REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1218 of 2006

KENYA SEED COMPANY LIMITED ……..……..……PLAINTIFF

V E R S U S

KENYA FARMERS ASSOCIATION LTD. ……..……DEFENDANT

R U L I N G

This is an application (by notice of motion dated 15th January, 2007) by the Defendant under section 6 (1) of the Arbitration Act, 1995 for stay of all proceedings in the suit pending arbitration. The Plaintiff filed suit by plaint dated 20th November, 2006 claiming the sum of KShs. 54,941,769/00 on account for goods sold and delivered. The Defendant entered appearance on 14th December, 2006. On 16th January, 2007 it filed the present application.

The application is made upon the grounds (as they appear on the face thereof) that the credit agreement referred to in paragraphs 4 and 5 of the plaint provide for arbitration in case of any dispute or differences arising between parties thereto; that the said credit agreement is signed by the parties herein and is binding on them; that arbitration is a condition precedent to the filing of this suit; and that therefore the suit is premature. There is a supporting affidavit sworn by one SYMON KIPCHUMBA CHEREGONY, the general manager of the Defendant. To this affidavit is annexed a Seed Agency Agreement dated 1st March, 2006 between the Plaintiff and the Defendant. The same appears to be duly executed.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by its learned counsel, KIMAMO KURIA, and filed on 12th February, 2007. The grounds of objection to the application emerging from that replying affidavit are that, the application having been filed after it entered appearance, the Defendant forfeited its right to apply for stay and to have the matter referred to arbitration; and that, in any case, the transactions giving rise to this suit took place before execution of the agreement of 1st March, 2006, and that therefore the arbitration clause therein is not applicable to this case.

I have given due consideration to the submissions of the learned counsel appearing, including the cases cited. I have also perused the plaint and the affidavit sworn in support of and in response to the application. It is to be noted that whereas the claim in the plaint is for goods sold and delivered, no dates are given when the goods were sold and delivered. It is to be noted further that whereas it is claimed in the replying affidavit that the goods upon which the claim is made were sold and delivered before the Seed Agency Agreement between the parties of 1st March, 2006 was executed, no other seed agency

agreement between the parties has been exhibited by the Plaintiff.

I therefore find, *prima facie*, that the only seed agency agreement between the parties is the one dated 1st March, 2006, and that it was pursuant to this agreement that goods were sold and delivered upon which the claim is made. Clause 23 of that agreement is a clear and unambiguous arbitration agreement between the parties. It provides:-

"**Any dispute, differences or questions which may arise at any time hereafter between the parties hereto shall be referred to the decision of a single arbitrator to be agreed upon between the parties or in default of agreement within 14 days to an arbitrator to be appointed at the request of either party by the chairman of the Chartered Institute of Arbitrators.**

Either party shall have a right to appeal to the High Court of Kenya if not satisfied with the arbitrators' decision."

There cannot be any dispute therefore that there is an arbitration agreement that binds the parties. Ido not find this arbitration agreement to be null and void, inoperative or incapable of being performed.

Section 6 of the Arbitration Act, 1995 provides:-

(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."

Learned counsel for the Defendant has argued that under section 6 quoted above a party seeking to enforce an arbitration agreement may apply for stay of proceedings not later than the time of entering appearance, or before he files any pleadings, or before he takes any other step in the proceedings. It was his view that these are three specific but **alternate** scenarios for applying for stay of proceedings and reference to arbitration. He submitted that the Defendant has not filed any pleading nor taken any other step in the proceedings; it has only entered appearance, and a memorandum of appearance is not a pleading. The Defendant has therefore properly sought stay of proceedings and reference to arbitration.

The learned counsel for the Plaintiff is on a different view. He submitted that a party must apply for stay of proceedings and reference to arbitration not later than the time of entering appearance, or the time of filing of any pleadings, or the time of taking any other step in the proceedings. According to him, if a party enters appearance, or files a pleading, or takes a step in the proceedings without at the same time, or simultaneously, filing the application for stay, he shall have forfeited his right to so apply.

It is to be noted that the two Court of Appeal cases cited interpreted section 6 (1)(a) of the old Arbitration Act, Cap 49, which was repealed and replaced by the Arbitration Act, 1995. Those cases are **CORPORATE INSURANCE CO. LTD VS WACHIRA** [1995 – 1998] 1 EA 20 and **AGIP (K) LTD VS KIBUTU** [1981] KLR 20. The wording of section 6 (1)(a) of the old repealed Act was different from the wording of section 6 (1) of the new Act. It provided:-

(1) "6 (1) If a party to an arbitration agreement, or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against

a person claiming through or under him, in respect of a matter agreed to be referred –

(a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings….."

As can be seen, the old Act provided, without ambiguity, that a party to legal proceedings involving parties to an arbitration agreement could, at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to court to stay the proceedings.

The new Act however is not so clear-cut; but it does alter the position obtaining under the old Act. Under the new Act, a party must now apply for stay of proceedings and reference to arbitration not later than the time when that party enters appearance, or files any pleadings, or takes any other step in the proceeding. Instances may arise where a party need not enter appearance but may file pleadings like defence. Instances may also arise where a party need not enter appearance or file any pleadings but may take any other step in the proceedings. Whatever the case, a party wishing for the proceedings to be stayed and the matter referred to arbitration under an arbitration agreement must so apply not later than the time he enters appearance (if indeed he enters appearance), or not later than the time he files any pleadings (if he does not enter appearance), or not later than the time he takes any other step in the proceedings (if he does not enter appearance or file any pleading). I take solace in the decision of Mbaluto, J in the case of **TM AM CONSTRUCTION GROUP OF AFRICA VS THE ATTORNEY GENERAL [2001] 1EA 291** inasmuch as he held that the defendant in that case should have applied for stay of proceedings and reference to arbitration not later than the time he entered appearance.

In the present case, the Defendant applied for stay of proceedings and reference to arbitration some 33 days after it entered appearance. The application was clearly made outside the time stipulated by section 6 (1) of the Arbitration Act, 1995. The application is incompetent and not properly before the court. It is hereby struck out with costs to the Plaintiff. Orders accordingly.

DATED AT NAIROBI THIS 24TH DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 27TH DAY OF JULY 2007