



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
Civil Case 656 of 2009**

INTERMIDDLE ENTERPRISES LTD.....PLAINTIFF

VERSUS

SAFARICOM LTD.....DEFENDANT

RULING

The plaintiff filed suit against defendant seeking several orders from the court. The suit arises out of a dealer agreement entered between plaintiff and the defendant. Contemporaneous with filing suit, the plaintiff filed an application seeking interlocutory orders of injunction to restrain the defendant from withholding residual and commissions due to the credit of the plaintiff's dealer account during the term of the dealer agreement dated 2nd April 2006, pending the hearing and determination of the suit. The defendant filed grounds in opposition to the plaintiff's application. Justine Ogowapit, the defendant's senior manager legal services swore a replying affidavit in opposition to the application. The application is yet to be heard by the court.

On 22nd September 2009, the defendant filed an application pursuant to the provisions of **Section 6** of the **Arbitration Act 1995** and **Rule 2** of the **Arbitration Rules, 1997**. The defendant is seeking orders of the court to stay the proceedings herein pending the hearing and determination of the dispute between the plaintiff and the defendant by arbitration. The defendant contends that under clause 22 of the dealer agreement, any dispute arising out of the said dealer agreement, is required to be resolved by arbitration. The defendant was of the view that the plaintiff filed the present suit in breach of express provisions of the said subject agreement between the parties herein. The defendant argued that under **Section 10** of the **Arbitration Act 1995**, this court lacked jurisdiction to intervene in matters governed by **Arbitration Act**. The application is supported by the annexed affidavit of Nzioka Waita, the defendant's head of department, legal and regulatory affairs. The plaintiff did not file any papers in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ohaga, counsel for the defendant and Mr. Macharia Nderitu, counsel for the plaintiff. I have carefully considered the said submissions. The issue for determination by this court is whether the defendant established a case to entitle this court refer the dispute to arbitration. The principles to be considered by the court in determining whether or not to stay proceedings herein pending determination of the dispute between the plaintiff and the defendant by arbitration were set out in the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation [2001] KLR 12**. In the case, the Court of Appeal, *inter alia*, held that for an applicant to succeed in his application to stay proceedings pursuant to the provisions of **Section 6(1)** of the **Arbitration Act 1995**, he is obliged to bring his application promptly. In determining whether to grant the application, the court will take into consideration whether the applicant had taken any steps in the proceedings other than the steps allowed by the section; whether there are legal impediments on the validity, operation or performance of the arbitration agreement and finally whether the suit indeed concerned a matter agreed to be referred to arbitration. **Section 6(1)** of the **Arbitration Act 1995** provides as follows:

“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 appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration ...” (emphasis mine).

In the present application, there is no dispute that the plaintiff and the defendant entered into an agreement that contains an arbitration clause. **Section 22.2** of the **Dealer Agreement** provides for the resolution by arbitration of any dispute arising out of the said agreement. The defendant was required to file the present application immediately after entering appearance if it required the proceedings

herein to be stayed pending the hearing and determination of the dispute between itself and the plaintiff by arbitration. This court's perusal of the court record discloses that the defendant upon entering appearance, filed the present application seeking to stay proceedings herein pending the hearing and determination of the dispute by arbitration.

However, on 28th September 2009, the defendant filed grounds of opposition to the application. The defendant further filed a replying affidavit in opposition to the application. Under **Section 6(1)** of the **Arbitration Act 1995**, a party wishing to invoke the provisions of the said section to stay proceedings pending reference of the dispute to arbitration, is required not to have filed any pleadings or take any steps in the proceedings. In this case, it is evident that the defendant has taken steps in these proceedings that disentitle it to the order of stay of proceedings pending the hearing and determination of the suit by arbitration. By taking steps in this suit, i.e. by filing pleadings in reply to the plaintiff's application for injunction, the defendant made an election to have the dispute between itself and the plaintiff determined by this court. Unless the plaintiff and the defendant agree at this stage to refer the dispute to arbitration, this court has the requisite jurisdiction to hear and determine the dispute. **Section 10** of the **Arbitration Act 1995** does not therefore apply since the parties herein have opted to have the dispute between them determined by the court.

In the premises therefore, the defendant failed to persuade this court that this is one of the cases which can be stayed pending reference of the dispute between itself and the plaintiff by arbitration. The defendant's application dated 22nd September 2009 lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009.

