REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY&TAX DIVISION

CIVIL CASE NO. 83 OF 2018

THE STANDARD GROUP PLC.....PLAINTIFF/RESPONDENT

-VERSUS-

WESLEY KIPTOO YEGON.....1ST DEFENDANT/APPLICANT

KEVIN MUSAU MULEI T/A

NRG RADIO.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to chamber summons application dated 18th July 2018, brought under the provisions of Section 6 of the Arbitration Act, 1995, Rule 2 of the Arbitration Rules, 1997; Section 3A of the Civil procedure Act, Chapter 21 of the Laws of Kenya and all other enabling provisions of law.

2. The Applicant is seeking for orders as here below stated;

a) That there be a stay of all proceedings herein pending Arbitration.

b) That the dispute between the Plaintiff and the 1st Defendant be referred to arbitration.

c) That the costs of this application be awarded to the 1st Defendant/Applicant against the Plaintiff/Respondent.

3. The Application is supported by an affidavit dated 18th July 2018, sworn by Wesley KiptooYegon, the 1st Defendant (herein "the Applicant"). He deposed that, on 1st February 2016, he entered into a Music Consultancy Agreement (herein called 'the Agreement") with the Plaintiff (herein "the Respondent"), whereby, he was contracted to provide inter alia, independent services of music consultancy. That clause 38 of the Agreement contains an Arbitration clause which stipulates that, any dispute or difference arising therefrom shall be referred to Arbitration.

4. That despite the Arbitral clause, the Respondent has instituted this suit without referring the dispute to Arbitration as stipulated under the stated clause and in total violation and/or breach thereof.

5. Further, by virtue of the Arbitration Agreement, the parties hereto agreed and are bound to proceed to Arbitration. That the allegations raised by the Respondent herein, relate to matters over and surrounding the Agreement, hence the matters are a proper subject matter of Arbitration.

6. The Applicant averred that he is ready, willing and able to proceed to Arbitration as stipulated in the Arbitration Agreement. Therefore the application ought to be allowed in the interest of justice.

7. However, the application was opposed by the Respondent on the following grounds:

a) The Application is misconceived, frivolous and bad in law;

b) The Application is in complete breach of the provisions of Section 6 of the Arbitration Act 1995.

c) The Application is in complete disregard of the binding decision of the Court of Appeal in Charles Njogu Lofty-vs- Bedouin Enterprises Ltd. Civil Appeal No. 253 of 2003 and the High Court decision in Diocese of Marsabit Registered Trustees –vs- Technotrade Pavillion Ltd [2014] eKLR;

d) The Application as filed and the prayers sought therein are an abuse of the court process.

8. The parties agreed to dispose of the application by filing written submissions. The Applicant submitted that, a contract creates a binding obligation between the parties therein, therefore the Respondent prematurely instituted this suit and the notice of motion application dated the 26th of February 2018, and is thus in breach of clauses 9 and 17 of the two consultancy agreements.

9. The Applicant argued that, the Respondent will not be prejudiced by the Arbitration proceedings, since Arbitration is one of the recognized avenues for dispute resolution, as encompassed under Article 159 (2) (c) of the Constitution of Kenya of 2010. Further, Section 6 of the Arbitration Act 1995 (herein "the Act"), empowers the Court, subject to the exception there under, to stay the proceedings and refer the dispute to Arbitration, where the proceedings are brought in a matter that is subject of an Arbitration agreement. Therefore in view of these provisions, the Honourable Court has no jurisdiction to entertain the Respondent's claim.

10. It was submitted that, Section 6 of the Act further provides that, stay of proceedings shall be granted, if it is proved that there is an Arbitration Agreement in place, and any proceedings before the Court should not be continued, if an application under subsection (1) has been made and the matter remains undetermined. That in the instant case, the matter is yet to be heard before an Arbitrator who will determine any kind of dispute that arises under the Agreement.

11. The Applicant referred to the case of; *Kenya Broadcasting Corporation -vs- National Authority for the Campaign Against Alcohol and Drug Abuse [2015] eKLR* where it was held that;

> *"…once a defendant files an application for stay of suit and seeks for referral of the matter for arbitration, he/she is not expected to file a defence to the claim, until or unless the court determines that application dismissing it thereby paving way for an opportunity to file defence. This is, however, not to say that the application for stay of suit or for referral to arbitration is per se arbitration proceedings. It is an attempt to refer the matter to arbitration, which at the end of it all; the Defendant must satisfy the Court that the proceedings are arbitrable".*

12. The Applicant refuted the Respondent's claim that he has admitted the jurisdiction of the Court by filing a notice of appointment of Advocates, and submitted that, it is instructive to note that, the only precondition for stay under Section 6 (1) of the Act is that, the application seeking for stay of proceedings be made not later than the time when the party seeking the same "enters appearance or otherwise acknowledge the claim".

13. That in the instant matter, he has not filed a memorandum of appearance or a statement of Defence, hence the jurisdiction of the Honourable court to adjudicate over this dispute has not been conceded to at all. The filing of the notice of appointment of Advocates was only to bring the Advocates on record and cannot in any way be construed as an acceptance of jurisdiction.

