**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 490 of 2004**

**KENYA PIPELINE COMPANY LIMITED ………....…………..PLAINTIFF**

**VERSUS**

**DATALOGIX LIMITED………………………………..…1ST DEFENDANT**

**CYBERCOM LIMITED …………...………………….……2ND DEFENDANT**

**RULING**

This is an application by the 2nd defendant in the counterclaim. It is an application under Section 6 of the Arbitration Act 1995 Rules 2 and 11 of the Arbitration Rules seeking interalia;

**(1) That there be a stay of all proceedings by the plaintiff in the counterclaim against the 2nd defendant/applicant herein.**

**(2) That the 2nd defendant and the plaintiff in the counterclaim be referred to arbitration in accordance with clause No.15.4 of the contract agreement dated 15th August, 2002.**

The contention of the applicant is that the contract agreement dated 15th August, 2002 between the plaintiff in the counterclaim and the 2nd defendant forming the subject matter of the dispute and suit against the 2nd defendant provides in express and unambiguous terms for arbitration in the event of a dispute. And a dispute having clearly arisen between the 2nd defendant and the plaintiff in the counterclaim, the proceedings against the 2nd defendant should be stayed and the parties be referred accordingly to arbitration. It is also the position of the applicant that the proceedings by the plaintiff in the counterclaim against the 2nd defendant have been instituted in contravention of clause 15.4 of the contract agreement between the parties.

The application is supported by the affidavit of **Joseph Njenga Njunge** who is a director of **Cybercom Limited** and who alleges to have personal knowledge of the matters in dispute between the 2nd defendant in the counterclaim and the plaintiff in the counterclaim. He states by a contract agreement entered into on 15th August, 2002 between **Cybercom** and **Kenya Pipeline Company Limited**, **Cybercom** was contracted by **Kenya Pipeline Company Limited** to provide information technology consultancy and project management services for **KPC's** enterprise transformation project on the terms and conditions set out in the said contract agreement. And that the said agreement contained an arbitration clause No.15.4 providing that any dispute arising out of or in connection with the contract agreement shall be finally settled by arbitration as more specifically stipulated in the said clause.

It is the contention of the applicant that the entire allegations of fraud, breach of fiduciary duty and/or breach of the contract agreement leveled against it by the plaintiff in the counterclaim is totally untrue and without any factual basis at all. It is further contended that these proceedings have been instituted against **Cybercom** in clear contravention of clause 15.4 of the contract agreement. It is also deponed that the filing of these proceedings against **Cybercom** is a clear manifestation that the dispute between the parties cannot be resolved amicably and the only recourse left is to refer the matter to arbitration.

It is the position of the applicant that it is desirous of having all disputes between itself and **Kenya Pipeline Company Limited** settled by way of arbitration as per clause 15.4 of the contract agreement, hence the necessity of the present application. The position was admirably supported by **Mr. Kiplangat** Advocate who submitted as follows: That the contract agreement contains an arbitration clause providing for reference of any dispute between the parties to an arbitration. The subject clause in material respect provides that any dispute between the parties shall be referred to an arbitration. And that clause as drawn is mandatory in nature and more important it is all dispute clause. There are no limitations in the arbitration reference.

**Mr. Kiplangat** Advocate submitted that a dispute having arisen between the parties, the parties should be held to their bargain by referring the matter to arbitration. In order to establish the nature of the dispute between the parties, it is necessary to look at the counterclaim and the affidavits filed by the parties in court record. The respective parties have made various allegations against one another which allegations have been denied either party. Such that there is in existence rival allegations or opposed positions on certain fundamental issues of facts and law. According to **Mr. Kiplangat** Advocate, the existence of such rival allegations or opposed positions is a clear demonstration that disputes have arisen between the parties.

The plaintiff in the counterclaim alleges a breach and the applicant denies the said breach. And that gives rise to a dispute fit to be decided through an arbitration. The truth or otherwise of those allegations does not fall for determination for this court.

On whether the 1st defendant in the counterclaim is the applicant's wholly owned subsidiary is a moot point which is contested. The applicant's position is that the 1st defendant is not or has not been a subsidiary of the applicant. According to **Mr. Kiplangat** Advocate, the fact that various allegations of breach and fraud is leveled against the applicant is not a ground to refuse arbitration. In support of that position, he relied on various cases namely;

**(1) HCCC No.721/2004 (OS) Nairobi, William Olwande vs American Life Insurance Company (K) Ltd** where **Ojwang J** referred the dispute to arbitration despite several allegations of fraud leveled against the applicant. The judge was not persuaded by the weight of fraud claims emanating from the respondent in that case. He found there was a relationship between the parties therein and which ended in a dispute, hence that relationship gives a legal framework for reference to arbitration as contained in the agreement. It was the position of the judge that the fact the applicant's case was tainted with fraud did not preclude the matter from being referred to arbitration in terms of the agreement made between the parties.

