REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Civ Appli 264 of 2006

IN THE MATTER OF THE ARBITRATION ACT, 1995 ACT NO. 4 OF 1995

AND

IN THE MATTER OF AN APPLICATION BY HENRY MURIITHI

MVUNGU AND AUGUSTINE

MUTHENGI KIIO UNDER SECTION 12(3) OF THE ARBITRATION ACT, 1995 FOR APPOINTMENT OF AN ARBITRATOR

AND

IN THE MATTER OF A JOINT VENTURE AGREEMENT DATED

NOVEMBER 15TH 2005

BETWEEN

HENRY MURIITHI MVUNGU……………..........................……………………………..1ST PLAINTIFF

AUGUSTINE MUTHENGI KIIO…………………..........................……………………..2ND PLAINTIFF

VERSUS

BRUNO ROSIELLO………………………...........................…………………………RESPONDENT

R U L I N G

This is an application pursuant to Section 12(3)(b) of the Arbitration Act, 1995. It asks this court to appoint an arbitrator to hear and determine a dispute arising from the Joint Venture Agreement dated 15th November 2005, between the parties thereto.

It is common ground that the parties to these proceedings were also parties to the Joint Venture Agreement.

By virtue of the provisions of clause 15 of that Agreement, any dispute arising out of the joint venture agreement was to be submitted to arbitration as per the Arbitration Act, 1995. The respondent has not disputed that clause. Nor has he denied the existence of a dispute between the parties.

As I understand it, the respondent's biggest problem with the suggestion that the dispute be referred to arbitration emanates from the fact that the applicant had also instituted separate court action, being HCCC No. 225 of 2006.

The applicants do concede that they did institute the proceedings in HCCC No. 225 of 2006. However, they insist that those proceedings were instituted for the sole purposes of securing an injunction to restrain the respondent herein from letting out the suit property to third parties.

To my mind, there can be no suit whose sole purpose was to only secure an interlocutory injunction, pending the determination of other issues, by a separate tribunal. I say so, because even for the purposes of securing an interlocutory injunction, the applicant therefor must demonstrate that he had a prima facie case with a probability of success. In other words, the pursuit of an interlocutory injunction cannot be an end unto itself.

Regrettably, in this case the applicants did not make available to the court, copies of the pleadings in HCCC No. 225 of 2006. Therefore, this court is unable to verify for itself what the suit was about.

In the circumstances, I am unable to ascertain whether or not the assertions of the respondent are accurate. In other words, I do not know whether or not the facts which form the basis for that suit are similar to those in this matter. Therefore, there is a real danger that the matters in issue may be similar, or might be overlapping one another. If that were the case, and if this court did appoint an arbitrator to determine the matters in dispute herein, I would have recognised two separate jurisdictions over the same subject matter. There would then be chances that the High Court might, in the process of adjudicating on the injunction application, make findings of fact or law, which findings might possibly turn out to be inconsistent with the findings by the arbitrator.

Therefore, until and unless this court was made fully aware of the particulars of the statement of claim which is intended to be placed before an arbitrator; as well pleadings in HCCC No. 225 of 2006, I would be unable to assess for myself whether or not it was desirable to appoint an arbitrator.

Secondly, the parties, or at least the applicants, would have to give a very clear picture to the court as to what would happen to HCCC No. 225 of 2006, in the event that the court were to appoint an arbitrator herein. Would those proceedings be stayed, and if so at what stage?

Obviously, the concerns I have highlighted are not necessarily exhaustive. However, I hope that they do help to demonstrate the court's reluctance to appoint an arbitrator whilst there were parallel ongoing proceedings before the High Court, and which may impact directly or otherwise on the intended arbitration proceedings.

Also, the applicants have not as much suggested to the court, the qualifications of the arbitrator who is contemplated as being appropriate for the task at hand. It is definitely not helpful for any person to ask the court to appoint an arbitrator, and leave it at that. I say so because I believe that it is not the function of the court to go about deciding for itself the persons who qualify to be appointed as arbitrators in any given situation, without the benefit of some input from the parties themselves. I hold the considered view that it is always prudent for the parties who seek the appointment of arbitrators, to put forward their suggestions of the persons deemed qualified for the task. The suggestions should be inclusive of the names and qualifications of the persons so named.

For all the foregoing reasons, I decline to appoint an arbitrator, for now. I also award the costs of the application dated 22nd March 2006, to the respondent.

Dated and Delivered at Nairobi this 18th day of July 2006.

FRED A. OCHIENG

JUDGE