ET Timbers Limited v Fang (Admiralty Cause E003 of 2021)
[2024] KEHC 879 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ADMIRALTY CAUSE E003 OF 2021

DKN MAGARE, J

FEBRUARY 5, 2024

BETWEEN

ET TIMBERS LIMITED ..... CLAIMANT

AND

DE FANG ..... DEFENDANT

RULING

1. When I finally sit down to write a book, on games people play, this file will form a chapter. For the last one year, I have made Rulings, directions and given a myriad of orders without a number. Before I concluded this ruling, I decided yesterday to check the CTS in case. To my horror, I noted a flurry of letters, between advocates some in a not so flowery language. Every effort has been made not to proceed. It is unfathomable that when a ship, worthy billions of Yuan, is being wasted away after being arrested, the Defendant is still keen on not proceeding.

2. The Court of Appeal has issued several directions. All these have not assuaged the parties' positions to understand that cases are in court not parked and left there. Courts sit to expeditiously determine cases not to baby sit them.

3. In September 2023, I gave orders that appeared like cast in stone, only to discover that they were cast in soapstone (pun intended)'. The last ruling I made on 28/9/2023, I made the following orders: -

> " The upshot of the foregoing is that I make the following orders: -
>
> a. Time be extended within which the Applicant is to file an acknowledgment of service or take protective measures as per the Admiralty rules.
>
> b. The same be filed within 7 days of this Ruling.
>
> c. The matter be listed for directions after this Ruling.

d. Failing to file an acknowledgement within 7 days of the ruling, the same shall cease to have effect.

e. The matter be heard and concluded by 24/2/2024, failing which, it shall stand dismissed

f. Costs be in the cause.

4. I also lamented on the history of this matter. I stated as doth in the very first paragraph of that ruling: -

> " This matter has a checkered history. It started with the file being placed before my predecessor on 4/4/2021 under certificate of urgency. This Court issued an order on Sunday 4/4/2021 for arrests of the ship on 4/4/2021. The firm of Inamdar made an application to set aside the warrants. Directions were given. The Court was informed of the need for security for the release of the arrested ship. In that matter the dispute appeared to have been between the Head owner, and the Charterer or Deponent owner. (*sic*)"

5. I was hoping against hopes that no other Application will be filed to derail the hearing. Unfortunately, there are two applications subsequently filed. The applications seek diametrically opposite orders. The parties nevertheless deserve to be heard even where there is nothing to say.

6. This reminds me of the lamentations of Morocco in the Merchant of Venice as doth: -

> " Morocco
>
> O hell! what have we here?
>
> A carrion Death, within whose empty eye
>
> There is a written scroll! I'll read the writing.
>
> Reads All that glitters is not gold;
>
> Often have you heard that told: Many a man his life hath sold
>
> But my outside to behold:
>
> Gilded tombs do worms enfold."

7. The Claimant's Application Notice is dated 22nd December 2023 and sought the following Orders:

a. Spent.

b. Pending the hearing and determination of this Application, the Defendant be restrained from taking and further steps against the Claimant pursuant to the Defendant's Arbitration Notices dated 14th November 2023.

c. Pending the hearing and after the determination of the Claim, the Defendant be restrained from taking and further steps against the Claimant pursuant to the Defendant's Arbitration Notices dated 14th November 2023.

d. The costs of this Application be paid by the Defendant.

8. The Application notice was premises on the grounds doth:

a. The Defendant sought to be enjoined to this suit in order to challenge jurisdiction of this Court and stay proceedings therein but it failed and lodged an Appeal to the Court of Appeal.

b. The Court of Appeal also dismissed the Application.

c. The Arbitration notices are not based on a valid Arbitration Agreement and are for illegitimate purposes.

d. The Defendant has participated in the claim since April 2021.

e. The Defendant has in fact filed his pretrial documents.

9. On the other hand, the Defendant filed an Application Notice dated 10th January 2024 seeking the following reliefs:

a. This Application be certified urgent and heard on priority basis.

b. Further proceedings herein be stayed pending the hearing and determination of this Application.

c. Costs be in the cause.

10. The Application was premised on the Grounds that:

a. On 14th November 2023, the Defendant commenced Arbitration in London and appointed a sole Arbitrator.

b. The Claimant equally appointed its Arbitrator on 3rd January 2024.

c. Arbitration in London has commenced and this suit should be stayed.

d. The Defendant has protested the jurisdiction of this court since inception of the matter.

e. Unless stay if granted, the Arbitration in London and the Court of Appeal case will be render nugatory.

