



ARBITRATION ACT

• · Once parties enter into an agreement with an arbitration clause, they have
lected to take their dispute to arbitration.

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Civil Suit 309 of 2005

ALLIANCE MEDIA KENYA LTD.....PLAINTIFF

VERSUS

MONIER 2000 LIMITED.....DEFENDANT

R U L I N G

The plaintiff has moved this court by a chamber summons brought under order 39 Rules 2,3 and 9 of the Civil Procedure Rules, companies Act and the Arbitration Act 1995.

The plaintiff seeks an injunction to restrain the defendant, its agent or servant from presenting to court, advertising, filing or taking out or continuing winding up proceedings against the plaintiff in respect of US \$ 162, 046. 67 and kshs 16, 957, 997. 43 and in respect of any other claim the defendant may make

. The application is grounded on 7 grounds, which were elaborated by plaintiff's counsel in argument. Plaintiff's counsel submitted in support of the application that the court should note that a winding up petition cannot be filed where a debt is disputed. He said the threat to file a winding up petition was malicious on the part of the defendant and was intended to coerce the plaintiff into paying a disputed debt.

Counsel referred to clause 20 A of the parties agreement dated 19th December 2004 which provides that any dispute should be referred to Arbitration. That there was a referral to the Arbitrator of a dispute between the parties which is still pending. The said referral to an Arbitrator was by the Hon Justice Azangalala following his ruling in HCCC No 156 of 2005. The said Arbitrator had set a timetable of submissions.

Plaintiff counsel submitted that the subject of the present claim by the defendant for which winding up is threatened related to printing, which was disputed and for damages. That where there is an arbitration clause the court's jurisdiction is to stay any proceedings and that the court can only refuse to stay proceedings where the arbitration clause is found to be void. Counsel relied on the case of HALKI SHIPPING CORP V SOPEX OILS LTD [1997] 3 ALL ER. 833; where it was held.

“Where the parties to a contract agreed to refer any dispute arising there from or in

connection therewith to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refused to admit or did not pay, was relevant dispute which the claimant was both entitled and bound to refer to arbitration, notwithstanding the fact that the respondent did not have a sustainable defence to it. In the instant case, the plaintiff claimed damages from the defendant for breach of charter party and since the defendant did not admit liability, however indisputable the plaintiff's claim there remained a dispute between the parties which by clause 9 of their agreement, they had agreed to refer to arbitration."

In regards to the defendant's claim for damages plaintiff's counsel argued such damages, which have not crystallised cannot be the subject of a winding up petition, here he relied on the case of MATIC GENERAL CONTRACTORS LTD – V KENYA POWER AND LIGHTING CO. LTD (2001) 2 EA.

The application was opposed. Defence counsel argued that the plaintiff had failed to satisfy the principles of granting injunction as enunciated in the case of GIELLA VERSUS CASSMAN BROWN [1973] EA 358. Further he argued that the plaintiff had failed to make disclosures when this matter first came to court, that is the plaintiff failed to disclose that its injunction application filed in HCCC 156 of 2005 was dismissed and also failed to disclose that the agreement dated 19th December 2005 was terminated. Once an agreement is terminated, he argued nothing is left and consequently the plaintiff could not rely on the arbitration clause. He relied on the case NAKURU OIL MILLS LTD VERSUS LAKHANI [1976] KLR 33.

Defence counsel argued that the printing service expenses were not in dispute and therefore cannot be the subject of arbitration. The other claim the subject of the winding up, that is damages, counsel argued that it was the damages that the defendant suffered as a result of the injunction granted to the plaintiff in HCCC 156 of 2005.

Defence counsel submitted that dispute, if any is not sufficient answer to a petition and relied on the case of RE TWEEDS GARAGES LTD [1962] 1 ALL ER 121.

I have carefully considered the arguments presented before me and the affidavits of both parties and their authorities. The parties entered into an agreement on 19th December 2004. That agreement which Hon Justice Azangalala found in HCCC 156 of 2004, to have **"made provisions for nearly all situations...."** Clause 20 A provides

"Any dispute arising between the parties hereto and all claims or matters in such disputes not otherwise mutually settled between the parties shall be referred to arbitration by single arbitrator....."

It is clear that the parties by that clause elected to have their matters of dispute to be referred to arbitration, rather than the court. That would mean that if there is a genuine claim against the plaintiff, which the plaintiff fails or refuses to pay, it can only be claimed through arbitration and not the court. In this regard I am very persuaded by the case of HALKI SHIPPING CORP – VERSUS – SOPEX OILS LTD (supra), that is however indisputable the defendants claim is, there remains a dispute and the same ought to be referred to arbitration as provided by clause 20 A. I do therefore find that the plaintiffs have proved a prima facie case and of course the damaging effect that is likely to come after a petition is published is not one that can be compensated with costs.

The defendant's claim represented by damages, it is allegedly owed to it in respect of damages suffered after injunction was granted in HCCC 156 of 2005 is not and cannot be the subject of a winding up. The day has not come when parties can award themselves damages they allege they suffered without seeking the sanction of the court; if that was to be allowed one would be inviting anarchy.

In view of the fact that Hon Justice Azangalala referred the matter relating to HCCC 156 of 2005 for arbitration I am persuaded that the issue of printing also ought to be referred to arbitration.

The orders of this court are: -

(1) That the defendant, whether by itself, its agent or servant be restrained from presenting to court, advertising however in any way, filing or taking out or continuing winding up proceedings against the plaintiff in respect of the claim of US \$ 162, 046. 67 and kshs 16, 957, 997. 43 pending the hearing and determination of the arbitration proceedings on the same.

(2) That the dispute relating to US \$ 162, 046. 67 and kshs 16, 957, 997. 43 be referred an arbitrator.

(3) The costs of the application dated 8th June 2005 shall be in the cause.

Dated and delivered this 27th day of July 2005.

MARY KASANGO

JUDGE