REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 113 of 2008

NDIMA TEA FACTORY CO. LIMITED…….....…….PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD…….DEFENDANT

RULING OF THE COURT

Pleadings: Plaint and Application

1. By a plaint dated 26/03/2008 and filed in court on 1/04/2008, the Plaintiff instituted its claim against the Defendant alleging that the Defendant had breached the Management Agreement entered into between the Plaintiff and the Defendant for the purchase and installation of a Continuous Fermenting Machine (CFM) by the Defendant on behalf of the Plaintiff. The Plaintiff alleges that the CFM that was purchased and installed by the Defendant at the Plaintiff's factory is not what the Defendant represented to the Plaintiff and that the entire transaction surrounding the importation of the said CFM is suspect for the reasons set out in paragraph 13 of the plaint. For the above reasons the Plaintiff prays for judgment against the Defendants jointly and severally in the following terms:-

(a) ***A permanent injunction restraining the Defendant whether by itself, agents, servants or otherwise howsoever from making any further payments from the Plaintiff's funds to Marshall Fowler India (P) Limited or at all person on account of the CFM installed at the Plaintiff's Factory.*** *(sic)*

(b) A permanent mandatory injunction directing the Defendant whether by itself, agents, servants or otherwise to delivery to the Plaintiff the originals of all import documents pertaining to the CFM installed at the Plaintiff's Factory, namely, (i) Invoice and Import Entry Documents; (ii) Certificate of Origin; (iii) Bill of Lading; (iv) Invoice and Import Entry Documents; (v) Import Declarations Form (I.D.F.); and Manual and User Guide.

(c) An order for an independent valuation, assessment and inspection of the CFM installed at the Plaintiff's Factory.

(d) An order for account of all sums paid to Marshall Fowler India (P) Limited and/or whichever other person on account of the CFM installed at the Plaintiff's Factory.

(e) The Defendant do pay the Plaintiff irregularly the difference between the sums found to have been irregular paid upon taking of the account and/or special damages for breach of contract together with interest thereon at court rates from the time of filing of this suit until payment in full.

(f) Costs of this suit together with interest thereon at court rates from the date of filing of suit until payment in full.

(g) Any such other or further relief as this Honourable Court may deem appropriate.

2. Contemporaneously with the plaint the Plaintiff also filed a Notice of Motion application brought under Sections 3, 3A, 63(c) and (e) of the Civil Procedure Act, Cap 21 and Order 39 Rules 2, 3 and 5 and Order 50 Rules 1 and 2 of the Civil Procedure Rules seeking orders that:-

1. This Application be certified as urgent.

2. Pending the inter partes hearing of this application, the Defendant whether by itself, agents, servants or otherwise howsoever be restrained from making any further payments from the Plaintiff's funds to Marshall Fowler India (P) Limited or at all on account of the CFM installed at the Plaintiff's Factory.

3. Pending the hearing and determination of this suit, the Defendant whether by itself, agents, servants or otherwise be directed to deliver to the Plaintiff the originals of all import documents pertaining to the CFM installed at the Plaintiff's Factory, namely, (i) Proforma invoice from the supplier; (ii) Certificate of Origin; (iii) Bill of Lading; (iv) Invoice and Import Entry Documents; (v) Import Declarations Form (I.D.F.); and Manual and User Guide.

4. Pending the hearing and determination of this suit, an independent valuation assessment and inspection of the CFM installed at the Plaintiff's Factory be conducted.

5. Pending the hearing and determination of this suit, the Defendant be ordered to deliver up to the Plaintiff an account of all sums paid to Marshall Fowler India (P) Limited and/or whichever other person on account of the CFM installed at the Plaintiff's Factory.

6. The costs of this Application be provided for.

The application is premised on the grounds that

(a) The Defendant is the Plaintiff's managing agent for its Ndima Tea Factory.

(b) The Defendant has without sanction of the Plaintiff and in breach of the agency agreement between it and the Plaintiff processed and installed at the Plaintiff's Factory a Continuous Fermentation Machine misrepresented to have been supplied by Marshall-Fowler India (P) Ltd. and imported from India when the same is locally assembled.

(c) The Defendant has despite requests from the Plaintiff in further breach of the agency agreement refused and/or failed to account to the Plaintiff for the determination and status of the machine and the sum of Kshs.16322987.00 committed to be paid to the alleged supplier, from the Plaintiff's funds.

