



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 879 of 2009**

MORIK TELECOMS LIMITED PLAINTIFF

VERSUS

TELKOM KENYA LIMITED DEFENDANT

R U L I N G

By this application, the plaintiff seeks two orders:-

1. *(Spent).*
2. *THAT pending the hearing and determination of this suit, the plaintiff and the defendant herein be compelled to refer their dispute arising out of their agreement dated 2nd April, 2007 to arbitration.*
3. *THAT costs of this application be provided for.*

The application is brought by a Chamber Summons dated 1st

December, 2009 and is made under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules; Sections 3 and 3A** of the **Civil Procedure Act; Section 6 (1)** of the **Arbitration Act, 1995; and Rules 2 and 8** of the **Arbitration Rules, 1997**, together with all enabling provisions of the law. It is supported by the annexed affidavit of one Peter Ombati, the plaintiff's Managing Director, and is based on the grounds that a dispute exists regarding a contract signed between the plaintiff and the defendant; that the said dispute relates to an alleged breach of the contract and extends even to the way the contract was drawn; and that since the contract is in dispute, the Chartered Institute of Arbitrators have declined to take it up on their own. The applicant therefore seeks for the court to order for the said dispute to be referred to the Chartered Institute of Arbitrators for an award to be realized.

Opposing the application, the defendants filed the following grounds of opposition:-

- (a) *That the Chamber Summons dated 1st December, 2009 is ex facie incompetent and fatally defective for failure to comply with the provisions of the Arbitration Act, 1995, and the Arbitration Rules, 1997.*
- (b) *That the plaintiff/applicant has circumscribed or substituted the statutory procedure prescribed*

by the Arbitration Act, 1995 and the Arbitration Rules, 1997 for the appointment of an arbitrator or arbitrators by the High Court.

(c) *That the relief sought by the Summons dated 1st December, 2009 is not provided for under the provisions of law relied upon.*

(d) *Prayer 2 of the said Summons is misconceived as it would result in the determination of the suit without hearing.*

During the oral canvassing of the application, Mr. Nyaberi for the Applicant argued that the original draft agreement between the parties contained a clause providing that disputes arising out of the contract between the parties would be referred to arbitration; when finally executed however, that clause was ambiguous, thereby rendering it impossible for the parties to refer the matter to arbitration. For this reason, the applicant moved to this court to make an order referring the matter to arbitration. He therefore asked the court to grant the orders as prayed.

Mr. Chiuri for the defendant referred to **Sections 10 and 12** of the **Arbitration Act, 1995** and **Rule 3 (1)** of the **Arbitration Rules, 1997** and submitted that the proper procedure would have been for the applicants to move the court by way of an Originating Summons, but they came by way of a plaint which was unprocedural. He referred to the cases of the **SPEAKER OF THE NATIONAL ASSEMBLY v. KARUME [2008] 1 KLR (EP) 425** and **EUROCRAFT AGENCIES LTD. v. TRADEWINDS EXPRESS LTD. (Milimani) HCC No. 562 of 2003 (OS)** and submitted that where a clear procedure is provided for, it should be strictly adhered to, and that failure to do so deprives the court of the requisite jurisdiction. Counsel finally submitted that the relief sought by the application is not provided for in the rules cited in the application, and that if prayer 2 is granted, it will dispose off the suit without a hearing. For those reasons, he urged the court to dismiss the application.

In his reply, Mr. Nyaberi submitted that the applicant was properly before the court, and that what the applicant was asking for was not the appointment of the Arbitrator, but for the court to help the parties to go to arbitration. That was why the applicant invoked **Rules 2 and 8** and not **Rules 3** of the **Arbitration Rules**. As the **Rules** do not provide a specific procedure to be followed in such a situation as this one, then the court has jurisdiction to lay down what procedure should be followed. He thereupon prevailed upon the court to do justice by referring the parties to arbitration.

After considering the application, the grounds of opposition, the submissions of Counsel and the authorities cited, I find that the issues which arise for determination are whether the applicant is properly before the court; what orders suit the occasion; and who should pay the costs.

The facts of this case are not in dispute. The parties herein entered into an agreement whereby the plaintiff undertook to provide Debt Collection Services in respect of such selected Business Accounts and Personal (Individual) Accounts as would be agreed between the parties, or any other accounts referred by the defendant. The agreement

carried an arbitration Clause, and it is that Clause which has fomented the problem between the parties. According to the plaintiff, the original draft carried an arbitration and dispute resolution Clause worded as follows:-

“15. ARBITRATION AND DISPUTE RESOLUTION.

15.1 The parties agree that any dispute arising within the contract period shall amicably be resolved between themselves. If after two days from the commencement of such negotiations the parties have been unable to amicably resolve a contract either party may require that the dispute be referred to Arbitration panel drawn from the Chartered Institute of Arbitrators.