The above decision was supported by the decision; **Telkom Kenya Ltd vs Kam Consult Ltd (2001) 2 E.A. 574,** where **Ringera J** (as he then was) held;

"**An arbitrator does not lose jurisdiction to handle a matter by the mere allegation of fraud in the pleadings. The arbitrator would be entitled to hear evidence and determine whether fraud had been established. It would be against public policy to enforce a contract including an arbitration clause, where fraud was established. However, it would defeat the purpose of the legislature if the mere allegation of fraud, no matter how mischievous, was enough to oust the arbitrator's jurisdiction".**

The other authorities cited to me by the applicant also support the position taken by the applicant and I do not wish to refer to each of them, notwithstanding their relevance and importance to the applicant's case.

The other ground raised by **Mr. Kiplangat** Advocate that the application was filed within time and equally that the applicant has not waived its right to refer the matter to arbitration.

Lastly **Mr. Kiplangat** submitted that the plaintiff/respondent has not shown in the replying affidavit, that the arbitration clause is null and void or that it is inoperative or incapable of being performed, therefore he urged me to refer the matter to arbitration.

**Mr. Wagara** for the 1st defendant in the counterclaim supported the position taken by the applicant. According to **Mr. Wagara** Advocate, the issues of conspiracy is irrelevant to the present application and that the dispute between the plaintiff in the counterclaim and the 1st defendant counterclaim should not be used to object to arbitration.

The application was opposed by **Mr. Wekesa** for the plaintiff in the counterclaim who submitted as hereunder: That this suit was commenced by **Datalogix** on 8th September, 2004, who is now the 1st defendant in the counterclaim. It sought an injunction against the plaintiff in the counterclaim but the attempt was lost in a ruling delivered on 26th March, 2006, which dismissed the application for injunction. That **Kenya Pipeline Company Limited** was compelled to defend the matter. It is the defence of **Kenya Pipeline Company Limited** that the tender subject of this suit was designed, prepared, overseen and evaluated by **Cybercom Limited** as consultants of **Kenya Pipeline Company Limited**. It became evident after the tender process that **Cybercom Limited** and **Datalogix Limited** were one and the same.

**Mr. Wekesa** posed a question that requires answers between the parties and the question is "**Was Cybercom Ltd, right as an agent of Kenya Pipeline Co. Ltd to award a tender to a Company which by documentation had been held as a subsidiary of Cybercom Limited?"** The same **Datalogix Limited** swore an affidavit saying that **Datalogix Limited** was a subsidiary of **Cybercom Limited**.

**Mr. Wekesa** Advocate submitted that there was fraud or breach of fiduciary duty committed by the applicant. And that is how applicant was brought into the suit. It is the position of **Kenya Pipeline Company Limited** that, that fraud or breach of fiduciary duty cannot be determined without the presence of the applicant. It is not possible for this court to determine those allegations without the presence of the applicant. And by bringing this application, the applicant is trying to defeat by seeking to transfer the matter from the jurisdiction of this court.

According to **Mr. Wekesa** Advocate the present application is an attempt to split the trial between this court and arbitrator. It is not tenable for the issue of fraud, which is the heart of this suit to be heard by this court and by an arbitrator. In his view **Mr. Wekesa** termed the whole process an attempt to defeat the cause of justice.

Now let me say that Section 6(1) of the arbitration Act gives the court discretion to order stay of proceedings where no sufficient reasons is shown why such order should not be made. It is a pre-requisite factor that before the court can exercise its discretion to make an order for arbitration, the applicant must satisfy the court that it is and was at all times willing to do everything necessary for the proper determination of the dispute. In my view in exercising its discretion the court should take into account the circumstances of the particular case and a mere semblance of a convenience of a particular party is not a credible factor to sway the discretion of the court. The onus of proving that the matter in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for reference to arbitration. And once the burden has been discharged, then the burden shifts to the opposing party to show cause why effect should not be given to the arbitration clause. See **Esmailji vs Mistry Shamji Lalji & co. Civil Appeal No.23/79 K. L. R. (1984) 150**.

