**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**MILIMANI COMMERCIAL COURTS**
**CIVIL CASE NO. 236 OF 2001**

**TM AM CONSTRUCTION GROUP (AFRICA) …….. PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL ……... DEFENDANT**

**RULING**

This application has been lodged by the Attorney-General, the defendant in this matter, under Section 6(1) of the Arbitration Act 1995 and Rule 2 of the Arbitration Rules 1997 for two orders, namely:-

(a) That the suit herein be stayed; and

(b) That the dispute between the parties be referred to arbitration.

The application is supported by two affidavits sworn on 24.4.2001 and 22.5.2001 by Engineer Erastus Mwongera who is the permanent secretary, Ministry of Public Works.

The plaintiff, TM-AM Construction Group (Africa), opposes the application on the following grounds:-

(a) The application is bad in law as it contravenes Section 6(1) of the Arbitration Act.

(b) The application has been filed well after the defendant entered appearance on 15.3.2001; and

(c) There is no dispute "between the parties which could be referred to arbitration."

Briefly, the facts leading to this application are that on 21.2.2001, the plaintiff instituted the suit against the defendant claiming various sums of money in respect of the construction and completion of the Kitale-Endebess road and the extension of the Iten-Tambach-Chebloch and Moi's Bridge- Leseru Roads. Summons to enter appearance together with a copy of the plaint and verifying affidavit were served upon the Attorney-General on 26.2.2001 in response to which, the Attorney-General, through the Principal Litigation Counsel (Miss Muthoni Kimani) ***entered appearance on 15.3.2001 .***

It would appear that upon entering appearance, the Attorney General did not serve, as he is required to, a copy of the Memorandum of Appearance upon the plaintiff's advocates because on 22.3.2001, those advocates filed a chamber summons application dated 20.3.2001 in court seeking the court's leave to apply for judgment against the defendant as is required by Order IXA Rules 7 and 11 of the Civil Procedure Rules. That omission on the part of the Attorney General to serve the memorandum of appearance in accordance with the law is confirmed by the affidavit in support of the application for leave to apply for judgment sworn on 22.3.2001 by Sanjeev Modi, the plaintiff's internal auditor.

The application for leave to apply for judgment was listed for hearing on 25.4.2001, but before that

could happen, the memorandum of appearance was served upon the plaintiff's advocates on 26.3.2001. That service of the memorandum of appearance though clearly belated, effectively rendered otiose the plaintiff's application dated 20.3.2001 for leave to apply for judgment.

The Attorney-General's inclination not to take action in this matter within the times limited by law did not end with the late filing and service of a memorandum of appearance. He again failed to file a defence within the time prescribed therefore under the Civil Procedure Rules and once again on 10.4.2001, the plaintiff's advocates lodged another application under the same rules for leave to apply for judgment against the Attorney General on account of the Attorney-General's failure to file and serve the necessary defence in the prescribed time. The second application was similarly listed for hearing on 25.4.2001.

The second application does not appear to have impressed the Attorney General either. Again he did nothing about it; he did not even file a replying affidavit. As if to demonstrate his contempt for the application, he waited until the very day the application was scheduled to be heard and then lodged, under a certificate of urgency, the application now the subject of this ruling.

It is of course, not the intention of this court to judge the conduct of the Attorney-General but one thing he cannot properly claim is that he has acted with diligence with regard to this matter.

Be above what it may, the substance of the application is clear and straight forward. There is no doubt that in the contract between the plaintiff and the defendant there is the usual arbitration clause providing for reference of disputes between the parties to arbitration. By virtue of section 6(1) of the Arbitration Act 1995:-

> ***"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies <u>not later than the time when that party enters appearance</u> 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."***

Appearance in this matter was entered on 15.3.2001 but this application was not made until 25.4.2001. The application was therefore lodged some 41 days after appearance had been made. What is the effect of this late filing of the application for stay? The language of the relevant provision is very clear and allows no room for doubt. The application is to be made not later than the time when appearance is made.

In the case of Corporate Insurance Company V. Loise Wanjiru Wachira (Court of Appeal, Civil Appeal No. 151 of 1995) the Court of Appeal stated:-

> ***"In the present case the appellant did more than just enter an appearance. It delivered a defence, which is of course a pleading, raising clause 10 of the policy as a defence. The appellant made no application for stay of proceedings. The appellant was a pa rty to an arbitration agreement within the meaning of section 6 of the Act ….. Arbitration clauses such as clause 10 in the policy are known as "Scott v Avery" arbitration clauses named after a leading case decided by the House of Lords in England way bac k in 1856 in which their efficacy was considered and have long been accepted as valid. These clauses do more than provide that disputes shall be referred to arbitration. They also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favourable award has been obtained.***
>
> ***…… In the present case, if the appellant wished to take the benefit of the clause, it was***

***obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause."***

Applying the decision of the Court of Appeal as stated above to the circumstances of this case, I find that the Attorney-General was obliged to apply for a stay '***not later than the time when he entered appearance*** '. Accordingly, by filing appearance on 15.3.2001 and waiting for some 41 days before applying for stay of the proceedings, the Attorney-General lost its right to rely on the arbitration clause. For that reason, the application is clearly untenable and cannot possibly succeed. That finding is sufficient to dispose of the application but since the application was also argued on the basis of another ground, I think I ought to consider it briefly.

The applicant claims that there is a dispute between it and the respondent which ought to be referred to arbitration but the respondent contends that there is not in fact any such dispute between the parties with regard to the matters agreed to be referred to arbitration. Section 6(1) (b) of the Arbitration Act (quoted above in full) provides that the court shall stay the proceedings and refer the parties to arbitration, ***unless it finds: -***

***"(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

Although in the affidavit which he has sworn in support of the application, Engineer **ERASTUS MWONGERA** the Permanent Secretary, Ministry of Roads and Public Works makes reference to a discussion relating to a dispute, not a single piece of evidence was tendered to show that a dispute in fact exists between the parties. There is also no positive disposition in Engineer Mwongera's rather bare affidavit as to the existence of a dispute. Furthermore, no document is annexed thereto in support of what Engineer Mwongera depones. Having regard to he provisions of Sections 107(1) and 109 of the Evidence Act which enact:-

***"107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(109) The burden of proof as to any particular fact lies on the person wh o wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

the failure by the applicant to tender evidence showing that there is in fact any dispute between the parties means that no basis has been established to show that a dispute in fact exists to justify staying the proceedings and referring the parties to arbitration. Given that position, I agree with the submission by learned counsel for the respondent that the Attorney-General is using Section 6(1) of the Arbitration Act for the purposes of delaying the respondent from recovering the money owed to it under the contract.

In the case of London and North Western and Great Western Joint Rly Cos. Vs. J. H. Billington Limited (1899) A.C. 79 at 81, Lord Halsbury (LC) said:-

***"The question which has been argued apparently before the Court of Appeal is a question no doubt of very great and serious importance both to the traders and to the railway Companies; but, my Lords, s o far as I am concerned, I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; an d I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise th en for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable."***

In my view, the above statement by the learned lord chancellor correctly expresses the views of this court with regard to the instant application. A party who is wholly unable to produce the minutest evidence to support an allegation of a dispute in a contract of the magnitude evidenced in this matter has absolutely no right to come to this court and seek a stay of proceedings and reference to arbitration allegedly because he for the first time alleges that there is a dispute between the parties. In my view the application is incompetent and must be dismissed with costs. It is so ordered.

Dated at Nairobi this 5th day of June, 2001.

**T. MBALUTO**

**JUDGE**