REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 155 of 2007

CHEVRON KENYA LIMITED…….....…..PLAINTIFF

VERSUS

TAMOIL KENYA LIMITED..…….....…...……DEFENDANT

RULING

Before me is an application dated 29.5.2007 expressed to have been brought under the provisions of Section 6 of the Arbitration Act, 1995 and Rule 2 of the Arbitration Rules, 1997. The application seeks two primary orders which are first that this suit and/or all proceedings in the suit be stayed and secondly that the dispute between the plaintiff and the defendant be referred to arbitration. The grounds for the application are that:

i) Clause 27.2 of the Agreement for Joint Operation of Into-Plane Service **("the subject agreement")** dated 16.12.1997 between the parties herein 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 subject agreement between the parties and is an abuse of the process of the court in the light of the express provisions of the Arbitration Act, 1995.

iii) Section 10 of the said Arbitration Act, 1995 specifically prohibits the Court from intervening in matters governed by the Arbitration Act, 1995.

The application is supported by an affidavit sworn by one Stephen Kiiyuru Karanja the General Counsel of the defendant. It is deponed in that affidavit inter alia that the foundation of the plaintiff's cause of action is the agreement dated 16.12.1997 entered into between Caltex Oil (Kenya) Limited and Mobil Oil Kenya Limited. It is also deponed that as averred in paragraphs 8 and 9 of the plaint both Caltex and Mobil have since changed their names to Chevron and Tamoil respectively and the rights and obligations of the two entities remain the same in the light of Section 20 of the Companies Act Chapter 486. It is further deponed that Clause 27.2 of the subject agreement expressly provides that any dispute or difference between the parties should be resolved by Arbitration and that the defendant remains ready and willing to have the dispute between the plaintiff and the defendant resolved by arbitration and is willing to do all that is necessary for the proper conduct of the arbitration.

The plaintiff opposes the application on the basis of a replying affidavit sworn by one James Chilongo its Area Operations Manager in Charge of Aviation Operations in Kenya, Rwanda and Uganda. In a nutshell the plaintiff depones that the defendant did not merely change its name from Mobil Oil Kenya Limited to Tamoil Kenya Limited but infact acquired the formers' control by acquisition of 100% of its

shares and had therefore to comply with Clauses 20 and 14 of the joint venture agreement which did not happen rendering the subject agreement inoperative in respect of the defendant. It is further deponed in the alternative that in any event this application is fatally defective having been filed in contravention of the mandatory provisions of Section 6 (1) of the Arbitration Act 1995 since according to the plaintiff the application has been filed later than the time the defendant entered appearance and/or took any other step in the proceedings. It is also deponed that the application is misconceived, premature and an abuse of the process of the court because, reference to arbitration does not preclude a party from applying to the High Court for any interim protection orders and such an application can be made to the High Court even before the commencement of arbitration. In the premises, according to the plaintiff this application is without merit and should be declined.

The application was debated before me on 15.5.2007 by Mr. Waweru assisted by Ms. Muchiri Learned counsels for the plaintiff and Mr. Ohaga Learned counsel for the defendant.

I have perused the application and considered the same together with the affidavits both in support of the application and in opposition thereto. I have also considered the plaint and the subject agreement. I have finally given due consideration to the written skeleton arguments and the oral submissions of the learned counsels appearing and all the authorities to which I was referred. Having done so, I take the following view of the matter.

On whether the defendant has contravened the provisions of Section 6 (1) of the Arbitration Act 1995 counsel for the plaintiff contended that this application had been filed later than the time the defendant entered appearance and/or took any other step in the proceedings and thus the defendant was disentitled from seeking stay of proceedings. The action the defendant took before lodging this application was the filing of a Notice of Appointment of Advocates. According to counsel for the plaintiff this application should have been lodged not later than when the Notice of Appointment was filed. Having been filed two days later the application was barred by Section 6 (1) of the Arbitration Act, 1995. Counsel for the defendant on his part contends that the filing of a Notice of Appointment on 28.3.2007 did not constitute taking a step in the proceedings so as to disentitle the defendant from applying for stay of proceedings under Section 6 of the Arbitration Act. He proffered two reasons for his contention. The first one was that the said Notice of Appointment purports to have been filed under Order 3 Rule 8 of the Civil Procedure Rules. However as the defendant had not previously defended in person the Notice of Appointment was and remains a misnomer and the court should not take cognizant of the same.

The second reason was that a Notice of Appointment of Advocates cannot be understood to be a step taken in the proceedings. In counsels' view the kind of "***step taken in the proceedings***" convisaged in Section 6(1) of the Arbitration Act must be one that acknowledges the jurisdiction of the court to entertain the dispute. I agree with counsel for the defendant that a Notice of Appointment of Advocates cannot be described as a step taken in the proceedings to deprive a defendant of his recourse to arbitration. A Notice of Appointment of Advocates does just that: Informs the court and the other side that the defendant will from the date of the notice be acting through counsel. A Notice of Appointment of Advocate does not in itself acknowledge the jurisdiction of the court to determine the dispute. Lord Denning MR as he then was stated as follows in: **Eagle Star Insurance Company Limited – vs – Yuval Insurance Company Limited [1978] 1 Lloyds Rep.357:**

"**On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings, and the willingness of the defendant to go along with the determination by the courts of Law instead of arbitration."**

A Notice of Appointment of Advocates is in my view not a step in the proceedings that impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with the determination of the court instead of arbitration.

