**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**(MILIMANI COMMERCIAL & TAX DIVISION)**

**CIVIL CASE NO. 800 OF 2009**

PANGAEA DEVELOPMENT HOLDINGS LIMITED…PLAINTIFF/APPLICANT

VERSUS

HACIENDA DEVELOPMENT LIMITED……........1ST DEFENDANT/RESPONDENT
MR. ADAM TULLER………………………………2ND DEFENDANT/RESPONDENT
MR. RICHARD REDMORE………………………3RD DEFENDANT/RESPONDENT
MR. DAVID MUNIU ……………………………...4TH DEFENDANT/RESPONDENT

**R U L I N G**

On 19th February, 2010 the plaintiff/applicant filed a Chamber summons application under section 6 of the Arbitration Act No. 4 of 1995, and Rule 2 of the Arbitration Rules and Sections 1A and 1B of the Civil Procedure Act. The same seeks the following orders:

a) THAT all further proceedings herein be stayed and this matter be referred to arbitration.

b) THAT this Honourable Court do refer to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) the question of the appointment of an arbitrator to determine the dispute herein.

c) THAT the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) do appoint a single arbitrator to hear and determine the dispute herein within twenty one (21) days of the date of this order.

d) That costs of this application be provided for.

Consequently on 21st June, 2010 the 1st, 2nd and 3rd defendants filed a notice of intention to raise a preliminary point of law under Order XIV rule 2 of the CPR. The said notice has raised an objection *in limine* that:

a) The plaint herein dated 26th October, 2009 does not seek any prayer to refer the matters pleaded therein to arbitration.

b) The request that the Honourable court do refer this cause to an arbitrator offends the provision of section 6 of the Arbitration Act No. 4 of 1995 and the Rule in Scott vs. Avery and Others [1843-60 All

ER).

c) The plaintiff herein is not a party to the Shareholders Agreement dated 3rd August 2006.

According to the defendant's counsel the plaint before this court has never sought any prayer to refer this suit to an arbitrator. Mr. Amolo who appeared for the defendants further submitted that the only prayers being sought are for general damages, permanent injunction to stop his client from breaching the agreement. Besides the above, the defendant's counsel also urged this court to refer to the plaint where the plaintiff has been described as a limited liability company based in Kenya. According to the learned counsel, that averment is denied and in the replying affidavit by the 2nd defendant called Adam Tuller that there is no company registered as Pangaea Development Holdings Limited. In addition to the above, the learned counsel referred this court to section 6 of the Arbitration Act and stated that it is no longer possible for this court to refer the matter to an arbitrator. It is his contention that the case of **Scott vs. Avery & Others [1843] All ER** has embodied the common law principles as reflected in section 6 of the Arbitration Act. In conclusion Mr. Amolo submitted that when the plaintiff came to court he did not invoke section 7 of the Arbitration Act to seek an interim measure. He also pointed out that the defendants had filed a defence and hence the matter could not be referred to arbitration.

On the other hand, the plaintiff's counsel Mr. Mogere submitted that they had filed their written submissions on 21st September 2010. Further to the above, he also submitted that they had filed the application under section 7 of the Arbitration Act which to him gives this court jurisdiction to grant a measure of protection. According to him, that is what exactly the applicant did. He also referred this court to the lengthy affidavits filed by the 2nd and 3rd defendants. In particular he referred this court to paragraph 27 to the affidavit of Richard John Redmore. The latter stated that he had no problems in referring the matter to arbitration. In addition to the above, he also referred this court to paragraph 46 of the affidavit of Adam Henry Tuller which also stated that the defendants have no objection to the belated suggestions to go for arbitration. The plaintiff's counsel also submitted that the said statement was made under oath on 1st December 2009. Following the above, the plaintiff presented a list of arbitrators and subsequently this matter was mentioned before this court on several occasions. However, that process was not successful and that is why they were forced to file this application. It is the contention of the plaintiff's counsel that Section 6 of the Act is clear that as long as the arbitration clause is not operative it shall be referred to arbitration. In addition to the above, he also submitted that issues like the registration of the company can be dealt with by the arbitrator. Apart from the above, he also referred this court to Section 17 of the Arbitration Act that allows the arbitrator to determine whether he has the jurisdiction to deal with the matter. As far as the case of **Scott vs. Avery [1873] All ER** is concerned, he submitted that the same was decided about 130 years before the Arbitration Act came into being. On the basis of the above, he has urged this court to apply Section 6 of the Arbitration Act. While concluding his submissions, he referred this court to section 159 of the new Constitution which recognizes that there are alternative forms of resolving disputes. Finally, he submitted that this is not a proper preliminary objection but was only intended to delay the matter. On the basis of the above, he has urged this court to dismiss the preliminary objection This court has carefully considered the opposing submissions by the learned counsels. At the outset it must be stated that the law on preliminary objections is well settled. In the case of **Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors Limited [1909] EA** 696, the Court of Appeal stated as follows:

