

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 186 of 2008 (O.S)

DIAMOND SHIELD INTERNATIONAL LTD ...APPLICANT

VERSUS

JOYCE WANJIRU MWAURA.....RESPONDENT

RULING

The applicant filed suit by originating summons pursuant to the provisions of Section 11 (2) and Section 12 (2) of the Arbitration Act, 1995 and Rule 3(1) of the Arbitration Rules seeking to have the dispute in respect of Diamond Shield International Limited, a limited liability company (*hereinafter referred to as the company*), referred to arbitration in accordance with the articles of association of the company. One of the directors of the company, Grace Wakio Ndege (*the applicant*) was aggrieved by the conduct of other directors of the company in excluding her from the management of the company. Contemporaneous with filing suit, the applicant sought interim reliefs from the court to restrain the directors of the company from unilaterally moving the principal place of the applicant's business from Ngiwa House, Moi Avenue to Hassa Plaza, Upperhill, Nairobi. The applicant further sought an interim order of the court to restrain the directors of the company from inviting "*strangers*" into the management of the company or incorporating another company with a similar name to conduct business which is in conflict and/or prejudicial to the interest of the company. The applicant further sought an interim relief from the court to restrain the registrar of companies from effecting any changes in the register of the members of the company pending the hearing and resolution of the dispute by arbitration. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Grace Wakio Ndege.

The application is opposed. The respondents filed notice of preliminary objection opposing the application. Zachary Mwangi Kariuki, a director of the company, swore an affidavit in further opposition to the application. In the said affidavit, he deponed that the applicant was no longer a director of the company since she had been resigned as a director by a resolution of the directors of the company. He swore that other persons had already been appointed as directors of the company. He deponed that the applicant had no interest in the company and was a busybody and a meddler. He further deponed that the applicant had failed to seek the authority of the company before she brought the present suit on behalf of the company. In the preliminary objection, it was contended on behalf of the respondent that applicant's suit was incompetent, bad in law and incurably defective since the affidavit in support of the originating summons and also the affidavit in support of the notice of motion were defective and inadmissible in evidence. The respondent urged the court to dismiss the application with costs.

At the hearing of the application, I heard the rival submissions made by Mr. Anyoka on behalf of the applicant and by Mr. Swaka on behalf of the respondent. The issue for determination by this court is whether the applicant established a case to enable this court grant her the interim reliefs sought pending the hearing and determination of the dispute by arbitration. For the applicant to succeed in her application, she must establish that the articles of association of the company contains a valid arbitration clause which will grant this court jurisdiction to issue the interim reliefs sought under Section 7 of the Arbitration Act. From the affidavits filed in this application, it is clear that there is a dispute between the applicant and the other directors of the company. The directors of the company have purported to exclude the applicant from the management of the company. They have further purported to appoint other persons as directors of the company. The applicant invoked article 31 of the Articles of Association

of the company and wishes to have the dispute that has arisen determined by arbitration. The said Article 31 provides 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 statues, 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, otherwise relating to the premises, 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 an 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.”

It is evident that there exists a valid and enforceable arbitration clause in the Articles of Association of the company. The applicant is apprehensive that before the said dispute is heard and determined by arbitration, the respondents would have interfered with the company in a manner prejudicial to the interests of the applicant. On the other hand, it is the respondents’ argument that the applicant is no longer a director of the company having been so removed in a resolution passed by other directors of the company. It is clear that the applicant has a legitimate grievance which ought to be ventilated by arbitration as provided for by the Articles of Association of the company. Meanwhile, it is only just and fair that this court grants the applicant interim relief as provided for under Section 7(1) and (2) of the Arbitration Act.

I will therefore grant the interim reliefs sought in prayer 3 and 4 of the notice of motion dated 9th April, 2008 pending the hearing and resolution of the dispute between the applicant and the other directors of the company by arbitration. For avoidance of doubt, and for the purposes of preserving the properties and the business of the company, the status quo that existed as at 5th March, 2008 in respect of the directorship of the company shall be maintained. The costs of the application shall be cause.

The parties to these proceedings should with immediate effect put in motion the arbitral process so that the pending dispute may be resolved as soon as possible.

DATED at NAIROBI this 19th day of June, 2008.

L. KIMARU

JUDGE