



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.95 OF 2011

GIFTED HANDS FURNISHINGS AND FABRICS LTD.....
.....PLAINTIFF

VERSUS

KIBUWA ENTERPRISES LTD.....DEFENDANT

R U L I N G

1. By a notice of motion dated 17th March, 2011, Kibuwa Enterprises Ltd seeks to stay the proceedings in this suit pending a reference to arbitration. It also seeks a further order that the dispute between the plaintiff and the defendant be referred to arbitration. The application is supported by an affidavit sworn by John Muriuki Kibuchi who is a director of the defendant company.
2. In response to the application, Silas Nyori Ndungu Mbugua, a director of Gifted Hands Furnishings and Fabrics Limited the plaintiff company, swore a replying affidavit. When the application for stay came up for hearing, Mr. Gicharu who appeared for the plaintiff/respondent, indicated that in accordance with the notice served on the defendant/applicant, the respondent wished to cross-examine John Muriuki Kibuchi who had sworn the affidavit in support of the application.
3. The application was opposed on the grounds that the intended cross-examination was on matters that touch on the dispute between the parties as opposed to what is before the court. Counsel for the respondent on its part argued that it was imperative that the court has all the information before it to enable it arrive at a just conclusion, and that it was therefore necessary for the deponent of the supporting affidavit to be cross-examined.
4. The notice of motion dated 17th March, 2011, was brought under Section 6 of the Arbitration Act 1995 and Rule 2 of the Arbitration Rules 1997. Section 6 of the Arbitration Act states as follows:

“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.*

5. Therefore, in dealing with an application under Section 6 of the Arbitration Act, the court must first establish that there is an arbitration agreement between the parties, and that the proceedings arise from such agreement. The court must also consider whether the agreement is valid and capable of being performed. Further, the court must be satisfied that there is a dispute between the parties in regard to the matters agreed to in the agreement.

6. Parties have sworn affidavits in support and in reply to the application dated 17th March, 2011. This is what the court has to consider in order to enable the court arrive at a decision as to whether the provisions of Section 6(1) of the Arbitration Act have been satisfied, and whether the proceedings should be stayed. It is therefore important that if there is an issue regarding the facts deponed to in the affidavit, as long as they are relevant to the questions raised in Section 6(1) of the Arbitration Act, the parties must be given an opportunity of testing those facts through cross-examination. For these reasons, I will overrule the objection and order that the defendant avail the deponent of the affidavit filed in support in their application dated 17th March, 2011, for cross-examination.

Dated and delivered this 31st day of May, 2011

**H. M. OKWENGU
JUDGE**

In the presence of: -
Gicharu for the defendant/applicant
Mwiti for the plaintiff/respondent
B. Kosgei - Court clerk