REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 232 of 2005

GOVERNORS BALLOON SARARIS LTD. ……..……PLAINTIFF

VERSUS

SKYSHIP COMPANY LTD.

COUNTY COUNCIL OF TRANS MARA ….……..DEFENDANTS

R U L I N G

The plaintiff has sued two defendants. The first is (1) Skyship Company Ltd. *(hereafter called Skyship.)* The second defendant is County Council of Trans Mara, a local authority duly established under the provisions of the Local Authorities Act Cap.265 *(hereafter called the 2nd defendant).*

It is pleaded that on 1/8/2000 there was a contract entered between the second defendant and Mara Balloon Safaris Ltd. whereby among the covenants agreed upon was that the said company for a consideration paid would have exclusive right to carry on the business of Air service for passengers using hot air balloons within a certain area as pleaded in paragraph 3 of the plaint. However, Clause 5.3 of the said agreement the second defendant covenanted:

"Not to permit the establishment of any additional hot air ballooning bases within a 15 kilometer radius of the Little Governors Camp such that the only two bases within that limit are the two already established and situated at Little Governors Camp (operated by MBS or its successor) and at Mara Serena Lodge (operated by Trans World Safaris Ltd.)".

The said contract was on 26/3/2001 with consent of second defendant assigned to the plaintiff. The plaintiff applied for relevant authorities for licence to operate the said business. The plaintiff sues for breach of the agreement and covenants against the 2nd defendant and damages for inducement to breach a contract against first defendant, the clauses are joint and severally. On 14/8/2008 the plaintiff filed an application seeking interlocutory orders injunction both prohibitory and mandatory pending the hearing of this suit.

Thereafter on 25/8/08 acting for 2nd defendant counsel by chamber summons brought under Section 6 of Arbitration Act No.4 of 1995, Rule 2 of the Arbitration Rules 1997 Section 3 A Civil Procedure Act, Cap.21 sought an order of stay of all further proceedings in this suit pursuant to Section 6 of the Arbtiration Act the plaintiff and the second defendant having by an agreement in writing agreed to refer to arbitration the matters in respect of which the action is brought. The 2nd defendant seeks from plaintiff all costs incurred in this suit so far. The agreement is exhibited as "WW – 1" and under Clause 11 headed

"Arbitration" it is stated:-

"Save as my be herein specifically provided all disputes or differences between the parties herein whatsoever shall at all times hereinafter whether during the continuance of this agreement or upon or after its determination arising between parties hereto touching or concerning this agreement shall be referred a single arbitrator to be agreed upon by the parties ……."

The plaintiff opposes this application on the grounds that:

1. This litigation involves other parties and cannot be severed.

2. It will result in two parallel proceedings.

3. It will bring the Judicial Procedure in disrepute.

The second defendant relies on supporting affidavit of Wilberforce

Wambulwa sworn on 25/8/2008. He is the County clerk of second defendant. It is admitted that the second defendant did grant a licence to the plaintiff to occupy a portion of the said Masai Mara Game Reserve and operate a balloon base within the said Masai Mara Game Reserve more particularly set out in the Balloon Operation Agreement aforesaid between plaintiff and 2nd defendant (copy marked WW-1).

From a close perusal of the said supporting affidavit it is clear the dispute between plaintiff and the 2nd defendant is whether the 2nd defendant has or is in the process of licensing a new ballon operation base within the zone "15 kilometres radius of Little Governors Camp". The 2nd defendant denies that it has authority or power to regulate any balloon operation whose base is outside the Game Reserve and which has been licenced by a third party. And the 2nd defendant states that it is willing to submit the dispute in this suit to arbitration.

The second defendant has cited several authorities:

1. Comments of Justice S.B. Malik and R.K. Melira on Arbitration Act 1940 of India and being Principles & Digest of Arbitration Law at page 262 paragraph 2. "Applicability" it is stated: the court may stay proceedings where

1. there is a valid arbitration agreement in existence.

2. the proceedings are in respect of matters agreed to be referred to arbitration

3. application for stay is by a party to the legal proceedings and that the party seeking stay is ready and willing to do all things necessary for proper conduct of arbitration and before taking any steps other than entering appearance in the suit.