On whether or not the defendant was a party to the subject agreement, counsel for the plaintiff contended that it was not. His argument was that the plaintiff is entitled to pre-emptive rights of the

acquisition of the shares held by Mobil Oil Kenya in the subject agreement. In that regard there is no valid agreement between the plaintiff and the defendant because the defendant is not a party to the agreement for the joint operation of an Into Plane Service at JKIA dated 16.12.1997. In the premises the joint operation agreement of the into plane service at JKIA is inoperative. It was further argued for the plaintiff that even if the defendant were a party to the agreement; it is in breach of the agreement fundamentally which is tantamount to a repudiation of the contract.

The defendant's counsel on his part argues that the defendant is a party to the subject agreement. His argument is partly based on the definition of '**party'** in Section 3 of the Arbitration Act, 1995 which reads:-

"**Party"** means a party to an arbitration agreement and includes a person claiming through or under a party.

The defendant has also sought the aid of Section 20 (4) of the Companies Act as read with paragraph 9 of the plaint to demonstrate that the defendant is a party to the subject agreement within the meaning of the Arbitration Act. Its position in other words is that it is claiming under Mobil Oil Kenya Limited and therefore qualifies as a party to the subject agreement within the meaning of Section 3 of the Arbitration Act. That argument on the face of it is quite attractive but the material availed to the court suggest otherwise. Firstly, the defendant did not merely change its name from Mobil Oil Kenya Limited to Tamoil Kenya Limited. The letter dated 1.12.2006 from Mobil Oil Kenya Limited to the Operating Committee and the participants for the joint operation of an into plane service at JKIA Nairobi exhibited as "**JC5"** clearly stated that:

"**On 1st December 2006, Tamoil Africa Holdings Limited has acquired the control over 100% of the shares in Mobil Oil Kenya Limited, and the company is under the process of being renamed Tamoil Kenya Limited."**

There was therefore an acquisition of 100% of the shares in Mobil Oil Kenya Limited, and the company is under the process of being renamed Tamoil Kenya Limited."

There was therefore an acquisition of 100% shares of Mobil Oil Kenya Limited by Tamoil Africa Holdings Limited. Mobil Oil Kenya Limited was not merely changing its name to Tamoil Kenya Limited. And what does the subject agreement say with respect to "**change in interest in a Participant"**? That is to be found in Clause 20 of the agreement which reads as follows:-

"**20.1. In the event that there should at any time be or be impending a change in the effective control of any participant, then unless otherwise agreed:**

(i) that participant shall forthwith give notice of such change to the Operating Committee;

(ii) such notice shall contain an offer by that participant to sell its share to the other participants at a price equivalent to the current replacement value less depreciation of its share in JIPS in the accounting records of the JIPS (Joint Into Plane Service)."

Clause 14 contains provisions for entry of Participants and admission criteria and Clause 20.3 contains consequences of transfer of shares resulting in a change in effective control of a participant. Clause 20.3 reads as follows:-

"**Subject to Clause 20.1, should a participant transfer or should there be a transfer by sale or otherwise of any part of the equity shareholding of that participant to one or more third party non-participants; resulting in a change in effective control of that participant as the term "*effective control*" is defined in Clause 20.2 such a transfer shall be effective as to such transferee under this Agreement and with respect to the other participants only if such transferee satisfies the new entry criteria set forth in Clause 14.3."**

Mobil Oil Kenya Limited by the letter of 1st December 2006 aforesaid, attempted to comply with Clause 20 of the subject agreement on its shares being acquired by Tamoil Africa Holdings Limited. That attempt came to naught as in a letter dated 20.12.2006 Mobil Oil Kenya Limited withdrew the notice of 1.12.2006 and added significantly that:-

"**On resumption of discussions, Tamoil Kenya Limited will avail all details and documents requested."**

The defendant's letter through its advocates dated 8.3.2007 did not help matters. The defendant did not show any desire to comply with requirements for entry to JIPS.

On the material placed before me therefore, I am persuaded that the defendant is not a party to the subject agreement, as it has not met the entry criteria set forth in Clause 14.3 being a new entrant. Section 6(1) of the Arbitration Act 1995 reads 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."

To my understanding of the above provisions of the Act, only a party to the arbitration agreement has the right to apply for stay of proceedings. As demonstrated above, the defendant is not such a party and was not entitled to lodge this application.

I am also of the persuasion that even if the defendant were to be deemed a party to the subject agreement it has not shown by action that it is desirous of going to arbitration. It acquired Mobil Oil Kenya Limited way back on 1.12.2006. Failed to meet the entry criteria as a new participant in the subject agreement and threatened instead to exercise its rights of proprietorship over the plaintiffs leasehold interest in LR. No.9042/54. Those actions were not in consonance with a desire to resolve any dispute by arbitration. In my view a mere say so in an affidavit is not sufficient.

I have carefully perused the plaint. Its foundation is clearly the breach by Mobil Oil Kenya Limited to offer its shares in the joint venture to the plaintiff and the defendant's failure to meet the entry criteria with regard to the Joint Into Plane Service (JIPS) venture and the consequences thereof. In my view therefore, the dispute between the plaintiff and the defendant is in reality not a dispute with regard to maters agreed to be referred to arbitration envisaged in the arbitration clause. It is barred by Section 6 (1) (b) of the Arbitration Act.

In the end the defendant's application dated 29.3.2007 and lodged on 30.3.2007 is dismissed with costs to the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Nyamunga holding brief for Ohaga for the defendant and Gatonye/Wanjiru for the plaintiff.

F. AZANGALALA

JUDGE

12/6/07