REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

Civil Suit 2071 of 2000

M-LINK COMMUNICATIONS COMPANY LTD. ……APPLICANT

VERSUS

COMMUNICATION COMMISSION OF KENYA ……..…1ST DEFENDANT

TELKOM KENYA LTD ……...……...….2ND DEFENDANT

RULING

This is an application under Order 45 rule 5 (1) and (2) of the Civil Procedure Rules, as well as Section 3A of the Civil Procedure Act.

The Plaintiff is asking this court to order the Defendants to appoint an arbitrator within 7 days of this Ruling. In the event that the Defendants should default in appointing an arbitrator within the time stipulated, the Plaintiff asks the court to appoint an arbitrator on behalf of the Defendants.

It is common ground that the suit herein was instituted by way of a Plaint, which was filed in court on 22nd November 2000. Thereafter, the 2nd Defendant filed its defence on 22nd January 2001.

But, on its part, the 1st defendant filed an application on 30th January 2001, seeking a stay of the proceedings, and also asking that the dispute be referred to arbitration. Arising from that application, all the three parties filed a consent letter on 1st November 2001. The record shows that although the consent letter was dated 22nd October 2001, the contents thereof were given the sanction of a court order by Ringera J. (as he then was) on 8th November 2001. The following are the terms of the said order;

> **"1. That notwithstanding the fact that the 2nd Defendant herein has filed a defence, all parties have agreed that there be a stay of proceedings in the above suit and dispute between the Plaintiff and the Defendants be and are hereby referred to arbitration.**
>
> **2. That an arbitration panel be appointed by the parties with the Plaintiff appointing one arbitrator and the Defendants jointly appointing one arbitrator.**
>
> **3. That this consent supercedes any other consent entered into by any of the parties in this matter.**
>
> **4. That the result of the arbitration be final and binding on all the parties.**
>
> **5. That the matter be mentioned on 29th November 2001."**

Pursuant to the provisions of the consent order above-cited, the case was indeed mentioned on 29th November 2001. At the said mention, the court was informed that the Plaintiff had appointed Professor Arthur Eshiwani as its arbitrator, whilst the defendants had jointly appointed Ms. Jan Mohammed.

The record of the proceedings on 29th November 2001, shows that Ringera J. made the following order;

> **"Arbitral proceedings to be concluded within 90 days of today and award filed on or before the expiration of the said period."**

It is the Plaintiff's case that the arbitration proceedings commenced on 21st December 2001. However, due to objections raised, by the 2nd Defendant, the proceedings did not proceed further.

First, the 2nd defendant is said to have raised a Preliminary Objection, but the same was dismissed by the arbitrators on 8th August 2002.

Next, the 2nd defendant is said to have raised another objection, in which it asked Ms. Jan Mohamed to disqualify herself, as the joint arbitrator nominated by the defendants. In response to that objection Ms. Jan Mohammed did disqualify herself. Notwithstanding the said disqualification of the joint arbitrator, the Plaintiffs say that the defendants had failed, refused or neglected to appoint a replacement. Therefore, it had been impossible to proceed with the arbitration, said the Plaintiff.

Having waited for the defendants to appoint another joint arbitrator, in vain, the Plaintiff issued a formal notice to them on 16th June 2005, to appoint a replacement. However, the defendants did not respond.

In the circumstances, the Plaintiff now contends that the defendant's failure to appoint a joint arbitrator amounted to a refusal to give effect to the consent letter dated 22nd October 2001. Therefore, as far as the Plaintiff was concerned, the interests of justice dictate that the defendants be compelled, by an order of this court, to appoint a joint arbitrator. Furthermore, if the defendants were to fail to appoint an arbitrator, the Plaintiffs submit that the court should proceed to appoint one, pursuant to the provisions of Order 45 rule 5 (1) and (2) of the Civil Procedure Rules.

In answer to the application, the 1st Defendant pointed out that the Plaintiff had failed to point out to the court that the consent order had been varied by the parties. For instance, it was pointed out that on 8th April 2002, the parties filed another consent letter, by which the earlier consent letter dated 22nd October 2001, had been expressly vacated.

Having perused the court records, I verified that, indeed, the parties did file a consent letter on 8th April 2002. The following are the substantive terms of the said consent letter, which was dated 2nd April 2002;

> **"1. There having been a reference to Arbitration under Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, the order of stay of proceedings made on 8th November 2001 be vacated.**
>
> **2. That Mr. Dinesh Kapila be appointed an Umpire and in the event that he is required to make an award he delivers his award within 30 days of the matter being referred to him by the arbitrators.**
>
> **3. The time for the conduct of the Arbitration and filing of the Arbitrators' Award be extended to the 30th of September 2002."**

My reading of the said consent is that it did not vacate the entire consent dated 22nd October 2001, as was contended by Mr. Oriema, advocate for the 1st Defendant. The only part of the earlier consent (dated 22nd October 2001) which was vacated, was the order staying proceedings. In that regard, Mr. Mwaniki,

advocate for the Plaintiff is clearly correct.