(d) The machine has no manufacturer's guarantee and its retention period of 6 months is about to expire.

(e) The Plaintiff stands to suffer irreparable damage on account of reduced production if the Defendant continues paying for the machine from the Plaintiff's funds before accounting for the documentation and status of the machine and the sum of Kshs.16322987.00 commitment towards the cost of the machine.

3. The application is also supported by an affidavit sworn by **NICHOLAS MAHIHU MURIITHI**, a director of the Plaintiff. It is not necessary for purposes of this ruling to go into the detailed contents of Mr. Muriithi's supporting affidavit. Suffice it to say here that Mr. Muriithi has filed in the case a copy of the resolution by the Plaintiff's Board of Directors authorizing him to swear and make the supporting

affidavit. The resolution was made and signed by the Plaintiff's directors on 10/03/2008. Further, the application was made under Certificate of Urgency for reasons that the Plaintiff stands to suffer irreparable damage on account of reduced production if the Defendant continues paying for the machine from the Plaintiff's funds before accounting for the documentation and status of the machine.

Defendant's Response

4. On the 7/04/2008, the Defendant entered appearance through the firm of Ochieng', Onyango, Kibet & Ohaga Advocates. On the same day, the said advocates filed a Chamber Summons under the provisions of section 6 of the Arbitration Act, 1995 and Rule 2 of the Arbitration Rules, 1997 seeking **ORDERS**

THAT:

(i) This application be heard in priority to the Plaintiff's Notice of Motion dated 26th March 2008;

(ii) This suit and/or all proceedings in the suit be stayed;

(iii) The dispute between the Plaintiff and the Defendant be referred to Arbitration.

(iv) The costs of this application be borne by the Plaintiff.

The Defendant's application is premised on three grounds:-

I. Clause 18 of the Management Agreement ('the management agreement') dated 1st July 1998 between the parties and duly acknowledged by the Plaintiff expressly provides for resolution of disputes by Arbitration;

II. This suit has been instituted by the Plaintiff against the Defendant in breach of the express provisions of the management agreement between the parties and is an abuse of the process of this Honourable Court in light of the express provisions of the Arbitration Act.

III. Section 10 of the Arbitration Act 1995, specifically prohibits the court from intervening in matters governed by the Arbitration Act, 1995.

5. Again, for reasons that the ruling does not strictly concern the Chamber Summons application filed by the Defendant on 7/04/2008, I shall not go into details of the contents of the Supporting Affidavit of **Rebecca Mbithi** made on 7/04/2008. The only point to note here is that according to the said Affidavit by Rebecca Mbithi the foundation of the Plaintiff's cause of action against the Defendant is the Defendant's responsibilities under the management agreement between the Plaintiff and the Defendant, hence the defendant's request that the whole suit be referred to arbitration for determination.

6. The Defendant's chamber summons is opposed through the Replying Affidavit sworn by **NICHOLAS MAHIHU MURIITHI** on 8/04/2008. Mr. Muriithi says that the documents sought by the Plaintiff from the Defendant concerning the CFM are within the possession of the Defendant; that senior officers of both the Plaintiff and the Defendant have met on several occasions with a view to resolving the matter amicably, but that no such solution has been forthcoming; that the Defendant's failure and/or refusal to respond to or act upon correspondence from the Plaintiff confirms that the Defendant does not have any defence to the Plaintiff's claim and therefore that there is no dispute or genuine dispute to be referred to arbitration and to justify the stay of the suit; that in the circumstances, the orders sought by the Plaintiff, and in particular the order seeking to restrain the Defendant from making further payments for the CFM from the Plaintiff's funds in the sum of Kshs.16 322 987.00 commitment towards the cost of the CFM ought to be granted.

Proceedings

7. On the 2/04/2008, Mr. Havi of Havi & Company Advocates' for the Plaintiff appeared before the Duty Judge who certified the application urgent and also directed that the application be served forthwith for interpartes hearing on 9/04/2008. No interim orders were granted to the Plaintiff.

8. On 9/04/2008, the parties appeared before me with Mr. Havi appearing for the Plaintiff while Mr. Kibet of M/s Ochieng', Onyango, Kibet & Ohaga advocates appeared for the Defendant. Counsel sought directions of the court as to which of the two applications, that is to say the Notice of Motion dated 26/03/2008 and the chamber summons dated 7/04/2008 should be heard first. Mr. Havi proposed, without any objection from Mr. Kibet that the parties should file skeletal written submissions and only get a date for highlighting the same. It was ordered that the chamber application dated 7/04/2008 should be heard before the Notice of Motion dated 26/03/2008 and consequently the same was fixed for hearing on 30/04/2008. Parties agreed to file and exchange skeletal written submissions before 30/04/2008.

