



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 208 of 2008**

**NECTEL (K) LIMITED.....PLAINTIFF**

**-VERSUS-**

**EASTERN AND SOUTHERN AFRICAN**

**TRADE AND DEVELOPMENT BANK.....DEFENDANT**

**R U L I N G**

The plaintiff and the defendant entered into a loan agreement by which the defendant agreed to advance the plaintiff US \$2,910,000 or its equivalent in various foreign currencies. The said agreement is dated 30<sup>th</sup> May, 2007. The plaintiff was required to fulfill certain conditions before the said loan amount was disbursed. A disagreement arose between the plaintiff and the defendant regarding whether or not the plaintiff had fulfilled the said conditions precedent before disbursement of the loan. On 7<sup>th</sup> April, 2008, the defendant wrote to the plaintiff advising it that “*the loan application*” had been cancelled. The plaintiff was aggrieved by the decision of the defendant to cancel the loan. On 21<sup>st</sup> April, 2008, the plaintiff filed the present suit against the defendant seeking various reliefs from the court, including, *inter alia*, a prayer for special damages to the sum of Kshs.94,950,483/=. Upon being served with summons to enter appearance together with a copy of the plaint, the defendant duly entered appearance.

On 12<sup>th</sup> May, 2008, the defendant filed a notice of motion under the provisions of **Section 6** of the **Arbitration Act** seeking an order of this court to stay proceeding herein pending resolution of the dispute that had arisen between the plaintiff and the defendant by arbitration in accordance with the terms of the loan agreement. The defendant contended that the loan agreement which was entered between the plaintiff and the defendant and dated 30<sup>th</sup> May, 2007, had a clause which provided for all disputes or differences between the plaintiff and the defendant in respect of the loan agreement be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

Although the plaintiff filed a replying affidavit in opposition to the application, at the hearing of the application, Mr. Machira, counsel for the plaintiff, conceded that indeed there was a clause in the loan agreement that provided for the resolution of any dispute between the plaintiff and the defendant by arbitration. He however expressed the apprehension of the plaintiff that the arbitration process may take longer than it would for this court to hear and determine the dispute. He submitted in view of the events that occurred prior to the plaintiff filing suit, the plaintiff was of the view that the defendant was using the arbitration clause in the said agreement to frustrate and delay the resolution of the dispute that had arisen between the plaintiff and the defendant.

Mr. Machira urged the court to give appropriate directions, including time lines, upon which the said arbitral process would commence and conclude its deliberations on the matters in dispute. Mr. Oraro for the defendant submitted that reference to arbitration was subject to rules and procedures provided under the arbitration clause of the loan agreement. He explained that under **Section 6** of the **Arbitration Act**, this court had jurisdiction to only make orders within the ambit of the said section. Mr. Oraro urged the court to grant the application sought by the defendant to stay proceedings herein pending resolution of the dispute between the plaintiff and the defendant by arbitration.

I have carefully considered the submissions made by counsel of the parties to this application. The plaintiff concedes that the loan agreement contained a clause which provided a mechanism under which any dispute between the plaintiff and the defendant would be resolved. **Clause 16.12** of the loan agreement provides that:

*“Any dispute or difference which may arise between parties hereto or as to the rights or obligations of either party hereunder or otherwise in connection with this Agreement which shall not have been settled by mutual agreement of the parties shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Arbitration award shall be final and binding on both parties.”*

**Clause 16.10** states that:

*“This Agreement shall be construed and governed in the accordance with the Laws of England.”*

The plaintiff, however, asked the court to give directions as to the manner in which the said arbitral process shall be conducted. The defendant opposes the issuance of any order other than that which was sought by the defendant. The issue for determination by this court is therefore whether this court can stay proceedings herein pending reference of the dispute to arbitration with stipulations in the manner in which the said arbitral proceedings may be conducted.

The section of the **Arbitration Act, 1995** that grants this court jurisdiction to stay proceedings pending resolution of disputes involving parties in a suit by arbitration is **Section 6. Section 6 (1)** of the **Arbitration Act** provides that:

*“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 unless it finds –*

- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed ;*  
*or*
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to the referred to arbitration.”*

This court is mandated to grant an order staying proceedings if it is established that there is an agreement that provide the settlement of the dispute by arbitration. This court is required to consider whether or not to order stay of proceedings and not make any other order concerning the arbitral process.

Since the plaintiff conceded that there exists an arbitral clause in the loan agreement, and further, since the plaintiff is not opposed to the dispute being referred to arbitration for resolution, this court will grant the defendant’s application for stay of proceedings pending resolution of the dispute by arbitration.

The concerns of the plaintiff as regard the manner in which the arbitral process shall be conducted is a matter which will be dealt with by the arbitrators appointed under the arbitral clause of the said loan agreement. At this stage of the proceedings, the court has no jurisdiction to give any directions in the manner by which the said arbitral proceedings shall be conducted. The arbitral clause and the Rules of

Conciliation and Arbitration of the International Chamber of Commerce provide an elaborate procedure under which the said arbitral process will be conducted. This court cannot therefore give directions as to the manner in which the said arbitration shall be conducted. If this court does so, it would be exercising jurisdiction that it does not have.

The application by the defendant dated 9<sup>th</sup> May, 2008, is therefore allowed. The proceedings herein are hereby stayed pending resolution of the dispute between the plaintiff and the defendant by arbitration in accordance with the terms of the loan agreement dated 30<sup>th</sup> May, 2007. The costs of this application shall be in the cause.

**DATED at NAIROBI this 23<sup>rd</sup> day of May 2008.**

**L. KIMARU**

**JUDGE**