REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 368 of 2005

PAMELA AKORA IMENJE …….……..PLAINTIFF

V E R S U S

1. AKORA ITC INTERNATIONAL LTD

2. BART JAN ROZE BOOM ……..……...DEFENDANTS

R U L I N G

The Plaintiff seeks by chamber summons dated 12th October, 2005 the following main orders:-

1. That the dispute herein be referred to arbitration.

2. That proceedings herein be stayed pending the filing of the arbitral award.

3. That the parties do appoint an arbitrator within 30 days.

4. That the arbitral award be filed within 90 days of appointment of the Arbitrator.

The application is expressed to be brought under section 6 (1) of the Arbitration Act, 1995 and also under rules 2 and 11 of the Arbitration Rules, 1997. The grounds for the application as they appear on the face thereof are:-

1. That there is a difference between the parties herein as evidenced by the amended plaint dated 11th August, 2005 and filed herein.

2. That article 31 of the Articles of Association of the 1st Defendant provides for reference of the difference between the parties to the decision of an arbitrator to be appointed by the parties.

3. That the 1st and 2nd Defendants have neither entered appearance nor filed defence in the suit.

There is a supporting affidavit sworn by the Plaintiff. To it is annexed a copy of the Articles of Association of the 1st Defendant. Article 31 thereof is an arbitration clause. It states:

"**Whenever any differences arise between the Company on the one hand and any of the members, their executors, administrators or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or**

to these Articles or to any statues affecting the Company or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."

The Defendants did not file any response to the application. However, they raised a preliminary objection to the entire suit in that the same is bad in law and constitutes an abuse of the process of the court because the Articles of Association of the 1st Defendant provide for a mandatory mode of settlement of disputes by arbitration which the Plaintiff has not invoked. They therefore wanted the entire suit struck out.

I have considered the submissions of the learned counsels, including the cases cited. The Plaintiff's application is wholly misconceived. Having chosen to file suit instead of invoking the arbitration clause in the Articles of Association of the 1st Defendant, she cannot now purport to have recourse to section 6 (1) of the Arbitration Act, 1995. That provision is available only to the Defendants. The very wording of the sub-section makes this plain and obvious. Having made her bed, as it were, the Plaintiff must lie on it. She chose to file suit; she must fall or stand by it.

Regarding the Defendant's prayer in the preliminary objection that the suit be struck out, I note that there is no application in that regard before me. Although the court no doubt has jurisdiction *in limine* to strike out suits, because of the drastic nature of the power to strike out, it is best that a formal application in that regard be brought as provided for in the Civil Procedure Rules. I will therefore decline the Defendant's request that the suit be struck out at this stage.

In the result, the Plaintiff's application by chamber summons dated 12th October, 2005 is refused. It is hereby dismissed with costs to the Defendants. Orders accordingly.

DATED AT NAIROBI THIS 15TH AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007