9. When the parties next appeared before me on 30/04/2008, Mr. Njoroge M.C. was present for the Plaintiff while Mr. Masika, E appeared for the Defendant. Mr. Masika informed the court that the Defendants had since been served with a Notice of Preliminary Objection dated 28/04/2008 and filed in court on the same date. This ruling therefore concerns that Preliminary Objection, against the backdrop of background of the case which has been given for clarity.

Notice of Preliminary Objection

10. The Notice of Preliminary Objection brought under Order 14 Rule 2 of the Civil Procedure Rules has four (4) grounds upon which Plaintiff seek to strike out the Defendant's chamber summons dated 7/04/2008:-

1. There is no agreement to refer to arbitration or jurisdiction to grant stay and/or refer this matter to arbitration.

2. The Defendant is not privy to the agreement dated 1st July 1998 upon which stay and referral is sought.

3. Kenya Tea Development Authority, the party with whom the Plaintiff contracted with in the Agreement dated 1st July, 1998 was a parastatal created in 1964 under Legal Notice No. 42 of 1964 (The Kenya Tea Development Authority Order) which was dissolved under Legal Notice No. 44 of 1999 (The Kenya Tea Development Authority [Revocation] Order 1999(and neither the defunct parastalal nor the Defendant can rely upon the agreement which is an agreement with a non-entity.

4. The agreement to refer to arbitration is null and void, inoperative or incapable of being performed.

The Plaintiff's (As Objector) Submissions

11. The Plaintiff's skeletal written submissions on the Preliminary Objection were filed on 5/05/2008 pursuant to this Honourable Court's order made on 30/04/2008. The Plaintiff submits that the Defendant in this case cannot rely or derive any benefit from the agreement which was made between the defunct Kenya Tea Development Authority (KTDA) and the Plaintiff; and that any inferences to the authority as implied by Legal Notices No. 44 of 1999 and 185 of 1999 is void illegal and of no effect. Mr. Njoroge for the Plaintiff referred the court to **Ismael Ombati Ochieng & 9 Others –vs- Kenya Tea Development Authority – HCCC No. 948 of 2003 at Nairobi – [2006]e KLR.** **Legal Notice No. 44 of 1999** was issued by the then Minister for Agriculture, Musalia Mudavadi under the powers given to him by Section 192 of the Agriculture Act, Cap 318. The Order is entitled:-

"**THE KENYA TEA DEVELOPMENT AUTHORITY (REVOCATION) ORDER, 1999"**

Under the Order, the Minister revoked the existence of the KTDA and in its stead established the Kenya Tea Development Agency Limited, the Defendant herein. The Minister also mandated the Kenya Tea Development Authority to incorporate a limited liability company (under clause 3 of the Revocation

Order) "***under the provisions of the Companies Act for the purpose of bringing the provisions of this Order into operation***".

Section 3(2) of the Revocation Order provides as follows:-

(2) ***The Company shall be the successor of the Kenya Tea Development Authority and subject to this Order, all rights, duties, obligations assets and liabilities of KTDA existing on the appointed day shall be automatically and fully transferred to the Kenya Tea Development Agency Limited and any reference to the KTDA in any contract shall, for all purposes, be deemed to be reference to the company.*** (Emphasis is mine)

12. I would observe, as did Ang'awa J in the **Ishmael** case (above) that at some point before KTDA incorporated the Defendant herein, there was a void, a vacuum during which no legal entity existed and to which all the assets and liabilities of KTDA could be transferred.

13. Section 6 of the Revocation Order also made other provisions with for reaching implications and in particular, section 6(a) and (f) which respectively read as follows:-

(a) any account between the KTDA and a customer shall, on and after the appointed day, become an account between the Company and the customer, with the same rights and subject to the same obligations and incidents, including the rights of set-offs as therefore and the account shall be deemed to be a single continuing account;

Provided that nothing in this paragraph shall affect any right of the Company or of the customer to vary the conditions or incidents subject to which the account is kept:

(b) ----------

(c) ----------

(d) ----------

(e) ----------

(f) Where, by the operation of the provisions of this Order, any right, liability or obligation becomes a right, liability or obligation of the Company, all other persons shall, on and after the appointed day, have the same rights, powers and remedies, and, in particular, the same rights and powers as to taking or defending any legal proceedings or an application to any authority, for ascertaining, perfecting or enforcing that right, liability or obligation as if it had at all times been a right, liability or obligation of the Company.