My position as I understand Section 6(1) of the Arbitration Act is that stay is not automatic but the court has to satisfy itself that circumstances exists to require parties to arbitration. It is clear from the reading of Section 6(1) of the Arbitration Act that the decision to refer the matter to arbitration is left to the discretion of the court. The court must give effect to the terms of a contract which provides for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give

effect, the wishes of the parties and their contractual relationship. Arbitration, I reckon is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. I think it is against public policy to deprive parties of that choice and hinder their attempt to resolve their dispute through arbitration mechanism.

Clause 15.4.1 of the agreement provides;

"**The parties shall endeavour to resolve any dispute between them in an amicable manner. In the event an agreement cannot be reached, then the dispute shall be referred to arbitration in accordance with this section. Any dispute arising out of, or in connection with this agreement shall, if not otherwise agreed be finally settled by arbitration wider the Chartered Institute of Arbitrators Kenya Branch Rules at the time in force by an arbitrator appointed in default of agreement, by the Chairman of the Chartered Institute of Arbitrators Kenya Branch".**

The applicant wants to enforce the above provision which is contained in the agreement between it and respondent. The said agreement was for the provision of information technology consultancy and project management services for **Kenya Pipeline Company Limited** enterprise transformation project (ETP). In short the applicant's obligation in the contract agreement was to carry out and document Kenya Pipeline requirements and thereafter pre-qualify and recommend suitable vendors for the products or services required. The applicant was also required to carry out the necessary technical and commercial evaluations of the bidders responses and submit to **Kenya Pipeline Company Limited** a detailed evaluation report in each procurement process. It is also clear in the contract agreement that the applicant was responsible for preparing the request for proposal documents to enable the required services to be procured by the respondent through a tender process.

It is on the strength of the above requirement in the contract agreement that **Mr. Wekesa** termed the attempt of the applicant to refer the dispute to arbitration as self-defeatist. He submitted that the 1st defendant in counterclaim is a wholly owned subsidiary of the applicant who advised the respondent on the tender award. As such it is alleged the applicant was the legal agent of the plaintiff in the counterclaim, thereby stood in a fiduciary relationship to the plaintiff in the counterclaim. It is contended that, that relationship did not permit the applicant to divert and/or award the contract to its wholly owned subsidiary and to do so was a breach of a fiduciary duty. Pursuant to the award of tender, the 1st defendant in the counterclaim received a sum of Kshs.115,029,582/65 from the plaintiff in the counterclaim. That amount is the subject of the counterclaim and in pursuit of that cause of action, the plaintiff in the counterclaim made various allegations of fraud and breach of fiduciary duty against the applicant herein. In dismissing **Datalogix's** application for injunction, **Justice Njagi** had this to say;

"**The most serious allegation leveled against the contract by Mr. Wekesa was that Cybercom, the consultant contracted by the defendant and who thereby became the defendant's agent, was the holding company in respect of the plaintiff and that the plaintiff was its wholly owned subsidiary. While the principal/agent relationship subsisted between the defendant and consultant (hereinafter referred to as Cybercom) there also existed a fiduciary relationship between them which Cybercom abused by awarding the contract to its wholly owned subsidiary. In response to this accusation, Mr. Ngatia submitted that the accusation would be correct only if the defendant did not know of the relationship between the plaintiff and Cybercom. The relationship is disclosed in the company profile of Cybercom Ltd a copy of which was forwarded to the defendants under cover of a letter dated 8/2/99. but that is all that they disclosed. The basic principle of law is that no agent is permitted to enter into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal with full knowledge of all the material circumstances and the exact nature and extent of the agents interest consents… The record shows that Cybercom and its wholly owned subsidiary the plaintiff herein share the same postal address. The plaintiff company prides itself on a staff complement comprising a manager, a secretary who receives visitors and incoming calls, a messenger who doubles up as a cleaner and a fourth nondescript officer. It is in such circumstances as those that one may be tempted to refer to such a company as an alias agent, trustee, or nominee for its holding company. In such situations, the subsidiary might exist in name**

**only while the holding company is really the power behind the throne. A contract entered into by such a subsidiary is not much different from that entered into by the holding company itself".**

There is no dispute that the applicant evaluated the subject tenders and respective bidders and in the end evaluated **Datalogix** as the most competitive bidder and recommended it for the award of the tender. The applicant in that position allowed itself to be in a position contrary to the interest of the plaintiff in the counterclaim. No doubt as an agent of **Kenya Pipeline Company Limited**, the applicant undertook a comprehensive evaluation of the process of the tender and gave final blessing to a company which is wholly owned as a subsidiary. As a result of that recommendation, the tender committee accepted the recommendation of **Cybercom Limited** to award the tender to Datalogix (1st defendant in the counterclaim). The affidavit by **Elizabeth Mumbi** confirms that **Datalogix** is a subsidiary of the applicant herein though that position is subsequently contested by the parties herein.

