



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 16 of 2009

**PETRO OIL KENYA LIMITED.....PLAINTIFF
VERSUS
KENYA PIPELINE CO. LTD.....DEFENDANT**

RULING

I have before me an application to stay these proceedings and refer the parties to arbitration. The application has been lodged by the defendant, Kenya Pipeline Company Limited, under section 6 of the Arbitration Act No. 4 of 1995 and Rule 2 of the Arbitration Rules of 1997. The main ground for the application is that the dispute between the parties arises out of a written agreement between them which agreement contains a valid arbitration clause which gives the disputes. In the premises, these proceedings should be stayed to allow the parties commence the arbitral process. The application is supported by an affidavit sworn by one John Muindi the defendant's Acting Chief Legal Officer. The affidavits elaborate the above ground. The applicant contends that clause 22 of their agreement obliges the parties to refer to arbitration any dispute or difference arising out of the performance or interpretation of the agreement and such a dispute has arisen.

The application is opposed and there is replying affidavit sworn by one Benjamin Gethura Kingori, the plaintiff's Chief Executive Officer. There is also a supplementary affidavit sworn by one Irene Wambui Nvutu, the plaintiff's Legal Officer. The contention of the plaintiff is three fold: that there is no dispute between the parties to be referred to arbitration; that the applicant has not complied with the provisions of their agreement regarding referral to arbitration and that in any case the applicant has lost the right to seek stay of these proceedings having filed its application too late.

When the application came up before me for hearing on 9th July 2009, counsel agreed to file written submissions which they duly filed and highlighted the same on 26th November 2009. I have considered the application, the affidavits filed together with the annexures and the submissions of counsel. Having done so, I think this application turns on whether or not the applicant has lost the right to lodge this application.

Section 6 (1) of the Arbitration Act 1995 reads as follows:-

**“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 an appearance or files any pleading 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.”**

The Court of Appeal in **Charles Njogu Lofty – v – Bedonin Enterprises Limited [Nairobi CA No. 23 of 2003] (UR)** said the following of the above provisions:-

“On the plain reading of that section, before the court can consider the issues raised in

paragraphs (a) and (b) of section 6 (1) of the Act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court:-

.....not later than the time when that party enters appearance or files any pleadings or takes any step in the proceedings.....”

The court further stated that **“even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered at the time of filing any pleading or at the time of taking any step in the proceedings.”**

What is the position herein? The applicant entered appearance on 27th April 2009. This application was then lodged on 11th May 2009 long after appearance had been entered. In the plain language of section 6 (1) of the Arbitration Act, 1995, the application has been filed too late. In this case 11 days is too late. That being the position I down tools and cannot consider the issues raised in paragraphs (a) and (b) of section 6 (1) of the said Act. The application is declined with costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF FEBRUARY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:

Mr. Magan for the plaintiff.

F. AZANGALALA

JUDGE

19TH FEBRUARY 2010