14. According to the Plaintiff's counsel, the dissolution of KTDA by Legal Notice No. 44 of 1995 means that the agreement entered into between the Plaintiff and KTDA became a nullity and that the same should not form a basis for reference to arbitration. That in the circumstances, section 6(1)(a) of the Arbitration Act should apply. The section provides as follows:-

"***6 (1) 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 be referred to arbitration.

15. Mr. Njoroge further contends that in law, a company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before its incorporation, and that for any company to be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement. In **Halisbury's Laws of England, 4th Edn Vol 7** paragraphs 727 and 728 are found in the following comment on contracts before incorporation or commencement of business:-

"***727. Extent of company's liability. A company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before incorporation. After incorporation it cannot ratify or adopt any such contract because in such cases there is no agency and the contract is that of the parties making it. The adoption and confirmation by a directors' resolution of a contract made before the incorporation of the company by persons purporting to act on its behalf does not create any contractual relation between it and the other party to the contract, or impose any obligation on it towards him*** *(see F.J. Neale (Glasgow) Ltd. –vs- Vickery 1973 SLT (Sh.Ct) 88* ***where it was held that a new company formed with the same name as the old company and taking over assets and goodwill was not liable on the old company's contracts.)*** *(See also Re Northumberland Avenue Hotel Co. (1886) 33 ch. D 16, C.A. and North Sydney Investment and Tranmnay Co. –vs- Higgins [1899] A.C. 263 at 721, P.C.*

728. Adoption of pre-incorporation contracts. In order that the Company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement (see Melhado v Porto Alegre Rly Co. (1874) L.R. 9 CP. 503)

16. What Mr. Njoroge is saying is that the Management Agreement signed between the parties on 01/07/1998 is null and void on grounds that there is no new contract validating the said previous agreement as between the Plaintiff and the Defendant herein, and accordingly in Mr. Njoroge's view the Defendant cannot seek to derive benefits under that agreement entitling the Defendant to get an order staying this suit and referring the dispute to arbitration. Mr. Njoroge has referred the court to **Consolidated Chemicals Limited –vs- KEL Chemicals Limited [1981] KLR 71** in which similar issues arose. The Court of Appeal considered certain English authorities among them **Kenler v Baxter [1866] LR 2 CP 174** and the **Northumberland case** (above) and concluded as follows at page 78:-

"***In order that the company may be bound by agreements entered into before its corporation, there must be a new contract to the effect of the previous agreement, although this new contract may be inferred from the company's acts when incorporated, except when such acts are done in the mistaken belief that the agreement is binding."***

17. Could it be said that the Defendant herein undertook such acts as would lead to the inference that the previous contract had been validated as between the Plaintiff and the Defendant? Or could it be said that whatever acts may have been done by the Defendant were done in the mistaken belief that the agreement was binding on it? The Plaintiff submits that whatever was done by the Defendant in respect of the Management Agreement dated 1/07/1998 was **an act in the mistaken belief that the agreement was binding** upon the Defendant. In **Trevor Price and Another –vs- Raymond Kelsall [1957] EA 752,** a case that was cited with approval in the **Consolidated Chemicals Limited** case (above) the Court of Appeal held that:-

"***A company cannot ratify a contract made before its incorporation but there may be circumstances from which it can be inferred that a company, after incorporation has made a new contract to the effect of the previous contract."***

18. Mr. Njuguna contends that there are no circumstances in the instant case from which such an inference could be made and that the Management Agreement between the Plaintiff and KTDA was terminated by Legal Notice No. 44 of 1999. It is to be noted however that there has been correspondence exchanged between the Plaintiff and the Defendant and in particular, the Defendant's letter dated 3rd March 2008:

M/s Havi & Company Advocates

Monier House, 1st Floor,

Mukungu Close

Parklands Road

P.O. Box 38422-00623

NAIROBI.

Dear Sir,

RE: CONTINUOUS FERMENTING MACHINE FOR NDIMA TEA

FACTORY

We refer to your letters of 18th and 28th February 2008.

