



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 221 of 2005

MAJIDOON KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA OLD COMPANY LIMITED.....DEFENDANT

R U L I N G

On 26th April 2005 the plaintiff filed a Chamber Summons dated 25th April 2005. By the said application, which was filed under a certificate of urgency, the plaintiff sought three substantive reliefs, namely:

- (i) An injunction to restrain the defendant from entering onto the petrol service station or interfering with the said station or equipment thereon.
- (ii) An order compelling the defendant to repair or replace a leaking underground petrol tank.
- (iii) A stay of the proceedings in the suit, pending Arbitration.

Immediately upon being served with the pleadings together with an injunction order, the defendant filed the application dated 29th April 2005, seeking, inter alia, the discharge of the injunction order with had been issued exparte. In the said application, the defendant also sought an order for stay of the proceedings, pending arbitration.

When the two applications came up before me, the parties had agreed that the matters in dispute be referred to arbitration

The only issue which remained for argument before me, was in relation to the costs of the said applications.

The plaintiff submitted that as its application was successful, costs should follow the event. But the defendant insists that it be awarded the costs of not only the applications, but also of the suit.

The defendant's reason for asking for costs is that there was never any need for the plaintiff to bring proceedings before the court, as there was a provision in the contract between the parties, to refer all disputes to arbitration.

It is common ground between the parties herein that by virtue of the provisions of Clause 19, in the Licence Agreement dated 6th July, 2001, any dispute or difference that might arise between them, which

they were unable to resolve through negotiations, would be referred to arbitration.

In the light of that clause in the Agreement, the defendant says that the plaintiff should have first sought the defendant's concurrence in referring the dispute to an arbitrator. However, the plaintiff went to court instead. And, once it had taken the dispute to court, the plaintiff sought orders to stay the very same proceedings which it had commenced.

Logically, it would appear that there was no need for the plaintiff to commence litigation, and immediately thereafter, seek orders to stay the very same proceedings.

Ordinarily, if a plaintiff institutes court proceedings in relation to an Agreement which provided that disputes arising therefrom would be taken to arbitration, one would expect the defendant to apply to court for stay of the proceedings, pending arbitration.

However, by virtue of the provisions of Section 6 of the Arbitration Act, 1995, the right to apply for a stay of proceedings is not vested exclusively on the defendant or the respondent. Therefore, there can be no bar to the plaintiff seeking to stay the proceedings which he himself had instituted.

To my mind, the most significant provision on the issue of costs of the two applications is Section 7 (1) of the Arbitration Act. It reads as follow;

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

I understand that provision to mean that even though there is an arbitration clause in an Agreement, a party to that Agreement would nonetheless be entitled to seek an interim measure of protection from the High Court.

Therefore, if the plaintiff herein felt that it was in need of an interim measure of protection, such as an interlocutory injunction, it cannot be faulted for instituting these court proceedings.

However, after the plaintiff had first obtained an ex parte injunction, the defendant moved swiftly, and successfully had it discharged. In effect, the reason why the plaintiff moved to court, which I understand to be the need to obtain an injunction, has not yielded the desired fruit.

On the other hand, the defendant did succeed in getting the interim injunction discharged. To that extent, the defendant's application dated 29th April 2005 has been a success.

However, it must be noted that, on a strict interpretation of the circumstances prevailing, the defendant did not need to also have applied for the dispute to be referred to arbitration. I say so because the plaintiff had already made that application. But that does not, in any manner, alter the fact that the defendant did succeed in getting the interim injunction discharged.

Meanwhile, both parties have agreed to have the dispute referred to arbitration. That agreement cannot be termed as a success on the part of any of the two parties, because the Agreement between them, already contained the requisite clause. In other words, there was no need for the court to make any orders before the dispute could be referred to arbitration.

In conclusion, the plaintiff has failed to sustain the injunction that it had sought, whilst the defendant succeeded in having the said injunction discharged. For those reasons, I hold that the defendant is entitled to the costs of both applications.

However, as regards the costs of the suit, I hold that those must await the fate thereof. As I understand it, the suit has not yet been determined.

Dated and Delivered at NAIROBI this 13th day of November 2006.

FRED A. OCHIENG

JUDGE