REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.208 OF 2004

TIMOTHY M. RINTARI ………………………………….. PLAINTIFF

VERSUS

MADISON INSURANCE CO. LTD. ………………… DEFENDANT

R U L I N G

The Chamber Summons herein, under S.6(1) of the Arbitration Act, 1995, Rule 2 of the Arbitration Rules and S.3A of the Civil Procedure Act seeks orders that:-

1. There be a stay of all further proceedings herein pending arbitration.

2. The dispute between the parties be referred to arbitration.

3. Costs of this application to the Defendant/applicant.

The application is supported by an Affidavit by Edward Njuguna Rukwaro of even date and is on the grounds that:-

1. There is in existence a valid and binding arbitration agreement between the parties;

2. The arbitration proceedings were at all times envisaged by the parties as a first and last resort in the event of a dispute.

3. The plaintiff did not commence and/or exhaust the arbitration avenue before the commencement of this suit.

4. In view of the arbitration Clause this court has no jurisdiction to entertain, hear, or determine this suit.

5. The Defendant/applicant is ready, willing and able to proceed to arbitration on any dispute arising between the parties as stipulated in the Agreement.

In his opposition, the Plaintiff/respondent avers that:-

(a) Having breached the rule in SCOTT VS. AVERY case, the Defendant is not entitled to the orders sought.

(b) Having refused to submit to arbitration process earlier on the Defendant is estopped from raising the matter.

(c) Having caused the Plaintiff to alter its legal position the Defendant cannot turn round to the detriment of the Plaintiff.

(d) The application is in bad faith, a afterthought and an abuse of the court process.

(e) The application is brought with the sole aim of delaying the speedy and fair conclusion of the dispute.

. Having carefully perused the pleadings and the submissions of the Counsel for the two parties, I have come to the conclusion that the disposal of this application turns on the interpretation of Section 6(1) of the Arbitration Act, 1995, as applied to the conduct of the Defendant/applicant in the present case. The Section [6(1)] of the Arbitration Act, 1995, provides as under:-

> **"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."**

From the pleadings and the Plaint, and the submissions by Counsel for the two parties, it is common ground that: there is a valid and binding arbitration agreement between the parties, as per Clause 20 of the Arbitration Agreement. It is also a common ground that there is a dispute between the parties, as evidenced by the suit herein. The critical facts in this application, vis-à-vis the provisions herein, are what the Defendant/applicant has done within the terms set out in Section 6(1) of the Arbitration Act, 1995. These are the facts, which are not contested:

(a) on 18/5/04 – the Defendant/applicant entered appearance.

(b) On 31/5/04 – the Defendant/applicant filed this application.

The applicant submitted that no other step was taken in the proceedings – in that no defence was filed, and no application of any sort except this one under S.6(1) of the 1995 Arbitration Act. In my view, the words **not later than the time when that party enters appearance … or files any pleadings or takes any other step in the proceedings …** mean simply what they say; and that is that if a party wants to apply for Stay of proceedings, as in this case, such an application must be made concurrently with any of the three steps first taken by the party applying for the Stay. Failing that, the party losses the right to subsequently make the application for Stay of proceedings.

The above was the holding in **VICTORIA FURNITURES LTD. VS. AFRICAN HERITAGE LTD. AND ANOTHER, Civil Case No.904 of 2001,** where, in the course of his Ruling, at page 5, Mbaluto, J. said, and I am happy to borrow his words: **"if the section were to be interpreted to mean that a party could file an appearance or take the two other steps mentioned above and then wait for sometime before applying for Stay of proceedings, the phrase not later than the time he entered appearance or etc, etc. would be not only superfluous but also meaningless."**

Here, the Defendant failed to apply for the Stay on 18/5/04 when it entered appearance, and only did so on 31/5/04. By the later date, the applicant had lost its right to apply for the Stay herein applied for.

I must also point out that there was a second ground on which the Defendant lost its right to apply for the relief sought for here. From the proceedings, the Plaintiff invoked Clause 20 of the Arbitration Agreement between the parties before filing the suit herein, vide its letter dated 26/3/04, which the Defendant turned down vide their reply dated 7/4/04 saying **"we do not agree that an arbitrator be appointed …"** Having rejected arbitration then, it is not possible for them to now invoke arbitration and apply for Stay of the proceedings under Section 6(1) of the 1995 Arbitration Act. They are clearly estopped by their own conduct.

For all the above reasons, the application is hereby dismissed with costs.

DATED and delivered in Nairobi this 13th day of May, 2005.

O.K. MUTUNGI

JUDGE