REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. 3 OF 2018

THE COUNTY GOVERNMENT OF KIRINYAGA..........PLAINTIFF

V E R S U S

AFRICAN BANKING CORPORATION LTD..................APPLICANT

RULING

1. The Plaintiff in this case County Government of Kirinyaga (C.G.K) filed a plaint dated 19/4/2018 seeking judgment against the defendant African Banking Corporation Ltd (A.B.C Ltd for a declaration that the agreement between them for supply, delivery and commissioning of a revenue collection service dated 28/12/2014 is null and void as it violates **Section 135(2) & (6) and Section 137 of the Public Procurement and Assets Disposal Act.** They also seek a declaration that the arbitration proceedings instituted under the same agreement are illegal and therefore null and void.

2. The Plaintiff also filed an application dated 21/5/2018 seeking an order that the arbitration proceedings commenced pursuant to the said agreement be stayed pending the hearing and determination of the suit. The court granted interim order of stay.

3. The defendant in turn filed the application dated 22/6/2018 which is now the subject of this ruling seeking an order that there be a stay of any and all court proceeding herein pending the hearing and determination of the application and pending the arbitration by an arbitrator. They also prayed that the suit be referred to arbitration.

I gave directions that the application by the defendant be heard first.

Applicants Case

That on 28/12/2014, the parties entered into a Revenue Collection and Management System Agreement whereby the defendant was to provide the plaintiff with Revenue Collection and Management System that would facilitate various services rendered by the County citizens. Without due regard to the agreement, the plaintiff instituted a suit challenging validity of the Agreement and seeking stay of arbitration proceedings initiated by the defendant.

4. That according to the Agreement Clause 26, any dispute arising from the agreement would be settled by arbitration. That the plaintiff is seeking to vary the terms of the Agreement by instituting a suit without first presenting the same for arbitration. That the parties have previously engaged on the appointment of arbitrator. That the issue raised on the validity of the Agreement can be argued before the arbitrator as provided in **Clause 26 of the Agreement.** That the dispute outlined in the plaint is within the scope of **Section 6(1)(b) of the Arbitration Act** hence it should be referred to arbitration.

5. The respondent opposed the application and filed a replying affidavit sworn by Joe Muriuki the County Secretary of the Plaintiff/Respondent.

Respondents Case.

In their response they stated that the Agreement is unlawful, invalid and therefore unenforceable on the following grounds:-

i) Paragraph 12-16 of the Agreement violates provisions of **Section 135(2) of the Public Procurement and Asset Disposal Act No. 33 of 2015** as the provisions are not based on the tender document.

ii) The Agreement violates **Section 135(6) of the Public Procurement and Asset Disposal Act No. 33 of 2015** as it does not contain statutory terms and/or tender documents;

a) Contract Agreement Form

b) Clause 3.16 of General Conditions of the Contract.

iii) The Agreement violates **Section 135(6) of the Public Procurement and Asset Disposal Act No. 33 of 2015** and in particular clause 13.2.

6. They instituted the proceedings seeking to invalidate the Agreement. That the Agreement being invalid there is no provision capable of being enforceable including the arbitration clause. That pursuant to **Section 6(1)(a) of the Arbitration Act No. 4 of 1995**, this court may decline to stay proceedings.

7. The parties proceeded by way of written submissions. For the applicant it is submitted that the issue for determination is whether the proceedings herein should be stayed pending hearing and determination and moved to arbitration. It is submitted that disputes arising out of or in connection with the agreement including but not limited to its validity shall be referred to arbitration as stipulated under Clause 26 of the agreement. That the parties are bound to proceed to arbitration on all disputes arising therefrom including the subject matter to the suit herein.

8. The applicant submits that they entered appearance by filing a memorandum of appearance and proceeded to apply for the stay of the suit pending hearing and determination of the application and the application is therefore properly before this court.

9. It is submitted that under **Section 10 of the Arbitration Act** it is stated that no court shall intervene in a matter governed by the Act except as provided under the **Act**. With regard to this proposition, she relies on the case of **Wringles Company (East Africa) –v- Attorney General & 3 Others (2013) eKLR** where the court held:- ***"that courts cannot re-write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the court cannot re-write the same."***

10. It is further submitted that Justice Kimaru applied the same principle in **Kenya Airports Parking Services Ltd & Another –v- Municipal Council of Mombasa 2010 eKLR** where he stated –

> ***"it is in this courts view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawfully and therefore invalid, such view does not invalidate the arbitration clause in the agreement."***

11. It is the submission by the applicant that since the agreement provides that even in the cases of validity of the agreement, the same should be referred to Arbitration, the court ought to refer the matter to arbitration.

