REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)

Civil Case 514 of 2009

CARZAN FLOWERS (KENYA) LTD..……..……..…1ST PLAINITFF

CAROL J. MANJI……..…….….2ND PLAINTIFF

RAMZAN H. MANJI……..……..…3RD PLAINTIFF

VERSUS

TARSAL KOOS MINCK B. V……..…1ST DEFENDANT

JOCOBUS KOOS MINCK……..2ND DEFENDANT

KODO BEHEER B.V…….....3RD DEFENDANT

NIKEDY B.V…….....4TH DEFENDANT

JAN C. VAN KESTEREN……..….5TH DEFENDANT

RULING

Before me is an application filed by the defendants pursuant to the provisions of **Section 6(1) of the Arbitration Act 1995** and **Rules 2** and **8** of the **Arbitration Rules, 1997**. The defendants seek to stay proceedings herein pending reference of the dispute between the plaintiffs and the defendants to arbitration. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavits of George Gitonga Murugara and that of Jacobus Minck. The application is opposed. Ramzan Habib Manji, the 3rd plaintiff swore a replying affidavit in opposition to the application. Prior to the oral hearing of the application, counsel for the parties to this suit agreed by consent to file written submissions in support of their respective opposing positions.

At the hearing of the application, I heard rival arguments made by Mr. Kiragu Kimani for the defendants and by Mr. Sheth for the plaintiffs. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have carefully considered the submissions, both written and oral made in support and in opposition of the application. The issue for determination by this court is whether the defendants have made a case to persuade the court that there indeed exists a valid and binding arbitration clause in the two documents that the defendants have relied on to compel the court to refer the dispute to arbitration. Mr. Kiragu Kimani and Mr. Sheth are agreed that if there indeed exists an arbitration clause which is required to be invoked in the event that there is a dispute between the plaintiffs

and the defendants, then this court will have no alternative but to order that the dispute be determined by the question as envisaged by the agreement of the parties. Again, Mr. Kiragu Kimani and Mr. Sheth are in agreement that there indeed exists an arbitration clause in the memorandum and articles of association of the 1st defendant to which the 2nd and 3rd plaintiffs and the 3rd, 4th and 5th defendants are shareholders and directors. The plaintiffs and the defendants further entered into another agreement dated 18th October 2006 referred to as the shareholders agreement. The said shareholders agreement was signed by the 2nd and 3rd plaintiffs and the 2nd and 5th defendants both in their personal capacities and in their capacity as directors of the 1st plaintiff and in the case of the 2nd and 5th defendants in their capacity as directors of the 1st, 3rd and 4th defendants. Article 31 of the articles of association of the 1st plaintiff provided that:

"*Whenever any differences arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these articles, or any claim on account of any such breach or alleged breach, or otherwise relating to the premise, or to these articles or to any statutes affecting the company, or to any of the affairs of the company, every difference shall be referred to the decision of the arbitrator, to be appointed by the Association of Arbitrators Kenya Chapter, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, or whom one shall be appointed by each of the parties in difference."*

Article 25 of the Shareholders Agreement provided as follows:

"*This Agreement and the relations between the parties (for this purpose including j. Minck and J.C. Van Kesteren) as well as the relations between the parties and the company itself shall exclusively be governed by the laws of Kenya. All disputes arising in connection with this Agreement, or further contracts resulting therefrom, shall be finally settled by arbitration in the Netherlands, but in accordance with Kenya Law. The arbitral tribunal shall be composed of three arbitrators, unless the parties agree to have their dispute settled by one arbitrator. Each party group will appoint one arbitrator, these two arbitrators will jointly appoint a third arbitrator. The place of arbitration shall be Amsterdam. The arbitral procedure shall be conducted in the English language. The parties may decide to follow the arbitration rules of The Netherlands Arbitration Institute, which is an independent organization which aims to promote arbitration as a means of settling disputes."*