Before we enter into correspondence with your firm, please note that as the Managing Agents of Ndima Tea Factory, we are not aware of any instructions to your firm and should be grateful if you could let us know your instructing clients and any documentary evidence of such instructions.

Yours faithfully,

KENYA TEA DEVELOPMENT AGENCY LIMITED

Signed

REBECCA MBITHI

HEAD OF LEGAL AND REGULARLY AFFAIRS"

19. As can be seen from the said letter, the Defendant says it is the Managing Agents of Ndima Tea Factory, and though it is not indicated, the writer may have had the Management Agreement dated 1/07/1998 in mind. The two letters dated 18th and 28th February 2008 by M/s Havi & Co. Advocates to the Defendant form part of annexture marked "***NM 2***" to the supporting affidavit of Nicholas Mahihu Muriithi dated 26/03/2008. It is also to be noted that in the year 2007, the Defendant formulated a factory modernization programme in which it required the Plaintiff among other factories, to install CFM. In order to implement the programme, the Defendant issued policy guidelines as seen from annexture marked "**NM 3**" to Nicholas Mahihu Muriithi's supporting affidavit dated 26/03/2008. The Defendant requested all "***factory boards to note the new policy and to facilitate implementation where necessary so as to reduce on the cost of production***." In the plaint, the Plaintiff makes extensive reference to the Management Agreement made in 1995 (though at paragraph 4 of the Replying Affidavit to the Defendants Chamber Summons, Mr. Nicholas Nduhu Muriithi says:-

'***4. The Plaintiffs other directors and I have on several occasions met up with the Defendant's Managing Director Mr. Tiambati, its Engineer Mr. Maina, its Procurement Manager Mr. Onyancha and its legal officers including Ms. Mbithi, seeking an amicable solution to this matter but none has been forthcoming nor has the Defendant even suggested that the matter be referred to arbitration."***

20. Can it be inferred from meetings alluded to and the correspondence exchanged between the two parties that the Management Agreement dated 1/07/1998 was validated and therefore that this Preliminary Objection on that ground is without basis?

21. The Plaintiff contends that despite these "***acts***" on the part of the Defendant and the Plaintiff, there is no written contract that was made with the Defendant after the Defendant was incorporated on 15/05/2000 to the effect of the previous contract with the defunct KTDA as required by law. Mr. Njuguna contends that it was erroneous on the part of the then Minister for Agriculture, Musalia Mudavadi to think that the assets and liabilities of KTDA could so easily be transferred to the Defendant under Legal Notice No. 44 of 1999 without a new contract being made to effect the previous contracts/agreements. (see re **Northumberland Avenue Hotel case** (supra). That the only remedy in this case was for the Directors of the two parties to enter into an agreement in the same terms, (see **Re Dale and Plant Limited (1889) Vol LXI 206**) and that it does not matter whether the directors adopt and confirm the contract before the formation of the company. In the instant case, there was no adoption by the directors of either party of the agreement entered into on 1/07/1998; and therefore that the Defendant is not entitled to rely on the Management Agreement dated 1/07/1998 without proper validation.

Defendant's (As Respondent) Submissions

22. Mr. Masika who appears for the Defendants vehemently opposes the Preliminary Objection. After giving a brief history of the matter he contends that the Plaintiff's claim is founded on the Management Agreement between the Plaintiff and the Defendant, and that paragraphs 5,6,7,10 and 11 of the plaint which set out the terms of the agreement are central to the issue now before court, and further that Nicholas Mahihu Muriithi in his Replying Affidavit does not dispute the existence of the Agency Agreement dated 1/07/1998. He further contends that by virtue of clause 18 of the Management Agreement this whole suit should be referred to arbitration. The clause reads:-

"***Any dispute arising between the parties as to the construction of this Agreement or the rights and obligations of the parties hereunder including the question whether any breach of non-observance by one of the parties of any terms of this Agreement is such as would justify arbitration proceedings for rescission by the other party shall be submitted to arbitration by three arbitrators. Such arbitration shall be conducted in accordance with the Arbitration (Act No. 4 of 1995) of the Laws of Kenya."***

23. It is not disputed that the Management Agreement exists. The dispute is whether the said agreement is of any effect in view of Legal Notice No. 44 of 1999 which killed and buried the KTDA and purported to resurrect it through the incorporation of the Defendant herein.