In this case no steps are taken by applicant and the validity of the arbitration agreement is not challenged. Instead the details of the dispute are highlighted by the two parties.

Regarding the third party to this suit namely first defendant, "Skyship" the plaintiff pleads that well knowing at all material times of the existence of the aforesaid contract between plaintiff and second defendant, maliciously and wrongfully and with intent to injure the plaintiff procured and induced the second defendant to break the said contract and the covenants contained therein. The particulars of breach are set out in the plaint. The first defendant has no arbitration agreement with the plaintiff and is clearly not a party to the agreement entered into by plaintiff and the second defendant. The plaintiff's contention is that in that case the arbitration clause ought not to be invoked.

Plaintiff's counsel relies on the authority of Taunton Collins vs. Cromie & another, 1964 2 ALL E.R. 332

in that case a plaintiff sued two parties, the architect and the contractors, as co-defendants. The Court of Appeal held that it was undesirable that there should be two proceedings before two different tribunals who might reach inconsistent findings, accordingly there was special reasons for the exercise of the discretion refusing the stay of proceedings.

Lord Denning M.R. referred to the case of Halifax Overseas Freighters Ltd. vs. Ramo Export (The "Pine Hill" case) where there was an arbitration clause in a charter party but no arbitration in the bills of lading. There was a claim and the ship owners brought an action against the bill of lading Holder and Charterers. The charterers relying on the arbitration clause applied to stay the proceedings against them. The Judge, McNair, J. held that they should not be stayed. Everything should be dealt with in the one action saying:

"I think that a serious risk would be …… that our whole judicial procedure would be brought into disrepute if as I have indicated there was a serious possibility of getting a conflicting questions of fact decided by two different tribunals."

Lord Pearson, L.J. agreed saying:

"In this case there is a conflict of two well-established principles. That parties should normally be held to their contractual agreements. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. The multiplicity of suits would also increase the costs."

In Kenya case Kisumuwalla Oil Industries Ltd. vs. Pan Asiatic Commoties PTE Ltd. & another [1995-1998] 1 EA 150 the Court of Appeal was dealing with an agreement with a Scott vs. Avery Clause which made it a condition precedent to take legal action only after obtaining an award. The court held that the appellant wishing to take advantage of the arbitration clause would have to apply for stay of proceedings. This authority is clearly distinguishable against the case of Lofty vs. Bedouin Enterprises Ltd. [2005] 2 E.A 122 in which the Court of appeal said:

"the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering the appearance or if no appearance is entered at the time of filing any pleading or at the time of taking any step in the proceedings."

This is not the case here as the application and the appearance were filed on the same date. In the case of China Road Bridge Corp. (Kenya) Ltd. vs. DMK the Court of Appeal held that the act of subsequently filing other suits can clearly be construed to mean that the applicant was not ready and willing to do all things necessary for the proper conduct of the Arbitration.

The Court of Appeal adopted the decision of Collins vs. Croime & another – saying that: "it was not desirable to maintain two dispute tribunals (the court and the arbitration). I have perused the affidavits filed by the parties and the plaint filed by the plaintiff. The cause of action appears to arise out of similar facts and it is joint and several.

Although the plaintiff opposing says the arbitration case is to avoid multiplicity of suits and parallel causes in two tribunals, I lean on the principles laid down in the China Road Bridge Corp. (Kenya) vs. DMK Construction above and I find in this case there are special circumstances to warrant a refusal of stay of proceedings order. It is in the interest of justice and judicial process that the suit should be heard as a whole. The decision of the court in Lofty vs. Bedouin Enterprises Ltd. indicates that the court has discretion in the matter of application for stay proceedings notwithstanding the provisions of paragraph (a) and (b) of Section 6 (1) Arbitration Act are satisfied.

Also in the "Principles and Diges of Arbitration Law" relied upon by the applicant at page 266 paragraph 6. The discretionary powers of court are set out thus:

"The court's powers of staying legal proceedings is discretionary and cannot be claimed as of right. In

fact each case has to be decided on its merits."

It is my finding therefore that there are special reasons to reject this application.

The application is therefore dismissed with costs to the respondent.

It is so ordered.

DATED and DELIVERED at Nairobi this 11th day of September 2008.

JOYCE N. KHAMINWA

JUDGE