**L. KIMARU
JUDGE**

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“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 appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration ...” (emphasis mine).

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However, on 28th September 2009, the defendant filed grounds of opposition to the application. The defendant further filed a replying affidavit in opposition to the application. Under **Section 6(1)** of the **Arbitration Act 1995**, a party wishing to invoke the provisions of the said section to stay proceedings pending reference of the dispute to arbitration, is required not to have filed any pleadings or take any steps in the proceedings. In this case, it is evident that the defendant has taken steps in these proceedings that disentitle it to the order of stay of proceedings pending the hearing and determination of the suit by arbitration. By taking steps in this suit, i.e. by filing pleadings in reply to the plaintiff's application for injunction, the defendant made an election to have the dispute between itself and the plaintiff determined by this court. Unless the plaintiff and the defendant agree at this stage to refer the dispute to arbitration, this court has the requisite jurisdiction to hear and determine the dispute. **Section 10** of the **Arbitration Act 1995** does not therefore apply since the parties herein have opted to have the dispute between them determined by the court.

In the premises therefore, the defendant failed to persuade this court that this is one of the cases which can be stayed pending reference of the dispute between itself and the plaintiff by arbitration. The defendant's application dated 22nd September 2009 lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009.

**L. KIMARU
JUDGE**

**INTERMIDDLE ENTERPRISES LTD.....PLAINTIFF
VERSUS
SAFARICOM LTD.....DEFENDANT**

RULING

The plaintiff filed suit against defendant seeking several orders from the court. The suit arises out of a dealer agreement entered between plaintiff and the defendant. Contemporaneous with filing suit, the plaintiff filed an application seeking interlocutory orders of injunction to restrain the defendant from withholding residual and commissions due to the credit of the plaintiff's dealer account during the term of the dealer agreement dated 2nd April 2006, pending the hearing and determination of the suit. The defendant filed grounds in opposition to the plaintiff's application. Justine Ogwapit, the defendant's senior manager legal services swore a replying affidavit in opposition to the application. The application is yet to be heard by the court.

On 22nd September 2009, the defendant filed an application pursuant to the provisions of **Section 6** of the **Arbitration Act 1995** and **Rule 2** of the **Arbitration Rules, 1997**. The defendant is seeking orders of the court to stay the proceedings herein pending the hearing and

determination of the dispute between the plaintiff and the defendant by arbitration. The defendant contends that under clause 22 of the dealer agreement, any dispute arising out of the said dealer agreement, is required to be resolved by arbitration. The defendant was of the view that the plaintiff filed the present suit in breach of express provisions of the said subject agreement between the parties herein. The defendant argued that under **Section 10** of the **Arbitration Act 1995**, this court lacked jurisdiction to intervene in matters governed by **Arbitration Act**. The application is supported by the annexed affidavit of Nzioka Waita, the defendant's head of department, legal and regulatory affairs. The plaintiff did not file any papers in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ohaga, counsel for the defendant and Mr. Macharia Nderitu, counsel for the plaintiff. I have carefully considered the said submissions. The issue for determination by this court is whether the defendant established a case to entitle this court refer the dispute to arbitration. The principles to be considered by the court in determining whether or not to stay proceedings herein pending determination of the dispute between the plaintiff and the defendant by arbitration were set out in the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation [2001] KLR 12**. In the case, the Court of Appeal, *inter alia*, held that for an applicant to succeed in his application to stay proceedings pursuant to the provisions of **Section 6(1)** of the **Arbitration Act 1995**, he is obliged to bring his application promptly. In determining whether to grant the application, the court will take into consideration whether the applicant had taken any steps in the proceedings other than the steps allowed by the section; whether there are legal impediments on the validity, operation or performance of the arbitration agreement and finally whether the suit indeed concerned a matter agreed to be referred to arbitration. **Section 6(1)** of the **Arbitration Act 1995** provides as follows:

“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 appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration ...” (emphasis mine).

In the present application, there is no dispute that the plaintiff and the defendant entered into an agreement that contains an arbitration clause. **Section 22.2** of the **Dealer Agreement** provides for the resolution by arbitration of any dispute arising out of the said agreement. The defendant was required to file the present application immediately after entering appearance if it required the proceedings herein to be stayed pending the hearing and determination of the dispute between itself and the plaintiff by arbitration. This court's perusal of the court record discloses that the defendant upon entering appearance, filed the present application seeking to stay proceedings herein pending the hearing and determination of the dispute by arbitration.

