



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 818 OF 2009

DIGI-TEL COMMUNICATIONS SYSTEMS LIMITED..... PLAINTIFF

VERSUS

ALCATEL LUCENT EAST AFRICA LIMITED.....DEFENDANT

R U L I N G

This application relates to a chamber summons brought under section 6(1) of the Arbitration Act 1995 and rule 2 of the Arbitration Rules. It seeks the following orders

1. **THAT the hearing of this suit be stayed pending the reference of the dispute to arbitration.**
2. **THAT the costs of this application and the proceedings be provided for.**

During the hearing of the application, the applicant's counsel Mr. Gachuhi submitted that they seek to stay the suit that was commenced by the plaintiff on the grounds that the contract between the parties contained an arbitration clause. Further to the above, he also submitted that there is a dispute between the plaintiff and the defendant and that a copy of the contract has been attached to the supporting affidavit. He referred this court to page 31 of their documents which show the arbitration clause. Specifically, he stated that the dispute between the parties concerns the plaintiff's performance of the contract. In addition to the above, he referred this court to page 33 of the documents which complains about poor workmanship. That apart he also referred this court to page 49 and 53 which relate to the site quality report. Apart from the above, the applicant's counsel submitted that by 20th January, 2010 the applicant had complained about poor workmanship and he further explained that the letters of complaint can be found in the further affidavit. He was of the considered opinion that the plaintiff suit cannot proceed for hearing before this court since there is a dispute resolution mechanism which is available to the parties. He emphasized that the parties are required to follow that mechanism. He further submitted that the respondent has not denied that site quality reports have not been available to confirm the quality of work. Neither has he denied receiving the letters dated 20th January 2010. In addition to the above, the respondents have not claimed that they have rectified the work that has been brought to their attention. In support of his submissions he quoted the case of **University of Nairobi vs N. K. Brothers Limited [2009] eKLR** at page 12. In conclusion, the learned counsel submitted that they have shown sufficient evidence of the dispute and differences to enable this court to refer the matter to arbitration. It is on the basis of the above that he has urged this court to grant the application.

On the other hand, the respondent through Mr. Olonde opposed the application while relying on their replying affidavit. However, the respondent's counsel conceded that there is an arbitration clause but the same will only come into effect if it is signed by both parties. According to the learned counsel the plaintiff signed the agreement on 24th February, 2009 and the same was forwarded to the defendant to sign the same. Thereafter, the plaintiff embarked on the services that they had agreed to perform. In

addition to the above, Mr. Olonde also referred this court to paragraph 9 of the plaint in which they have given the breakdown on the work down and when the sites were handed over. It is his opinion that the same has not been denied by the defendant. Further to the above, he also submitted that the defendant never signed and returned the agreement till 17th September 2009 when the plaintiff was threatening legal action. On the said occasion the defendant only sent a photocopy of the agreement. It is on the basis of the above that the plaintiff cannot tell when the agreement was signed by the defendant. Apart from the above, Mr. Olonde submitted that by 17th September, 2009 the plaintiff had completed and handed over all the sites. It is his view that the failure of the defendant to sign and hand back the agreement the plaintiff is not bound by the same. It was also his view that section 6(1) of the Arbitration Act should be read in collaboration with subsection 2. He also pointed out that since the suit was filed in October 2009 no action has been taken by the defendants. To him it means that the defendant is not serious about referring the matter for arbitration. In his opinion the court can only stay proceedings when the parties are serious about arbitration. He also pointed out that the plaintiff is suffering substantial loss at the rate of Kshs. 30,000 per day. In conclusion, the respondent's counsel submitted that if the court is inclined to order for stay of proceedings then the arbitration should be done within a limited period of time since the plaintiff is suffering. He urged this court not to allow any party to frustrate another. This court has carefully considered the opposing submissions by the learned counsels. In addition to the above, this court has carefully read the agreement between the two parties. Article 49 of the agreement between the parties (exhibit A) states as follows:

“This Agreement shall be interpreted and governed in accordance with the French law, without application of its conflict of law principles. The application of the Vienna Sales Convention 1980 (CISG) is excluded.

For its execution, the parties elect their respective domiciles at the addresses indicated on the Agreement document.

All disputes between the parties arising out of or in connection with this Agreement or concerning its formation, performance, interpretation, breach or termination which cannot be settled amicably, shall be finally settled under the Rules of Arbitration and Conciliation of the international Chamber of Commerce by three arbitrators appointed in accordance with these Rules. The arbitration shall take place in Geneva, Switzerland and shall be conducted in English”.

From the conduct of the parties, it is crystal clear that they deliberately included the arbitration clause given the specialized nature of the agreement that they had between themselves. The parties appreciated the fact that in the event of a dispute relating to the engineering profession, there may be need of an arbitrator who has an understanding of that particular specialty. Having clearly identified the intentions of the parties, it is incumbent of this court to assist the parties reaching their objectives. This court is of the considered opinion that whereas there is a clear dispute between the parties, the machinery that they had put in place has not been fully exhausted. The court also appreciates the fact that in a business relationship there may be need for continuity and a cordial working relationship. It is easier to achieve those kinds of objectives when the parties opt to use the arbitration machinery. In the adversarial system of litigation the winner normally takes it all. However, in the arbitration system, there can be some leeway to enable the parties continue their business relationship. Considering the above factors, I hereby direct the parties to subject themselves to arbitration in compliance with the agreement that they had signed. In compliance with the above, the parties are hereby directed to appoint three arbitrators within the next two weeks. In the event of a stalemate, then the court will make the necessary orders. Further mention on 8th October 2010 for further directions. Those are the orders of this court.

**MUGA APONDI
JUDGE**

Ruling read signed and delivered in open court in the presence of:

Makande - Applicant's/Defendant's Counsel

Olonde - Respondent's/Plaintiff's Counsel

**MUGA APONDI
JUDGE**

24TH SEPTEMBER 2010