



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 60 of 2010

CHANNEL 2 GROUP CORPORATE (CHANNEL 2).....PLAINTIFF

VERSUS

KENYA BROADCASTING CORPORATION (KCB).....DEFENDANT

R U L I N G

1. The Chamber Summons dated 18th February 2010 is brought by the Defendant under the provisions of **Rule 3(2)** of the **Arbitration Rules 1997** of the **Arbitration Act 1995**. The Applicant is seeking for an order that the Plaintiff's suit filed by way of an originating summons be struck out with costs. In that suit, the applicant is seeking for an order that this court do appoint an arbitrator as per the joint venture agreement.
2. This application is premised on the grounds that the joint venture agreement between the Plaintiff and the Defendant was terminated on 16th March 2009. There is no longer in existence any business relationship between the parties. The Plaintiff also closed down their offices in Nairobi therefore any loss of business should be claimed by way of a plaint and not a determination by way of arbitration.
3. The Plaintiff is seeking for an arbitrator in London to arbitrate on the Joint Venture Agreement. The Plaintiff's claim is that they incurred losses as a result of the termination of the contract. Matters of damages and losses from an agreement can only be determined by way of a suit filed through a plaint where parties can adduce evidence. Thus there is no matter that is capable of being referred to an arbitrator. Moreover, the Plaintiff is a foreign company, and this is confirmed in their affidavit that they closed their offices in Nairobi that is why they want an arbitrator to be appointed in Britain. That is notwithstanding that the business was being carried out in Nairobi and the best forum is to seek compensation for the losses by filing a suit.
4. This application was opposed by the Plaintiff; reliance was placed on the replying affidavit sworn by **Ajay Sheth** on 8th April 2010. The Plaintiff contends that there is a Joint Venture Agreement which was wrongfully terminated by the Defendant under Clause 17 of the Joint Venture Agreement. Both parties are entitled to refer any dispute relating to the interpretation and enforcement of their rights to arbitration. It is the Defendant who purported to terminate the Joint Venture Agreement while making allegation of breaches. The Plaintiff pointed out that the Defendant's action was unfounded and maintains that the agreement was wrongfully terminated, which issue needs to be

determined by arbitration. The arbitration agreement is separate from the main contract and it survives the contract termination therefore it should be subjected to arbitration for an arbitrator to determine all the issues. The mere fact that the contract was terminated and, the Plaintiff closed their offices in Nairobi, cannot bar the Plaintiff from insisting on the rights and obligations stipulated in the contract.

5. This application is brought under the Arbitration Rules makes provisions on the procedure. The substantive law that guides the court on whether or not to strike pleadings is provided under the civil procedure rules. It is trite law that striking out pleadings is a drastic measure which is sparingly done and it is done when the pleadings complained about, are an abuse of the court process and discloses no triable issue(s). (See the case of **DT Dobie & Co. Limited vs. Muchina [1982] KLR**) as per **Madan JA**:

“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

6. In this case, the Plaintiff filed an Originating Summons under **Section 12(3) of the Arbitration Act** seeking this court to appoint either **Mr. James Corbert, QC, FCIArb or Lady Justice Frances Margaret Kirkham, solicitor and Chartered Arbitrator or Mr. Anthony Bingham, LLB (Hon), FCIArb, Barrister** to act as Arbitrator under Article 17 of the Joint Venture Agreement dated 10th May 2006, made between the Plaintiff and the Defendant. Clause 17 of that the joint venture agreement contains an Arbitration clause in the following terms:-

“Any dispute between or among the parties to this Agreement relating to the interpretation and enforcement of their rights and obligations under this Agreement shall be resolved solely by arbitration in London according to the Kenyan Laws.”

7. By virtue of the above provision which is within the Joint Venture Agreement dated 10th May 2006, it is clearly stipulated where the seat of the arbitration will be and, that disputes among the parties to the agreement on the interpretation and enforcement of the rights and obligations should be resolved through arbitration. For those reasons I do not think that the Plaintiff’s suit lacks merit. The respondent is merely following the provisions of the Joint Venture Agreement by seeking the orders they have sought in the Originating Summons. The issue being raised by the Applicant regarding loss and damages can be canvassed before the arbitrator, and if the applicant is dissatisfied with the decision, they can apply to the High Court.

8. I have no hesitation to arrive at the conclusion that the suit herein should not be struck out. I dismiss the application with costs to the Respondent.

RULING READ AND SIGNED ON

THE 24TH SEPTEMBER 2010.

M. K. KOOME

JUDGE