11. The Claimant filed a Replying Affidavit through Kinyua Kamundi advocate. They contested the genuineness of the affidavit of Peter Makena. I may not go into that arena. It was their case that the defendant participated in the case since 2021 April and are such precluded from making this application. It was Mr Kamundi's view that the applicant sought leave to file acknowledgement of service, out of time, which this court granted in September 2023. A Defence was filed on 26/10/2023. The Respondent also filed witness statements on the said date.

12. It is their case that the Respondent filed another claim, that is, Admiralty Claim Number 5 of 2023, which is being handled with this matter. The Respondent filed another Application in April 2021 to lift the warrant on the cargo. They lost and appealed to the Court of Appeal. The Appeal is pending in the said court. They relied on words of Justice G.S. Pall J.A, in *Kisumuwalla Oil Industries Ltd. v Pan Asiafic Commodities PTE Ltd & Another* as encapsuled in the wisdom of justice P J O. Otieno in the case of Jolly Rosso" & "Jolly Verde" and Owners of Mv. Jolly Diamante.

13. In reality, the case referred by the claimant is the decision in *Advanced Distributors Co. Ltd v Ignazio Messima & Co. Spa* [2016 eKLR, *Advanced Distributors Co. Ltd Versus Ignazio Messima & Co. Spa* Or *Owners Of Motor Vessel, "Jolly Rosso" & "Jolly Verde" & Owners Of Mv. Jolly Diamante* where Justice P. J O. Otieno stated as doth: -

> " 25. This bring me to the question of what is meant by the expression, 'taken any steps in the proceedings'; The records of the court as summarized above show that either due to the exigencies of the case or just the dictates of practice of

commerce the defendant made a deliberate choice to first prosecute a limb of the application that availed to it the release of the vessel on terms, prior to pursuing the order for stay pending arbitration. That step and choice has vested upon it a benefit by this court. Can it be said that action is step in the proceedings or it is a mere assertion of a right" There is equally in the application before court for consideration a prayer that the claim be struck out.

26. In the words of G.S.Pall J.A, in *Kisumuwalla oil industries Ltd. v Pan Asiafic Commodities PTE Ltd & Another*, "the applicants application to strike out the plaint and dismiss the suit cannot be anything but a step in the proceedings." (emphasis and contextualization mine).

14. It is the claimant's case that this application be dismissed and the Application dated 22/12/2023 be allowed. Of course, I shall ignore the last sentiments as they are not within the province of a replying affidavit.

15. The Respondent filed a Replying Affidavit stating that the dispute is whether the bills of lading are legitimate. The second issue is whether the defendant is bound to voyage charter as an undisclosed principal of Starrway trading co shipping Ltd. It follows that under English law, inconsistent claims principle, the dispute under master bills of lading or the voyage charter should be subject to arbitration in London. The respondent has thus commenced arbitration tribunal in London on 14/11/2023. They also appointed an arbitrator and the claimant has equally appointed their arbitrator. The Claimant lost a challenge to the Respondent's arbitrator.

16. It is the Respondent's view that they did not participate from 2021. They state they participated for less than two months. I was unable to follow the convoluted logic in this respect. The respondent then went into the merit of the arbitration and how the London arbitral tribunal is the proper one. I shall not address most of the questions on merit to avoid embarrassing the final outcome.

17. I note at no time did the Respondent admit existence of the arbitration clause. They are based on the contingence that if the bills of lading and voyage charter are genuine. The question is whether a party can found an arbitration on an agreement they have not entered into. It is not however, a question that I need to decide today as the case will not turn on it.

Analysis

18. Before I proceed, I wish to point out that there is a ship at the shores, already arrested since 2021. No one appears bothered, on the economic loss suffered by the continued detention of the ship and humongous cargo.

19. Nevertheless, there are two issues that I need to deal with, that is: -

    a. Whether, this court ought to stay these proceedings pending proceedings in the London Arbitral Tribunal.

    b. Whether to stay the proceedings in the London Arbitral Tribunal due to the pendency of this case.

20. The two issues are intertwined. The determination will depend on the law. The applicable law is the law of England. Nevertheless, the court's seat is in Mombasa in the Republic of Kenya. Kenyan law is thus equally applicable to the extent possible.

21. The *Arbitration Act* 1996, Chapter 23 laws of England has a long title as an Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes. The same has been in force since 17/6/1996.