In the counterclaim, it is alleged the applicant herein corruptly designed, processed and recommended the award of the tender to its declared wholly owned subsidiary. It is also alleged that the said fraud was perpetuated by former employees of **Kenya Pipeline Company Limited** in cahoots with officers of **Datalogix Limited** and **Cybercom Limited** wherein the consultant interfered with and manipulated the tendering process in violent breach of the law and generating fictitious documents in pretended part performance of a non-existent contract to the 1st defendant in the counterclaim. It is further alleged as a result of that fraud, the 1st defendant in the counterclaim illegally and corruptly received a sum of Kshs.115,429,583/= for no work done. The plaintiff in the counterclaim in paragraph 29 states;

**The defendant states that the plaintiff (read Datalogix Ltd) was a mere alias, cloak of Cybercom Ltd in the transaction the subject of this suit and Cybercom Ltd in breach of its fiduciary duty to the defendant as its agents and in a monumental fraud recommended an award of the tender to the project to "itself" in the disguise of the plaintiff yet it was the consultant in the exercise. The plaintiff and Cybercom Ltd's fraud and breach of fiduciary duties speak for themselves".**

The plaintiff in the counterclaim then lists 9 particulars of the alleged fraud and states **Datalogix Ltd** and **Cybercom Ltd** are liable to repay to the defendant the sum of Kshs.115,429,583/= received in perpetuation of the fraud by the said parties. The law is that agents have duties to discharge of a fiduciary nature towards their principal. And no party having such duties is allowed to enter into agreements in which he has or can have a beneficial interest conflicting or which may possibly conflict with the interests of those whom he is bound to protect. In short the agent of the principal cannot be the principal of another agent which is connected to the middle principal so as to give a position of advantage contrary to the interests of the instructing principal. The law bars agents to enter into engagements conflicting with the interests of those whom it is bound to safeguard and protect from any eventual peril.

In my view a question may arise as to the legality of the relationship between Datalogix and **Kenya Pipeline Company Limited** in respect of the subject tender recommended by **Cybercom** to be awarded to **Datalogix**. **Mr. Wekesa** Advocate submitted that the question to be determined by this court is the issue of the original tender. And that the amendment to bring in **Cybercom Limited** does not change the subject matter. He termed the applicant as an essential party to the determination of the entire dispute between the parties. In short he submitted that a trial without the applicant would be a farce and it is an open attempt to remove the case from this court to an arbitration.

It is my humble opinion that our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter. Section 3 of the Arbitration Act defines a party as "***a party to an arbitration agreement and includes a person*** **claiming through or under a party"**. The crux of the dispute is the tender project which the plaintiff in the counterclaim was undertaking. It is alleged the applicant who was an agent of **Kenya Pipeline Company Limited** used its position to steal the tender or award the tender to its subsidiary company. A strange feature in this matter is that there are two separate agreements involving the parties herein. One agreement is between the applicant and the plaintiff in the counterclaim, while the other agreement is between the plaintiff in the counterclaim and the 1st defendant in the counterclaim. It is strange because

the 1st defendant company is a wholly owned subsidiary of the applicant. It would be absurd to suggest or even contemplate that there was no fundamental breach of the two agreements by the parties.

As stated it is difficult to make a definite finding on the relationship between the applicant and the 1st defendant in the counterclaim. It is difficult because the dispute between the parties is pending before it for determination. However, it suffices to state that the 1st defendant is merely an ancillary or front men for the real ownership of the business undertaken by the 2nd defendant in the counterclaim. There is substantial allegation that the 1st defendant in the counterclaim has a fronting arrangement with the applicant. The relationship between the 1st defendant and 2nd defendant is complex, intricate, delicate, intertwined and/or difficult to comprehend. It may be a case of a front company giving its name to the transaction but the real principals may be elsewhere pretending to be an agent of **Kenya Pipeline Company Limited**.

