



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1093 OF 1999**

**NELLIWA BUILDERS & CIVIL ENGINEERS LTD. ... PLAINTIFF**

**VERSUS**

**JACOB MGARU SOLOMON ..... 1ST DEFENDANT**

**ASTRID SOLOMON ..... 2ND DEFENDANT**

**GEORGE ERIC SOLOMON ..... 3RD DEFENDANT**

**BERNARD GLEN SOLOMON ..... 4TH DEFENDANT**

**RULING**

This is an application by the defendants under Section 6(1) (a) of the Arbitration Act for orders to stay these proceedings pending the hearing and determination of the dispute between the parties through arbitration. Section 6(1) of the Arbitration Act under which the application is brought provides.

***“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.”***

The application is based on the ground that there is an agreement between the parties requiring reference of any dispute or difference between the parties for arbitration.

The plaintiff opposes this application on the ground that the defendant have taken such steps as disentitle them from referring the matter to arbitration in terms of Section 6(1) of the Arbitration Act. The steps that are alleged to have been so taken include filing of appearance, a defence and notice of preliminary objection.

In my view, a party who seeks to take advantage of an arbitration agreement must apply to the court not later than the time that party enters appearances or files any pleadings or takes any other step in the proceedings. My understanding of the foregoing provisions in the context of the instant case is that the defendants should have applied for reference to arbitration not later than 21.9.1999 when they filed an appearance. The record shows that they did not do so, but instead proceeded later to file their defence on 5.10.1999 and a notice of preliminary objection on 24.10.2000.

In my view the taking of those other steps after filing their appearance disentitled the defendants from invoking the provisions of Section 6(1) of the Arbitration Act to refer the matter to arbitration.

For the above reasons, I agree with Mr. Ohaga’s submissions that the application lacks merit and must be dismissed with costs. It is so ordered.

Dated at Nairobi this 16th day of February, 2001.

**T. MBALUTO**

**JUDGE**