Mr. Kiragu Kimani submitted that the two arbitration clauses in the articles of association of the 1st plaintiff and the Shareholders Agreement were sufficient to establish beyond peradventure that the plaintiffs and the defendants had agreed to have any dispute between resolved by arbitration in the first instance instead of a suit being filed in court. He urged the court to therefore refer the dispute to be determined by arbitration as envisaged by the agreement of the parties. Mr. Sheth was however of a contrary view. He submitted that the matters in dispute between the plaintiffs and the defendants were not matters that were covered by the arbitration clauses. He submitted that the defendants have committed fraud upon the plaintiffs necessitating the plaintiffs to file the present suit. He argued that the particulars of fraud and misrepresentation pleaded in the plaint disclosed a dispute which could not possibly be resolved by arbitration but by the court. It was the plaintiffs' contention that in view of the events that had already taken place, the plaintiffs were of the firm opinion that they were not bound by the Shareholders Agreement entered between the parties herein on 18th October 2006 and that was the reason why the plaintiffs were seeking a declaration of the court that the said agreement was illegal null and void. On their part, the defendants argued that the fact that the plaintiffs were challenging the validity of the Shareholders Agreement did not mean that the arbitration clause in the agreement could not be given effect to by the court. Mr. Sheth submitted that the defendants had not established to the required standard of proof that the dispute between the plaintiffs and the defendants ought to be referred to arbitration thus necessitating the court to stay proceedings herein pursuant to Section 6(1) of the Arbitration Act. Mr. Kiragu Kimani countered this argument by submitting that the defendants had established a case for the stay of proceedings herein pending reference of the dispute of arbitration.

Having evaluated the facts of this application, it is evident that there exists arbitration clauses in the

two documents that mandates this court to refer the dispute between the plaintiffs and the defendants to arbitration. I was not persuaded by the submission of the plaintiffs that since they had filed the present suit with a view to nullifying the Shareholders Agreement, then this court cannot invoke the arbitration clause in the said agreement. I think it is now settled law that an arbitration clause in an agreement is considered as constituting a separate agreement from the main agreement so that where a party is challenging the validity of such agreement, he cannot use such challenge as an excuse to oust the jurisdiction of the arbitrator to hear and determine the dispute. This is what is referred to as the separability principle which was laid down in the case of Harbour Assurance Co. Ltd v Kansa General International Insurance Co. Ltd [1993] 1 Lloyd's Rep 455 where it was held that the main contract and the obligation to arbitrate were distinct undertakings so that any challenge as to the validity of the main agreement had no necessary impact upon the validity of the arbitration clause. In the present application, the plaintiffs will be at liberty to challenge the validity of the Shareholders Agreement before the arbitrator. Under Section 17 of the Arbitration Act, the plaintiffs are at liberty to ask the Arbitral Tribunal to rule on whether it has jurisdiction to hear and determine the matters in dispute in light of the fact that the plaintiffs are challenging the validity of the Shareholders Agreement.

I therefore hold that the defendants have established that there exists an arbitration clause that mandates this court to refer the dispute between he plaintiffs and the defendants to arbitration. I hereby order that the dispute between the plaintiffs and the defendants shall be determined by arbitration as envisaged by the agreement of the parties herein. As regard the venue of the arbitration, it is evident that the parties herein are not in agreement. The two arbitration clauses envisage that the applicable law in the arbitration proceedings would be Kenyan Law. However, the Shareholders Agreement specifies that the venue of the arbitration shall be in the Netherlands. The plaintiffs are opposed to the Netherlands arbitration venue. This court is of the view that where a party desires that an arbitration proceedings be conducted outside the jurisdiction of this court, he must lay sufficient basis. In the present application, it was clear that the subject matter of the arbitration is the business of the 1st plaintiff which is a company incorporated in Kenya. Applying the principles laid down by the Court of Appeal in United India Insurance Co. Ltd vs East African Underwriters (K) Ltd [1985] KLR 998, I hold that the venue of the arbitration shall be at Nairobi Kenya. Since the parties have agreed that the applicable law will be Kenya, justice dictates that such arbitration be conducted within the jurisdiction of this court.

I therefore hold that, pursuant to Section 6(1) of the Arbitration Act, the proceedings herein shall be stayed pending the hearing and determination of the dispute by arbitration. As regard the interim orders that were issued by this court, I direct that the same is set aside pending the filing of an appropriate application by either party under Section 7 of the Arbitration Act for the grant of interim measures pending the hearing and determination of the application. So that the plaintiffs are not prejudiced, the interim orders earlier granted are extended for a further period of seven (7) days pending the filing of appropriate application under Section 7 of the arbitration. There shall be no orders as to costs.

DATED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2009.

L. KIMARU

JUDGE