22. Section 1 of the *Arbitration Act* 1996, of England and Wales provides as follows: -

> " General principles.
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> a. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> b. The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> c. In matters governed by this Part the court should not intervene except as provided by this Part."

23. This means that all decisions related to arbitration must bear the objectives in mind. Further, Section 9 of the *Arbitration Act* 1996 of England and Wales, provides for stay of proceedings as follows: -

> " Stay of legal proceedings.
>
> a. A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> b. An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> c. An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> d. On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
>
> e. If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

24. Regarding stay of admiralty cases, section 12 of the 1996 *Arbitration Act*, UK, provides as doth: -

> a. Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—

b. Order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

c. Order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

d. Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order as would apply if it were held for the purposes of proceedings in the court making the order.

25. It is my view that the court has powers to determine whether or not the proceedings ought to be stayed. In this case, the defendant filed acknowledgement of service and defence. By dint of so filing or taking a step in the proceedings, the right to stay proceedings is lost by dint of section 9(3) of the *Arbitration Act* ,1996.

26. Section 9(3) of the *Arbitration Act*, 1996 of England and Wales is pari materia, section 6(1) of the *Arbitration Act*, 1995 of the Republic of Kenya. The said Section 6 of the Kenyan *Arbitration Act* provides as follows: -

> " 6. Stay of legal proceedings
>
> (1) 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 otherwise acknowledges the claim against which the stay of proceedings is sought, 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.
>
> (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
>
> (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

27. The matter sought to be stayed was filed in 2021. Parties have litigated in this court and the Court of Appeal. I directed filing of acknowledgement of service. There was unconditional acknowledgement of service and soon thereafter a defence was filed. Upon filing defence and several other steps being undertaken, the Applicant lost the right to refer the matter to arbitration.

28. The Defendant Applicant lost the right to stay the suit pending arbitration. In the case of *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR, the court of Appeal addressed the issue related to stay of proceedings under section 6(1) of the *Arbitration Act*.

> "In Corporate Insurance Company versus Wachira (*supra*) the court held inter alia that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In UAP Provincial Insurance Company Ltd versus Michael John Beckett (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the *Arbitration Act*. In the said case, the court had this to say:
>
> > "16. In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part:
> >
> > .....
> >
> > 17. It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.
> >
> > 18. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to under?? an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of Section 6 (1) (b) to express himself on the merit or demerit of the dispute.

Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

19. the provisions in section 6 (1) (b) of the *Arbitration Act* are similar to the provisions of Section 1(1) of the *Arbitration Act*, 1975 of England before its amendment by the *Arbitration Act*, 1996."

In Adrec Limited versus Nation Media Group Limited [2017] eKLR, the court added that:

> "Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration"

See also Eunice Soko Mlagui versus Suresh Parmar& 4 others [2017] eKLR, for similar reflections on this provision as follows;

> " Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration. See also the ruling of the High Court, (Gikonyo, and J) in Dioceses of Marsabit Registered Trustee –vrs Techno trade Pavilion Ltd, HCCC No. 204 of 2013.
>
> .....
>
> The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.
>
> Be that as it may, to the extent that after amendment section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering

> appearance, the pre-2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty versus Bedouin Enterprises ltd, CA No. 253 of 2003, this court considered section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence. (See also Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12, Corporate Insurance Co. versus Loise Wanjiru Wachira, CA 151 of 1995 and Kenindia Assurance Co. Ltd versus Patrick Muturi, CA No. 87 of 1993)."

29. It is therefore my holding that the court cannot stay a matter where parties have actively participated and taken steps. Doing so will amount to countenancing forum shopping. There is no issue regarding the loss of the right to stay proceedings. Even in the law of England, section 9(3) of the *Arbitration Act* 1996, the same position applies. In any case the court has no jurisdiction to grant orders which a statute expressly prohibits.

30. In the case of Owners of the *Motor Vessel "Lillian S" v Caltex Oil (Kenya)* Ltd [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

31. I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision.

32. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order.

33. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, The supreme court stated as doth:-

> " This Court dealt with the question of jurisdiction extensively in (the case of) the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution*

confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

34. The Court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

35. This position is buttressed under *Article 8* of {{>https:*uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf* UNCITRAL Model Law on International Commercial Arbitration}} 1985// as with amendments as adopted in 2006, which states as doth: -

> " *Article 8*. Arbitration agreement and substantive claim before court (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

36. This Application was brought long after submitting its statement of defence. Consequently, I decline to allow the application to stay proceedings. The matter shall therefore proceed as scheduled.