12. The applicant while relying on the case of **State –v- Ollagoruwa(1992) CSCD 17** has raised the issue of jurisdiction and states owing to the presence of the arbitration clause in the agreement, the court has no jurisdiction to hear and determine the matter. That the applicant has at all times been willing to do everything to commence the arbitration proceedings. That the agreement has an arbitration clause and they urge the court to refer the matter to arbitration.

13. For the respondent it is submitted that the issue for determination is whether the court should grant a stay of proceedings and refer the matter to arbitration. It is submitted that under **Section 6(1) (a) of the Arbitration Act No. 4/1995** the court may not grant a stay of proceedings to refer the parties to arbitration if it finds 'inter alia' that the arbitration agreement is null and void, in operative or incapable of being performed. That the court has to determine a threshold issue of whether there exists a valid arbitration between the parties, if the same is raised by a party as an invalid arbitration agreement it cannot be the basis upon which parties can refer disputes to arbitration. They rely on **Niazsons (K) Ltd –v- China Road & Bridge Corporation Kenya (2001)eKLR** where the Court of Appeal held as follows:-

> ***"Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred."***

14. It is submitted that the arbitration clause cannot be treated ***"separately"*** or 'independently' or disengaged from the other clauses in the agreement as it forms an integral part of the agreement. That the law is settled that any agreement that contravenes a statute is illegal and therefore null and void. The court is referred to the Court of Appeal decision in **Njogu & Company Advocates –v- National Bank of Kenya Ltd** where the court stated –

> ***"Since the appellant and the respondent had clearly agreed on the above provisions, it is evident that they were both party to the agreement, it is evident that they were both party to an agreement that is illegal as the terms of the agreement contravened the law. In the case of Peter –v- Singh (2) 1987 KLR 585 the holding that a contract entered into by the parties that was contrary to the provision of Section 3(1) of the Ex-change Control Act Cap 113 was illegal ab initio and unenforceable."***

The court quoted with approval the case of **Archbolds (Freightage) Ltd –v- S. Spanglett Ltd (1961) IQB 374** where it was held that such a contract is unenforceable.

15. It is submitted that the agreement in issue is illegal and void for violation of statutory provisions which have been pointed out above. That since the arbitration clause is part and parcel of the agreement the validity and enforceability therefore is strictly tied to the validity of

the agreement. Consequently, the agreement herein being invalid, all the provisions in the agreement including the arbitration clause cannot stand and should therefore perish with the agreement. The court was referred to **Jaikishan Dass Mull –v- Luchhiminarain Kanoria & Co.** where it was held:-

> ***"Now, there can be no doubt that if a contract is illegal and void an arbitration clause which is one of the terms thereof must also perish along with it ------"***

16. Furthermore, it is submitted that the condition precedent for submitting the dispute arising from the agreement to arbitration had not been met as there was no evidence that parties attempted negotiations and that the negotiations failed. The court was referred to ***Nanchang Foreign Engineering Company (K) Limited –v- Easy Properties Kenya Limited (2014) eKLR*** where it was stated:-

> ***"It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant's application would automatically fail as referral to arbitration would be premature."***

The respondent prays that the application be dismissed.

Analysis & Determination:

I have considered the application and the submissions. The issues which arise for determination is:-

1) Whether the proceedings herein should be stayed and the matter be referred to arbitration.

In determining this issues, **Section 6(1) of the Arbitration Act No. 4 of 1995** is key. It provides:-

> ***"(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 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 provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is ***"null and void, in operative or incapable of being performed,"*** and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration. Where a party alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.

The arbitration clause in the agreement reads as follows:-

> **Claims, Disputes and Arbitration.**
>
> **26.1**
>
> ***"All disputes (in whatever form and nature) arising out of or in connection with this Agreement including but not limited to its, its validity, refunds, system delays, failure to settle as provided herein, an incomplete transaction and/or any purported breach or termination*** *(a "Dispute")* ***shall be (A) initially settled within Ten (10) by mutual discussions, negotiations and agreement between a negotiation team comprising of persons nominated by either party in the event that such discussions do not resolve the Dispute within the said term period then the Dispute shall (B) be finally settled under the most current Rules of Arbitration of the Chartered Institute of Arbitrators of Kenya which Rules are deemed to be incorporated by reference into this Clause 26.1. It is hereby agreed that."***

17. The clear intentions of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with Judicial Authority, under Article 159(2)(c) of the Constitution which states.

> **"In exercising Judicial authority courts and Tribunals shall *be guided by the following principles –***
>
> ***"alternative forms of dispute resolution including reconciliation, mediation, arbitration ---------- shall be promoted."***

The court will therefore promote other forms of dispute resolution where the circumstances of the case so allows and the parties have agreed to an alternative mode of dispute resolution other than the court.