However, notwithstanding the terms of the consent letter dated 2nd April 2002, the parties were unable to comply with the same. They therefore executed another consent letter dated 1st October 2002. By that consent the parties agreed as follows;

> **"The time for conduct of arbitration and filing of arbitrators award be extended for a further seventy six Days until 15th December 2002."**

Both defendants submitted that as the date set by consent of the parties lapsed, the entire reference to arbitration also lapsed.

However, the Plaintiff insists that the original consent order, referring the dispute to arbitration still subsisted, even though the time-limits set at various times thereafter had already passed.

Mr. Khawaja, advocate for the 2nd Defendant submitted that where there was an order referring a matter to arbitration, if the said order was specific as to time, any action taken outside that time was a nullity. He relied on **NYANGAU –VS- NYAKWARA [1986] KLR 712,** as authority for the said proposition. In that case Gachuhi J.A. held as follows, at page 718;

> **"Reverting to the first ground, it is clear that arbitration started well outside the time set out by the court of 90 days. This goes to the root of the jurisdiction.**
>
> **The arbitrator himself is an advocate who should have known the provisions of the Civil Procedure and in particular the provisions of Order 45 under which he was to conduct the arbitration as directed by the court. It does not matter when he was served with the notice. The provisions of rule 8 are quite clear that an extension of time could be made by the parties in writing or by order of the court. The arbitrator could have applied to the court for extension of time before embarking on it. It has been argued that the parties participated. This does not cure the position. It was up to the arbitrator not to proceed with the arbitration outside the time allowed by the court."**

Platt J.A. also expressed the same view. At page 722, he held as follows;

> **"Rule 3 of Order 45 requires a time limit to be specified, and rule 8(1) requires the agreement to extend time to be in writing, and not witnessed merely by conduct. It is therefore necessary to use English authorities on this point with care, because in some aspects, the Civil Procedure Rules have provided different rules to those which applied or apply in England. Rule 8 (1) clearly avoids conduct. It follows that whenever Mr. Osoro was served with the reference, he had to see that he could act under it, and if time had already expired he had to see that it was enlarged. Consequently, if the award must be set aside, that must be on the basis that the arbitrator had no power to act outside the terms of the reference. Therefore, the objection goes to the jurisdiction of the arbitrator to enter upon the arbitration."**

Hancox J.A. (as he then was) dissented. However, he too acknowledged that an arbitrator should always act within the time as stipulated, or as extended by agreement, in accordance with Order 45 rule 8. His only point of dissent was that the issue did not go to jurisdiction.

From the foregoing, it is clear that if an arbitrator was to conduct the arbitration process outside the time set by the court, or even if he was to file an arbitral award outside the time specified, the proceedings or the award would be a nullity, whichever the case may be. The same position was restated by Court of Appeal in **MAIRI –vs- NGONYORO "B" & ANOTHER [1986]KLR 488.**

The question that then arises is whether in this case, the court ought to direct the defendants to appoint a joint arbitrator even though the request for such order was made long after the period set by the

court, and varied by consent of the parties, had long lapsed.

It will be recalled that by the consent letter dated 1st October 2002, the parties had extended the time for the conduct of the arbitration and filing of the arbitrators' award, for a period of seventy-six days, until 15th December 2002.

In the circumstances, if an arbitrator was to be appointed now, he could not conduct any arbitration proceedings or file any award, as the same would be a nullity. In this case, even though the parties had not expressly provided for time in the consent letter dated 22nd October 2001, when the court mentioned the case on 29th November 2001, it expressly directed that the arbitral proceedings be concluded within 90 days, and that the award be filed on or before the expiry of that period. To my mind, the said order of the court was in compliance with the express provisions of Order 45 rule 3 (1) which provides as follows;

> **"The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order."**

As far as I am concerned, even though the Plaintiff appears to imply otherwise, the parties have all along been aware that, by virtue of the provisions of Order 45 rule 8 (1), they could extend the time for the making of the award, whether or not the time had expired, provided the parties filed an agreement in writing. I say so because Mr. Mwaniki, advocate for the Plaintiff contended that the original order referring the case to arbitration remained alive, notwithstanding the lapse of the time set for conducting the arbitration proceedings and filing the award. If the Plaintiff did not appreciate the need for extension of time, by way of written agreements then I believe that it would not have been party to the written agreements in that regard.

Since the time for the arbitration proceedings lapsed on 15th December 2002, it would not be possible for the arbitrators to conduct any proceedings until and unless the parties consented to extend time, through a written agreement, or alternatively unless and until the court did extend the said period. Therefore, it does appear to me that an order for the appointment of an arbitrator may be an exercise in futility, as there was no guarantee that the parties would agree to extend time or that the court would do so.

In the circumstances, I believe that the Plaintiff is seeking to place the cart before the horse. It may therefore wish to consider whether or not to first seek to persuade either the other parties, or alternatively, the court to extend the time for the conduct of the arbitration proceedings and the filing of the award. Perhaps, if it got over that first hurdle, the Plaintiff might then make an attempt to go over the next one, in relation as to who the arbitrator should be.

But for now, the application dated 26th September 2005 is without merit. It is therefore dismissed, with costs to the defendants.

Dated and Delivered at Nairobi this 23rd day of November 2005.

FRED A. OCHIENG

JUDGE.