37. The next aspect is the application to strike out/staying the Arbitration in London. The same is based on the existence of this case. This amounts to determination on the jurisdiction of the arbitrator.

38. I note that the seat of the arbitration is in London. This means the proper court to handle the question of the propriety of the Arbitration lies in the court in London as the seat of the arbitration. The seat is not determined by the physical location of the arbitration dispute or arbitral tribunal but the country whose law is being used in terms of arbitration.

39. The substantive law in the arbitration is not the Law of Kenya. I will refrain to decide whether it is the court in London or in the country whose substantive law, the parties agreed to use. The parties are at liberty to move the court in the country where the arbitration agreement bases its substantive law.

40. The other aspect is that the arbitrator, is best placed to determine on the basis of kompetenz-kompetez on their jurisdiction to handle a matter, that this court is seized with. In the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling), justice John M. Mativo J, as he then was stated as doth:-

> " 61 A reading of Contract 1 and 2 and the Settlement agreement leaves no doubt that the party's intentions were clear. In any event, the question whether there exists a dispute or not touches on the jurisdiction of the arbitrator. The arbitrator's jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges. Section 17 of the *Arbitration Act* provides for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as a court arbitral tribunal, may have competence, or jurisdiction to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and *Arbitration Rules.*[39] *Article 16(1) of the Model Law and Article 23(1) of the Arbitration Rules* both dictate

that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

41. The Court concluded, in the *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021 as doth: -

> " Flowing from the jurisprudence discussed herein above and the conclusions arrived at, it is my finding that the dispute disclosed in this case falls within the ambit of Article 8 of the agreement. Therefore, I find and hold that the defendant's application dated 2nd March is merited. *Section 6(1) of the Arbitration Act* provides that 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 otherwise acknowledges the claim against which the stay of proceedings is sought, 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."

42. This answers the twin answers, the case can only be stayed if;

a. The Application is made not later than the time of appearance or before taking any other step.

b. The court does not find that that the Arbitration Agreement is null and void, inoperative or incapable of being performed;

c. Finds that that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration

43. This is done sequentially. Once the first limb falls, there is no need to move to the next. This rests the case for the Application notice dated 10/1/2024.

44. As to whether this court has power to stay proceedings in London, the court finds that the supervising court for the arbitration is not this court. Section 44 of the *Arbitration Act* of England provides as follows: -

> " Court powers exercisable in support of arbitral proceedings.
>
> 1. Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> 2. Those matters are—
>
> i. the taking of the evidence of witnesses;
>
> ii. the preservation of evidence;
>
> iii. making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings —
>
> 1. for the inspection, photographing, preservation, custody or detention of the property, or

2. ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorizing any person to enter any premises in the possession or control of a party to the arbitration;

iv. the sale of any goods the subject of the proceedings;

v. the granting of an interim injunction or the appointment of a receiver.

3. If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

4. If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

5. In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

6. If the court so orders, an order made by it under this section shall cease to have effecting whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

7. The leave of the court is required for any appeal from a decision of the court under this section.

45. It is thus the court in the seat of the Arbitral Tribunal that can be moved to stay. This is the same position that such a court cannot stay proceedings before me. The respondent will have a herculean task of dissuading this court from proceeding.

46. In the circumstances, this court has no jurisdiction both under the *Kenyan Act* and the Law of England to stay proceedings in England. I will not advise parties what they need to do. Not all is lost. I note that under section of the *Arbitration Act* of England and Wales, the effect of refusal of stay is that, "If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

47. This matter shall therefore proceed as ordered. What the parties will do to the proceedings in London is within the jurisdiction in the seat of the Arbitration. I do not want to usurp jurisdiction of the courts and adjudicating bodies in the seat of the arbitration.

48. It is my sincere hope that this ruling settles the issues and allows the matter to proceed unhindered.

Determination

49. The upshot of the foregoing is that I make the following orders: -

    a. The Application for stay of proceedings is dismissed with costs.

    b. The Application to stay the Arbitration in London is dismissed. Given, it is a novel point, each party shall bear their costs.

    c. The matter to proceed forthwith with the case for hearing on day-to-day basis.

    d. Directions on hearing to be given forthwith, in terms of time allocating for 5th 6th and 7th February, 2024.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 5TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Kinyua Kamundi for the Claimant

Mr Njuguna Makena for the Defendant

Mr Amakobe for the interested Party, KPA.

Court Assistant - Brian