Whether the application is properly before court.

The tenor and import of **Article 159(2) (c) of the Constitution** as read together with **Section 6(1) of the Arbitration Act** is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.

18. The defendant after filing memorandum of appearance duly filed the application seeking to stay the proceeding pending Arbitration. Since the defendant filed the application within the time frame set out in **Section 6(1) of the Act,** the court should proceed to consider it.

19. In this case **Section 6(1) of the Arbitration Act** has put a limitation to matters that will be referred to arbitration. It is the respondent's case that the court will not refer the matter to arbitration as the agreement and by extension the arbitration clause are null and void as they violate various provisions of the law. This in itself is a ground upon which the court will decline to refer the matter to arbitration as an agreement which violates the law is null and void **'ab-intio.'** This was stated in the case of **Njogu & Company Advocates –v- National Bank of Kenya Limited (2016) eKLR** a court of Appeal decision which I have quoted above. Also the Court of Appeal in Niazsons (K) Limited –v- China Road and Bridge Corporation (supra) has stated that, the court has to determine ***"whether there are any legal impediments on the validity operation or performance of the arbitration agreement."*** I need therefore to consider whether this court has to make a determination on the agreement as provided under **Section 6(1) (a) & (b) of the Arbitration Act**. It is alleged that Para 12-16 of the agreement violates **Section 135(2), (6) of Public Procurement and Asset Disposal Act No. 33 of 2015** as the paragraphs are not based on tender documents. It will be important at this stage therefore to look at what these provisions states:-

> **Section 135(2) of the Public Procurement and Asset Disposal Act No. 33 of 2015** provides:
>
> ***"An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings."***
>
> **Section 135(6) of the Public Procurement and Asset Disposal Act No. 33 of 2015** provides:
>
> ***"The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—***
>
> ***(a) Contract Agreement Form;***
>
> ***(b) Tender Form;***
>
> ***(c) price schedule or bills of quantities submitted by the tenderer;***
>
> ***(d Schedule of Requirements;***
>
> ***(e) Technical Specifications;***
>
> ***(f) General Conditions of Contract;***
>
> ***(g) Special Conditions of Contract;***
>
> ***(h) Notification of Award."***
>
> ***Section 137 of the Public Procurement and Assets Disposal Act No. 33 of 2015 and in particular clause 13.2 provides:***
>
> ***"The accounting officer of a procuring entity shall not request or require, as a condition of awarding a contract, that a person who submitted a tender undertake responsibilities not set out in the tender documents."***

Para 12-16 of the agreement annexture **'BM1'** has not made any reference to tender documents. The replying affidavit at Paragraph 4 states that the agreement does not contain the contract Agreement Form, the general conditions of the contract and other documents. It is also deposed that the agreement contains terms and in particular clause 13 which did not form part of tender documents.

20. The averments did not elicit any response from the applicant though the applicant was given leave to file a response. As such as submitted by the plaintiff that the agreement is invalid has not been challenged.

21. The applicant has submitted that clause 26 of the agreement has stipulated that all disputes including but not limited to its validity shall be referred to arbitration. This despite the fact that **Section 6(1) (a)** is clear that the court will not order a stay if the agreement is null and void, inoperative or incapable of being performed. My view is that parties cannot in their agreement seek to rubbish a statutory provision in the statute and effectively oust the jurisdiction of the court. In **Lee –V- The Showmen's Guild of Great Britain (1952) 2 QB 329 (C. A) Quoted in (Niazsons K Ltd –v- China Road & Bridge Corporation Kenya (2001) eKLR.**

"If parties should seek by agreement to take the law out of the hands of the court and put it into the hands of a private tribunal without any recourse at all to the courts in the case of error of law then the agreement is to that extend contrary to Public Policy and Void." The intention of the legislature is that if the agreement is **'inter-alia'** null and void, the forum with jurisdiction to hear and determine the matter is the court and the court will therefore not be obligated to stay its proceedings. The Section envisages a determination by the court. whether to stay the proceedings.

22. In **Niazsons (K) Ltd –v- China Road & Bridge Corporation Kenya 2001 eKLR** which I have quoted above the court stated that it is incumbent on Judge seized of the matter to deal with it as a whole to discover whether any of the legal impediments set out in the Section exists as to disentitle the applicant a stay. I do not agree with the counsel for the applicant that since the arbitration clause states that the issue of validity of the contract shall be referred to arbitration, the court lacks jurisdiction to determine whether the agreement is null and void.

