REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 344 OF 2007

RED FOX COMMUNICATIONS LTD. ……...……PLAINTIFF

VERSUS

COUNTY COUNCIL OF OLEKEJUADO

PRIME OUTDOOR NETWORK LTD. ……...DEFENDANTS

R U L I N G

I have before me two applications by the defendants which seek similar orders. The first application dated 11.7.2007 was filed by the 2nd defendant and the 2nd application was lodged by the 1st defendant and is dated 23.7.2007. The two applications seek that this suit and all proceedings herein be stayed pending arbitration and further that the dispute between the parties be referred to arbitration.

The grounds for the application are similar. They are that there is an arbitration agreement between the parties under which the differences between them should be determined and this suit should therefore be referred to arbitration.

The applications are expressed to be brought under the provisions of Section 6 (1) of the Arbitration Act, Section 3A of the Civil Procedure Act and all enabling provisions of the law. The 2nd defendant's application is supported by an affidavit of one Francis Raudo, its Managing Director and the 1st defendant's application is supported by the affidavit sworn by its clerk, Joseph Malinda.

The applications are opposed and there are replying affidavits sworn by one Michael Mbugua Ngugi, a director of the plaintiff. The applications were heard together on 7.9.2007. Counsel had by consent agreed to submit in writing which submissions were relied upon by them.

I have considered the applications, the affidavits filed together with the annextures, the submissions made and the authorities cited. It may be appropriate to outline some background to this dispute for a better understanding of the same. The plaintiff and the 2nd defendant are involved in the same business of outdoor advertising and both entered into separate licence agreements with the 1st defendant for installation of street lighting, infrastructure in the area of jurisdiction of the 1st defendant. There is however, a conflict as to the specific are each of the licencees were to operate. When the 2nd defendant commenced its installation, the plaintiff objected on the basis that it was the same area that had been designated for it. The objection was not heeded and the plaintiff filed this suit. Both agreements have an arbitration clause and that clause is the foundation of the defendants' applications.

Before considering the merits or demerits of the application, it is convenient to dispose of what in my view is a preliminary issue raised by the plaintiff in respect of the supporting affidavit sworn by Francis Raudo the said Managing Director of the 2nd defendant. The plaintiff has objected to that affidavit on the ground that the said Francis Raudo does not state that he had the 2nd defendant's authority to swear the said affidavit. Relying on the authority of Microsoft Corporation vs. Mitsumi Computer Garage Limited [2001] 2 EA 460, the plaintiff argues that the said affidavit is fatally defective and should be struck out in which event the application would be dismissed. That argument is sound in my view. Francis Raudo does not state that he swore the affidavit with the authority of the 2nd defendant. However, this application has been argued on the basis that that affidavit is valid. The objection to the same in my view should have been taken as a preliminary point of objection and a determination on the same could have resulted in the striking out of the affidavit. Since Counsel have presented their arguments on the basis of its validity I am inclined to consider the same in this ruling.

Turning now to the merits of the applications it seems to me that the fundamental issue for determination is whether the fact that both licence agreements provide for reference to arbitration outs the jurisdiction of the court. The plaintiffs position is that the agreements were separate and not tripartite. I think the plaintiff cannot be faulted on that point. Its agreement with the 1st defendant was independent of the agreement between the 1st defendant and the 2nd defendant. Indeed it is not suggested by any of the parties that the 2nd defendant was a party to the agreement between the plaintiff and the 1st defendant or that the plaintiff was a party to the agreement between the 1st defendant and the 2nd defendant.

It is therefore clear to me that a dispute between the plaintiff and both defendants cannot be said to be subject to any arbitration agreement. The decision in Roussel Uclaf vs. G.D. Seale & Company Ltd. [1978] 1 Lloyd's Rep.225 is distinguishable from this case in that the latter involved a company and its subsidiary. In any event the 2nd defendant did not avail the English Arbitration Act to ascertain if its provisions are the same as provisions of our own Act.

Under the Arbitration Act 1995 only a party to an arbitration agreement may refer a dispute to arbitration. The 2nd defendant is not such a party to the agreement between the plaintiff and the 1st defendant and its contention is clearly misconceived.

With regard to the 1st defendant's application it is not disputed that as between it and the plaintiff, there is an arbitration agreement. A dispute between them alone would obviously have to be resolved under the arbitration clause. However, this dispute is not between the plaintiff and the 1st defendant alone. The 2nd defendant is involved. In the premises the plaintiff had the option to commence separate proceedings against the defendants. It could have referred the dispute with the 1st defendant to arbitration and commenced this suit against the 2nd defendant. That option in my view although legitimate would not be prudent in view of the fact that the dispute between the plaintiff and both defendants is so intertwined that it should be tried together.

The second option open to the plaintiff was to institute these proceedings in view of the fact that the dispute involves the plaintiff and a third party: the 2nd defendant. In the event, the court will consider the entire dispute between the parties at once. In my view the plaintiff's choice of forum cannot be faulted.

In the end the defendants' applications are without merit and are dismissed with costs. It is so ordered.

DATED and **SIGNED** at **NAIROBI** this 11th day of December 2007.

F. AZANGALALA

JUDGE

DATED and **DELIVERED** at **NAIROBI** this 13th day of December 2007.

M.A. WARSAME

JUDGE

Read in the presence of:- Mr. Odhiambo Ochung for the 2nd defendant/applicant and I am also holding brief for Kinyanjui for 1st defendant/applicant and Mr. Githinji for the plaintiff/respondents in open court.

M.A. WARSAME

JUDGE

13/12/07