**Mr. Kiplangat** Advocate was of the view that an overlap between issues, the possibility of inconsistent findings does not make an arbitration clause inoperative while **Mr. Wekesa** Advocate position is that it is not possible to determine the dispute without the presence of the applicant and by trying to transfer the dispute between the applicant and the plaintiff in the counterclaim, the court would be splitting the trial and even complicating the defence and counterclaim of **Kenya Pipeline Company Limited.**

In **Niazsons (K) Ltd vs China road & Bridge Corporation Kenya (2001) K.L.R. 12 Bosire JA** held;

"**The policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved. If any authority is necessary there is a clear enactment in Section 6 of the Civil Procedure Act".**

To that extent therefore, the plaintiff in the counterclaim would have difficulties in prosecuting its counterclaim against the defendants, one of which wants to remove itself from the jurisdiction of this court. The counterclaim is founded on various allegations of fraud, perpetuated by the defendants in the counterclaim. And to be fair to the plaintiff, I think it would be impossible for it to proceed with such a claim in the absence of the central party in the dispute. There is an allegation that there is no contract between the plaintiff in the counterclaim and the 1st defendant in the counterclaim. I have also noted that the 1st defendant in part performance of the alleged agreement received substantial amount of money from the plaintiff in the counterclaim. I do not wish to indulge in whether the said contract was properly and legally executed and has been recognized and acted upon by the parties.

I agree that there is an agreement between the applicant and the plaintiff in counterclaim which provides for an arbitration clause. Under Section 6(1) (a) of the Arbitration Act the court's jurisdiction to refer the matter to arbitration would be fettered only if the agreement was null and void or was inoperative or was incapable of being performed. Let me add that in situations where parties agreed to refer disputes to arbitration, the jurisdiction to deal with substantive disputes or differences is given to the arbitrator, the court retains residual jurisdiction to deal with peripheral matters so that the matter in dispute can be dealt in the manner agreed between the parties. That is what the applicant wants in this application. I hasten to add that a right to go arbitration is not automatic. The moment a dispute arises the yardstick is whether the plea is an attempt to defeat a matured cause of action or defence of another party. In this case the plaintiff in the counterclaim says that to refer the dispute to an arbitration would be sending its counterclaim to a death row and it would eventually suffer or succumb to natural death.

The decision/determination in this matter would ultimately revolve around the question whether the two contracts are valid and capable of enforcements. The foundation is that the contract must be beneficial to both parties and consideration must flow from one party to the other. The plaintiff in the counterclaim claims to have lost a sum of over Kshs.115 million, while no service or equipments were supplied by the defendants herein. A basic principle of law is that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself/itself implicated in the illegality.

Having considered the resplendent submissions of **Mr. Kiplangat** and **Mr. Wagara**, I am of the view that the dispute falls outside the purview of the arbitration agreement because conditions precedent have been defied by one party to the detriment of the other. The conflict/controversy in this matter is one which an arbitrator has no role to play due to the nature of the dispute, the legal issues involved and the intricate position between the applicant and 1st defendant in the counterclaim. It is the acts and omissions of the applicant which took the arbitration clause out of the province of the arbitration. The applicant by recommending its own relative to the lucrative tender, may have acted in a manner contrary to its fiduciary duty. It is my position that the attempt to refer the dispute to arbitration is a patch up by one sibling on the torn clothes of another. And I think it would be exceptionally unjust to the plaintiff in the counterclaim if this court were to allow the attempts of the relatives to patch up their clothes on a piece removed from the clothes of the plaintiff. The removal of one piece from the clothes of the plaintiff may expose it or make it naked with no recourse. I think this court must allow the parties to keep their respective clothes till the determination of who should be entitled to the piece now removed by the applicant.

It is my judgement that this is not the kind of dispute that can be referred to arbitration as contemplated under Section 6 of the Arbitration Act. I think this court has the duty to refuse the separation of the Siamese twins for the result would be devastating to the parents. The court would have the opportunity to determine whether the various allegations of fraud and breach of fiduciary duty are baseless or not. The court would also decide whether the allegations leveled against the 1st and 2nd defendant, in the counterclaim is baseless or not. And equally the court would decide whether the counterclaim by the plaintiff is sustainable against the defendants or not.

In short the court would determine the dispute in totality and in the presence of all the necessary parties to the dispute. The rival allegations and opposed positions on certain fundamental issues would be sifted before court and in the presence of the three contestants. No party would be able to disguise himself, the person behind the throne would be known. There would be no veil available to the parties and the truth would come to the open field. The court would have the opportunity to apportion liability and the blame worthiness of each party would come to the open. The rights, obligations, duties and interests of the parties would be defined. Of course in the presence of all the three parties herein.

In the premises, I agree with **Mr. Wekesa** Advocate, that the application is an attempt to split the matter between this court and by an arbitrator. In my view no fair decision would be reached in the absence of the applicant. The possibility of conflicting decisions between the different foras is imminent and that may jeopardize the rights of the parties and eventually embarrass the due process of the law. It would be incorrect to split the dispute between the parties between this court and an arbitrator.

**It means the application has no merit and it is dismissed with costs to the respondent.**

Dated and delivered at Nairobi this 31st day of May, 2007.

**M. A. WARSAME**

**JUDGE**