24. Counsel for the Defendant referred to section 3 of the Arbitration Act 1995 (the Act) as to the definition of an "***arbitration agreement***" and "***party***" and says that the said definitions apply to the two parties in this suit. He also says that the Management Agreement conforms to section 4(2) and 4(3) (a) of the Act which require the agreement for arbitration to be in writing and signed by both parties. Again it is not in dispute that the Management Agreement is in writing and signed by both parties. The real question is whether the agreement is still valid as between the Plaintiff and the Defendant herein.

24. Section 6 of the Act makes provisions for stay of legal proceedings. Contrasting this provision with section 6 of the Arbitration Act, Chapter 49 Laws of Kenya (now repealed) Mr. Masika says that whereas the repealed provision gave the court the discretion as to whether or not to stay proceedings and refer the same to arbitration, the equivalent provision in the 1995 Act gives the court no such discretion. Section 6 of the Act provides as follows:-

6(1) A court before which proceedings are brought in a matter in which is the subject of an arbitration agreement shall, if a party so applies not later than the time when this party enters appearance of 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 be referred to arbitration.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made.

25. In a nutshell, unless the court finds that it is restrained by the impediments set out in section 6(1) (a) of the Act, it has to stay this suit and refer the parties to arbitration. This was the position stated by Bosire JA in **Niazsons (K) Limited –vs- China Road & Bridge Corporation Kenya [2001] KLR 12**. In that case, it was held, *inter alia*, that as long as an application for stay of proceedings under section 6(1) of the Act is brought promptly, the court is obliged to consider only three things:-

(a) Whether the applicant has taken any steps in the proceedings other than the steps allowed by the section;

(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

(c) ***Whether the suit indeed concerned a matter agreed to be referred to arbitration.***

At page 22 of the judgment in the **Niazsons** case (above), Bosire JA said

"***I think that once an application under Section 6(1) of the Arbitration Act has been made, it is incumbent upon the judge seized of the matter to deal with it as a whole, to discover whether any of the legal impediments set out in the section exist to disentitle the applicant to a stay."***

Questions to Ask

26. The question to ask here is whether any of the legal impediments set out in the section exist to disentitle the applicant to a stay, in other words, is the Preliminary Objection by the Plaintiff meritorious? Relying on **Pan African Builders and Contractors Limited –vs- National Social Security Fund Board of Trustees (Milimani HCCC No. 32 of 2002** – (unreported), Counsel for the Defendant argues that no such impediments have been demonstrated by the Plaintiff especially because, the Defendant argues, the Plaintiff does not dispute the existence of the Management agreement. Referring to **Halki Shipping Corp –vs- Sopex Oils Ltd. [1997]3 AII ER 833** counsel for the Defendant' says that there is no reason why this suit should not be stayed and the parties referred to arbitration. The brief facts of that case were that the Plaintiff was the owner of a vessel which was chartered to the Defendant under a charter party dated 20/06/1995 for the carriage of goods from the far East to Europe. By Clause 9 of the agreement, the parties agreed to refer any dispute arising therefrom or in connection therewith to arbitration in England, any such dispute to be governed by English Law. The Plaintiff alleged that the Defendant had failed to load and discharge the vessel within the agreed time and sued in the High Court. The Defendant denied liability and applied to the court to stay proceedings under Section 9 of the Arbitration Act, 1996 and contending that there was a dispute between the parties for the purpose of Clause 9 and which dispute the Plaintiff was bound to refer to arbitration. The Plaintiff on the other hand contended that since the Defendant had no arguable defence, there was no dispute within the meaning of Clause 9 and therefore it was not bound to refer the claim to arbitration.

27. Mr. Masika also referred the court to the above case in response to the Plaintiff's contention that there is no dispute between the Plaintiff and the Defendant herein. He contends that the fact that this suit has been filed is sufficient evidence as to the existence of a dispute between the parties. In the **Halki** case (above) it was held –

"***Where the parties to a contract agreed to refer any dispute arising therefrom or in connection therewith to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refused to admit or did not pay, was a relevant dispute which the claimant was both entitled and bound to refer to arbitration, notwithstanding the fact that the respondent did not have a sustainable defence to it ---"***

28. I would agree with counsel for the Defendant that indeed in the instant case, there is a dispute between the parties in which the Plaintiff seeks certain injunctive orders against the Defendant, the taking of accounts and payment of certain sums of money. If it were not so, there would be absolutely no reason why the parties should be before me. The only question that begs an answer is whether this dispute should be referred to arbitration as per the Defendant's application dated 7/04/2008; and if so on what basis?