However, on 28th September 2009, the defendant filed grounds of opposition to the application. The defendant further filed a replying affidavit in opposition to the application. Under **Section 6(1)** of the **Arbitration Act 1995**, a party wishing to invoke the provisions of the said section to stay proceedings pending reference of the dispute to arbitration, is required not to have filed any pleadings or take any steps in the proceedings. In this case, it is evident that the defendant has taken steps in these proceedings that disentitle it to the order of stay of proceedings pending the hearing and determination of the suit by arbitration. By taking steps in this suit, i.e. by filing pleadings in reply to the plaintiff's application for injunction, the defendant made an election to have the dispute between itself and the plaintiff determined by this court. Unless the plaintiff and the defendant agree at this stage to refer the dispute to arbitration, this court has the requisite jurisdiction to hear and determine the dispute. **Section 10** of the **Arbitration Act 1995** does not therefore apply since the parties herein have opted to have the dispute between them determined by the court.

In the premises therefore, the defendant failed to persuade this court that this is one of the cases which can be stayed pending reference of the dispute between itself and the plaintiff by arbitration. The defendant's application dated 22nd September 2009 lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009.

**L. KIMARU
JUDGE**

**INTERMIDDLE ENTERPRISES LTD.....PLAINTIFF
VERSUS
SAFARICOM LTD.....DEFENDANT**

RULING

The plaintiff filed suit against defendant seeking several orders from the court. The suit arises out of a dealer agreement entered between plaintiff and the defendant. Contemporaneous with filing suit, the plaintiff filed an application seeking interlocutory orders of injunction to restrain the defendant from withholding residual and commissions due to the credit of the plaintiff's dealer account during the term of the dealer agreement dated 2nd April 2006, pending the hearing and determination of the suit. The defendant filed grounds in opposition to the plaintiff's application. Justine Ogwapit, the defendant's senior manager legal services swore a replying affidavit in

opposition to the application. The application is yet to be heard by the court.

On 22nd September 2009, the defendant filed an application pursuant to the provisions of **Section 6** of the **Arbitration Act 1995** and **Rule 2** of the **Arbitration Rules, 1997**. The defendant is seeking orders of the court to stay the proceedings herein pending the hearing and determination of the dispute between the plaintiff and the defendant by arbitration. The defendant contends that under clause 22 of the dealer agreement, any dispute arising out of the said dealer agreement, is required to be resolved by arbitration. The defendant was of the view that the plaintiff filed the present suit in breach of express provisions of the said subject agreement between the parties herein. The defendant argued that under **Section 10** of the **Arbitration Act 1995**, this court lacked jurisdiction to intervene in matters governed by **Arbitration Act**. The application is supported by the annexed affidavit of Nzioka Waita, the defendant's head of department, legal and regulatory affairs. The plaintiff did not file any papers in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ohaga, counsel for the defendant and Mr. Macharia Nderitu, counsel for the plaintiff. I have carefully considered the said submissions. The issue for determination by this court is whether the defendant established a case to entitle this court refer the dispute to arbitration. The principles to be considered by the court in determining whether or not to stay proceedings herein pending determination of the dispute between the plaintiff and the defendant by arbitration were set out in the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation [2001] KLR 12**. In the case, the Court of Appeal, *inter alia*, held that for an applicant to succeed in his application to stay proceedings pursuant to the provisions of **Section 6(1)** of the **Arbitration Act 1995**, he is obliged to bring his application promptly. In determining whether to grant the application, the court will take into consideration whether the applicant had taken any steps in the proceedings other than the steps allowed by the section; whether there are legal impediments on the validity, operation or performance of the arbitration agreement and finally whether the suit indeed concerned a matter agreed to be referred to arbitration. **Section 6(1)** of the **Arbitration Act 1995** provides as follows:

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In the premises therefore, the defendant failed to persuade this court that this is one of the cases which can be stayed pending reference of the dispute between itself and the plaintiff by arbitration. The defendant's application dated 22nd September 2009 lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009.

L. KIMARU
JUDGE

INTERMIDDLE ENTERPRISES LTD.....PLAINTIFF
SAFARICOM LTD.....DEFENDANT

RULING

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DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009.

L. KIMARU
JUDGE