15.2 All disputes, differences or questions between the Company and Contractor (read the defendant and the plaintiff) with respect to any matter arising out of or relating to the Contract, other than breach in which the decision of the Company is to be final and conclusive, and except and in so far as may be otherwise provided in the Contract shall be referred to the arbitration of two persons, one to be appointed by the Company (read “the defendant”) and the other by the Contractor (read “the plaintiff”).

However, the version of the agreement which was signed between the parties was worded slightly differently. It reads:-

“15. ARBITRATION AND DISPUTE RESOLUTION.

15.1 The parties agree that they will make every and all good faith efforts to resolve the disputes between them in an amicable and informal manner. If after two days from the commencement of such negotiations the parties have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred to arbitration.

15.2 All disputes, differences or questions between the Company and the Contractor with respect to any matter or thing arising out of or relating to the Contract, other than a matter or thing as to which the decision of the Company is to be final and conclusive, and except and in so far as may be otherwise provided in the Contract shall be referred to the arbitration of two persons, one to be appointed by the Company and one by one Arbitrator.

15.3 ...

15.4 The Arbitration proceedings shall take place in accordance with the provisions of the Arbitration Act, 1995, Laws of Kenya ...”

It is obvious from both the draft and the signed agreement that the express intention of the parties was that any disputes between them be resolved informally, and where their informal negotiations did not yield any fruit, then either party could require that the dispute be referred to arbitration. Under Clause 15.1 of the draft, such a dispute was intended to be referred to the arbitration of two persons, one to be appointed by the plaintiff, and the other by the defendant.

Whereas this intention was manifested beyond peradventure, the signed agreement does not bear the same clarity. It states that any dispute between the parties would be referred to the arbitration of two persons, one to be appointed by the Company, i.e. by the defendant, and one to be appointed “*by the Arbitrator.*” This latter part does not make sense. While it is patently clear that one arbitrator would be appointed by the defendant, it is not equally clear from Clause 15.2 which “*Arbitrator*” would appoint the second arbitrator. It is impossible, therefore, to enforce that Clause, and it was that impossibility which prompted the plaintiff to come to court. Does this court have jurisdiction to entertain the plaintiff’s application?

It is instructive that the only substantive prayer sought in this application is for an order that pending the hearing of this suit, the plaintiff and defendant herein be compelled to refer their dispute to arbitration. The application is expressed to be made under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules, Sections 3 and 3A** of the **Civil Procedure Act; Section 6 (1)** of the **Arbitration Act, 1995**; and **Rules 2 and 8** of the **Arbitration Rules, 1997**. A close look at each of these provisions shows that **Order XXXIX** of the **Civil Procedure Rules** deals with temporary injunctions and interlocutory orders, and that the prayer sought herein cannot be accommodated under that **Order**. Similarly, **Section 6 (1)** of the **Arbitration Act** applies where a suit is filed in respect of a matter in which there is an arbitration agreement. In such a situation, **Section 6 (1)** empowers the court to stay the proceedings pending reference of the matter to arbitration. However, such a stay and reference to arbitration will not be made if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Where the court declines to stay such proceedings, then the matter would proceed to hearing in court. The application before the court does not purport to stay any proceedings and, therefore, the matter does not lie under **Section 6 (1)**. That leaves us with **Rules 2 and 8** of the **Arbitration Rules, 1997**.

Rule 2 states that applications under **Sections 6 and 7** of the **Act** shall be made by summons in the suit. In this matter, there is neither an application for stay of proceedings under **Section 6**, nor an application for an interim measure of protection under **Section 7**, and therefore **Rule 2** of the **Arbitration Rules, 1997**, does not apply. Likewise, **Rule 8** of the said **Rules** comes into play only where an order is made under **Sections 6 and 7**, and since no such order has been made, **Rule 8** does not come into play.

By reason and wholly on account of the foregoing, only **Section 3A** is left to govern this matter. As expressed in the agreement between the parties, it was their clear intention in Clause 15.1. of the Agreement signed between them that any disputes between them would be sorted out amicably. The said Clause states as follows:-

“The parties agree that they will make every and all good faith efforts to resolve the disputes between them in an amicable and informal manner. If after two days from commencement of such negotiations the parties have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred to arbitration.”

From this Clause, it is clear that the intention of the parties was to resort to arbitration if their informal attempts at dispute resolution did not yield any fruits. Unfortunately for them, Clause 15.2 is not properly worded, but with goodwill between the parties, it can be amended to give meaning to their intention. **Section 3A** of the **Civil Procedure Act** therefore comes into play. The relevant part thereof reads as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice ...”

In order to give effect to the intention of the parties in this case, I hereby invoke the court’s inherent power under **Section 3A** and grant prayer 2 of the application as prayed. In the circumstances of this case, I direct that each party will bear its costs of this application. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of April,2010.

L. NJAGI

JUDGE