The Issues

29. After setting out the pleadings the submissions and the law, I think that the only issue that arises for determination is whether the Defendant herein should be allowed to proceed with its application brought under section 6(1) of the Act on the strength of the Management Agreement dated 1/07/1998 and executed between the Plaintiff and the KTDA? It has been agreed by both parties that the KTDA was dissolved by a ministerial order vide Legal Notice No. 44 of 1999 as read together with Legal Notice No. 185 of 1999. Legal Notice No. 185 of 1999 changed the appointed day from 1/01/2000 to 1/07/2000. There is also evidence on record that the Defendant Company herein was not incorporated until 15/05/2000. I note here that from the date of Legal Notice No. 44 of 1999 to 15/05/2000, there was some vacuum in the legal persona of the defendant. Does the Management Agreement bind the parties herein? The Plaintiff thinks that the parties are not bound by the said agreement because that agreement died upon issuance of Legal Notice No. 44 of 1999; that no other contract was made between the parties herein to validate the said agreement and that any acts purportedly done by the parties pursuant to Legal Notice No. 44 of 1999 were of no consequence. The reasons to support these arguments are contained in the preceding pages of this ruling. The Defendant on its part says that that agreement is still alive and that unless the court is satisfied that there are other impediments to disentitle it from the orders sought the applicant should be allowed to prosecute its application for an order of stay and reference to arbitration. The reasons for holding this position are also given in the Defendant's submissions, which I have already highlighted above.

Findings

30. I am persuaded that the then Minister for Agriculture Musalia Mudavadi had the power to issue Legal Notice No. 44 of 1999 as Section 192(4) of the Agriculture Act Cap 318 empowered him to do so. But as I noted earlier, the Minister made other far reading provisions under the said legal notice one of which was to direct the then dissolved KTDA to incorporate a limited liability company to be known as **Kenya Tea Development Agency Limited** at a future date and to transfer to that yet to be formed company all the assets and liabilities of KTDA, and all agreements that had been entered into by KTDA. The arbitration agreement from which the Defendant seeks to benefit was one of those agreements. Is that agreement valid and operative?

31. The cases that were cited to the court by counsel are clear that for that agreement to be valid and operative, the same should have been validated by another contract between the Plaintiff and the Defendant herein. No such validation agreement has been shown to the court by the Defendant. The Defendant may argue that the Management agreement cannot be questioned since the Plaintiff's claim is in fact based on it. That may well be so but my finding is that whatever transactions may have been mutually undertaken by both parties herein regarding the subject matter of this suit were based on erroneous assumptions that the arbitration agreement was valid. I do find and hold that without being validated that agreement is null and void and inoperative. In the circumstances, I find and hold that section 6(1) (a) of the Act comes into play and the Defendant would thus be disentitled to bring the application dated 7/04/2008. As was held in **Re Dale And Plant Limited** (above) what the parties –

"***--- should have done was to have entered into an agreement in the same terms."***

32. It does not matter that the directors and other senior members of staff of the warring parties have met and held discussions. It does not matter that the Defendant may not have any or any reasonable defence to the Plaintiff's claim. What matters here is that the management agreement dated 1/07/1998 is null and void; it is invalid and of no consequence between the Plaintiff and the Defendant.

Conclusion

33. In the result, I have no choice but to uphold the Plaintiff's Preliminary Objection dated 28/04/2008 on the grounds –

a. ***That there is no agreement to refer to arbitration or jurisdiction to grant stay and/or refer this matter to arbitration.***
b. ***That the Defendant is not privy to the agreement dated 1/07/1998 upon which stay and referral is sought.***
c. ***That the agreement to refer to arbitration is null and void, inoperative or incapable of being performed***.

34. As to ground (3) of the Preliminary Objection --, I think that the same was superfluous since KTDA indeed died upon issuance of Legal Notice No. 44 of 1999. In any event, the Defendant is not claiming to be KTDA. It has come forth in its own right as the company that was formed after KTDA was dissolved.

35. Having reached the above conclusions, I have no choice but to strike out the Defendant's Chamber Summons application dated 7/04/2008. Each party in this cause shall bear its own costs.

It is so ordered.

Dated and delivered at Nairobi this 19th day of September, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-