issues in dispute to arbitration under the agreement. Indeed this is very clear from Section 6 (1) of the Arbitration Act 1995 which states 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 not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, 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.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made." (Emphasis supplied)

It is clear from the foregoing, that an application by the Defendant ought to have been for stay of proceedings and reference to arbitration. The same should also have been made before delivering a defence. In the words of the Section, the Defendant ought not to have taken any other step in the proceedings after entering appearance but to have brought this application. Not only did the Defendant deliver a defence, but it also delivered a counterclaim against the Plaintiff. In view of this, I hold that the defendant did submit to the jurisdiction of this court and had waived its right to have this matter referred to arbitration.

9. Having found that the Defendant had acceded to the jurisdiction of this court, I do not think that the application is well founded under Order 2 Rule 15(1) of the Civil Procedure Rules.

10. Accordingly, I find that the motion has no merit and dismiss the same with costs to the Plaintiff.

DATED and **DELIVERED** in Nairobi this 28th day of November, 2012.

A. MABEYA

JUDGE