23. None of the authorities cited by the plaintiff was dealing with the provisions of **Section 6(1) (a) of the Arbitration Act.** The case of **Kenya Airports Parking Services Ltd –v- Municipal Council of Mombasa** which relied on the decision of the Court of Appeal in **Adopt-A-Light Ltd –v- Magnate Ventures Ltd & 3 Others (2009) eKLR**, the court was dealing with **Section 17 of the Act** which is on competence of arbitral tribunal to rule on its jurisdiction. The arbitration clause under the Section is an arbitration clause which under the section is treated as an agreement independent of the other terms of the contract. This is under the principle of separability of arbitration clauses in agreements.

24. In the case **Niazsons (K) Ltd –v- China Road & Bridge Corporation Kenya** the court stated that whether or not an arbitration clause or agreement is valid is a matter seized of a court in the suit in which stay is sought and is duty bound to decide. The claim by the respondents that the agreement is invalid should therefore be determined by this court. In **Esmaj –v- Mistry Shamji Lalji & Co (1984) KLR,** Court of Appeal. The principle governing the grant of stay of proceedings were laid down and are as follows:-

> **a) The court is not bound to grant stay but has discretion to grant or not to grant.**
>
> **b) The discretion to grant should not be exercised when strong cause for doing so is shown.**
>
> **c) The burden of proving such strong cause is on the plaintiff.**
>
> **d) In exercising discretion, the court should take into account the circumstances of the particular case.**
>
> **e) A mere balance of convenience is not enough.**

25. The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings, once this burden has been discharged then the burden shifts to the opposing party to show cause why the effect should not be given to the arbitration clause.

26. In this case the applicant in the supporting affidavit has not stated the nature of the dispute which has arisen between the parties. The grounds in support of the application do not disclose the dispute if any. It only refers to letters marked BM-2-. In one of the letters the applicant has stated that it was demanding an outstanding amount. The amount has not been stated. It is not sufficient for the applicant to state that under clause 26 of the agreement it is stipulated that any and all disputes arising out of or in connection with the agreement including and not limited to a dispute over its validity shall be referred to arbitration. The applicant must specify the dispute and the nature of the dispute.

27. The respondent at Para -25 of the plaint has pleaded that the agreement is invalid and has proceeded to state the particulars of invalidity. This has been reiterated in the replying affidavit. The applicant has not challenged the respondent's claims that the agreement is not valid. The applicant has the burden to prove that there was a dispute which fell within the arbitration clause. The burden was not discharged. The burden did not shift on the respondent. In essence, the applicant failed to state with certainty the nature of the dispute and more so that it falls within a valid and subsisting arbitration clause in the agreement. The respondent's contention that the agreement is invalid has not been challenged and is therefore sound. This is an issue which falls for determination by this court and under **Section 6(1) (a) of the Act** the court ught to exercise discretion and decline to order a stay of proceedings. Since the applicant has failed to demonstrate that there is a dispute and the nature of the dispute he does not deserve the exercise of discretion by this court.

28. Though the applicant has earnestly urged this court to find that clause 26 is the way to go, it is true to say that it failed to abide by ***the clause itself. Clause 26 states mandatorily that ------***

> ***"(a dispute) shall be (A) initially settled within 10 days by mutual discussions, negotiations and agreement between a negotiation team comprising of persons nominated by either party in the event that such discussions do not resolve the dispute within the said terms period the dispute shall (B) finally settled by the most current rules of Arbitration ---------."***

29. The applicant has not tendered evidence to prove that the parties attempted to settle the dispute if any through negotiations and that the negotiations failed. It goes back to what I have already pointed out that the applicant has not proved that there is a dispute or the nature of the dispute. Clause 26(A) is a condition precedent and where it has not been complied with clause 26(B) has not come into force nor has it fallen due. It would therefore be premature to refer the matter to arbitration even if the court were to find that clause 26 applies. I refer to **Nanchaing Foreign Engineering Company (K) Limited –v- Easy Properties Kenya Ltd 2014 eKLR.**

30. The parties had agreed that the first step was to attempt negotiations in an attempt to reach an amicable resolution of the dispute if any. Strict enforcement of clause 26 would require that negotiations be done and before that is done the matter is not ripe for referral to arbitration. The prayer to refer the matter to arbitration must fail.

31. In Conclusion I find that the applicant has failed to prove the nature of the dispute or that he has a dispute which this court ought to refer to arbitration. The respondent has demonstrated that it has raised matters in the plaint which calls for determination by this court as provided under **Section 6(1)(a) of the Arbitration Act.** I therefore order as follows:-

> **1. The application lacks merits and is dismissed.**

2. The applicant shall proceed to file a defence within 14 days.

3. Costs to the respondents.

Dated at Kerugoya this 4th day of May 2020.

L. W. GITARI

JUDGE