***"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

The court went further by observing that:

***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be***

***raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, and, on occasion, confuse the issues. This improper practice should stop."***

From the above clear provisions of the law, it is very evident that the present preliminary objection does not raise pure point of law. It is noted that the contention as to whether the plaintiff is a party to the shareholders agreement dated 3rd August 2008 is a factual issue which can only be resolved during the hearing of this matter. That means that this court cannot delve into that issue at this stage since it is premature. Secondly, it is apparent that the preliminary objection states clearly that the plaint does not seek any prayer to refer the matters pleaded therein to arbitration. Whereas that statement is correct, as far as the prayers are concerned in the plaint, it is significant to note that in paragraph 12 of the plaint the plaintiff has clearly acknowledged the fact that there exists a dispute under the agreement as to how the parties should carry out their obligations. The same paragraph also states that the parties are yet to agree on a suitable arbitrator to hear and determine the dispute. Apart from the above, this court has carefully considered the replying affidavit of Adam Henry Tuller which is dated 1st December 2009. In that affidavit at paragraph 46 the deponent clearly stated that the defendants have no objection to the belated suggestion to go for arbitration. Similarly, Richard John Redmore also swore an affidavit on 1st December 2009. In paragraph 27 of the said affidavit, he also did not object to the arbitration process. Apart from the fact that the two defendants are not opposed to the arbitration process, section 159 (2) (c) and (d) of the new constitution provides as follows:

***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***

***(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).***

***(d) Justice shall be administered without undue regard to procedural technicalities."***

It is obvious that without this court going to any particular section of the Arbitration Act, Cap 49 Laws of Kenya that in the event that there is any conflict between the Constitution and any Act of Parliament, then obviously the provisions of the Constitution must prevail. Right now we are in a new constitutional dispensation which requires the courts to dispense justice fairly, impartially and speedily without any undue technicalities. In the event that this matter goes for arbitration, then it is very obvious that all the parties will be granted an opportunity to ventilate their cases fully before a award is made by the arbitrator who has been appointed. That effectively means that no party will be prejudiced during the arbitration process. It is also crystal clear that before any arbitration process commences, any party is at liberty to raise the issue of the jurisdiction of the said tribunal. This court has carefully considered the shareholders agreement which was signed on 3rd August 2006. Clause 19.1 specifically deals with dispute resolution/arbitration. That clause reinforces the fact that when the parties entered into the agreement they foresaw a situation where they could be disputes and hence provided a mechanism for arbitration. Given the above analysis, I hereby dismiss the notice of intention to raise preliminary point of law which was filed by the defendants on 17th June, 2010 since the same has no merits at all. Lastly, I hereby order the defendants to pay for the costs of this Preliminary objection.

Those are the orders of this court.

**MUGA APONDI**

**JUDGE**

***Ruling read, signed and delivered in open court in the presence of*** : Mogere - Plaintiff's Counsel
Defendants' Counsel - absent

**MUGA APONDI**

**JUDGE**

**23RD FEBRUARY, 2011**

**4.10 P.M.**