14. The Applicant relied on the case of; *Niazsons (K) Ltd -vs- China Road & Bridge Corporation Kenya [2001] eKLR* where it was held that,

> *"it is therefore my view, and I so hold, that section 6 (2) of the Arbitration Act, 1995, does not permit parallel proceedings to be handled simultaneously. Consequently, it was not open to the respondent to take out an application for stay of proceedings and at the same time file a written statement of defence. As stated in the Joab Omino Case (Supra) the bringing of an application for stay of proceedings under Rule 6(1) of the Arbitration Act, 1995, the respondent's duty to file a written statement of defence was suspended".*

15. However, the Respondent filed response submissions and submitted that, under Section 6 (1) of the Act, the court will not grant orders as herein sought; if a party makes the application later than the time when the party entered appearance or otherwise acknowledges the claim; or if the Arbitral Agreement is null and void or if there is in fact no dispute between the parties to be referred to arbitration.

16. Further, although the Applicant relies on clause 38 of the Music consultancy Agreement (herein "the MCA") dated 15th February 2017, as the arbitral clause and the premise of its application for stay of proceedings, there is no clause 38 in the said Agreement. However, clause 17 of the MCA, provides that in the event of any dispute arising between the parties herein, then such a dispute (if not resolved by mutual agreement within 14 days), is to be referred for Arbitration by a single Arbitrator appointed by the parties or in default by the Chairman of the Chartered Institute of Arbitrators.

17. The Respondent submitted that, while it is true that the MCA provides for Arbitration of any dispute arising between the parties thereto, it is peremptory to note that the present case is not only between the Applicant and the Respondent, but there is a third party, one Kevin Musau Mulei, who trades as NRG Radio who has been sued as well for unlawful user of the confidential information disclosed to it by the Applicant. Thus the Plaintiff's cause of action of breach of trade, secret and confidentiality is against both Defendants and it is an intricately linked cause of action. Thus itis not subject of an arbitral proceeding provided for under Clause 17 of the MCA dated 15th February 2017.

18. That even if the case herein was only between the Applicant, and the Respondent, the Applicant has not met the threshold set out in Section 6 (1) of the Arbitration Act, requiring him to promptly move the court upon service of the pleadings. That the Applicant was served with the pleadings in this case on 5th March 2018. On 9th April 2018, he unconditionally entered appearance and filed a substantive response to the Plaintiff's application for Injunction vide his Replying Affidavit sworn on 9th April 2018. Therefore he submitted to the jurisdiction of the Honourable Court. He is a Johnny come late and cannot now resile from that position in the instant case.

19. The Respondent submitted that, most importantly, the Applicant filed an application dated 9th April 2018, to strike out the suit herein on account that the case does not raise a cause of action as against him. He also sought that the suit be struck out for want of jurisdiction because, in his view, the MCA was an Employment Contract (presumably subject to the jurisdiction of the Employment and Labour Relations Court). That although the MCA had an arbitration clause, there was no prayer in the said applications seeking a stay of these proceedings and a referral to Arbitration.

20. As such, the Applicant is estopped from raising such an issue at this moment. That the Applicant had an obligation and opportunity to raise the same issue then, but failed to and cannot now raise the same after proceeding to file his submissions in respect to the application for injunction and attending court for the hearing of the injunction application on three occasions.

21. The Respondent relied on the Court of Appeal decision in the case of; *Charles Njogu Lofty –vs- Bedouin Enterprises Ltd [2005] eKLR, the Court of Appeal (Omolo, Waki & Deverrrel, JJA)* where it was stated that:

> *"On the plain reading of that section, before the Court can consider the issue raised in paragraphs (a) and (b) and (b of Section 6 (1) of the Act, the Court has to satisfy itself that the party applying for reference to arbitration has applied to the Court: -----not later than the time when that party enter appearance or files any pleadings or takes any other step in the proceedings…"*

22. It was submitted that the Court of Appeal approved the holding of Githinji (as he then was) in the case of; *Bedouin Enterprises ltd. –vs- Charles lofty and Joseph Mungai Gikonyo T/A Garam investments Civil Case No. 1756 of 2000,* which rejected the argument that, an application for reference of a dispute to Arbitration can be made at three stages, namely at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. Further reference was made to the Court of Appeal case of; *Eunice Soko Mlagui –vs- Suresh Parmar&4 others [2017] eKLR*. The Respondent reiterated that an arbitral clause is only applicable to the parties thereto and not involving third parties.

23. Finally, the Respondent argued that, the Applicant has been indolent by failing to comply with Section 6(1) of the Act and has forfeited his right to apply for and have the proceedings stayed or matter referred to Arbitration. Therefore he should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the Court. Reliance was placed on the case of; *Technotrade Pavilion Limited [2014] eKLR and Midroc Water Drilling Co. Ltd –vs- National Water Conservation & Pipeline Corporation (2015) eKLR*

24. I have considered the Application in the light of the arguments advanced by the parties and the submissions in support thereof, I find that the issues that have arisen are whether :

> *a) Whether the parties entered into any agreement and if so, whether the said agreement contains an arbitral clause.*
>
> *b) Whether both Defendants are bound by the arbitral clause (if any)*
>
> *c) Whether the court should grant the prayers sought; and*
>
> *d) Who should bear the costs of the Application?*

25. As regards the first issue, I find that the parties herein, being the Plaintiff and the 1st Defendant, entered into two agreements dated 1st February 2016 and 15th February 2017. The copies thereof are found in the Plaintiff's list and bundle of documents at page 122 and 128 respectively. Clauses 9 and 7 thereof, expressly states that:

> *"In the event of any dispute arising between the parties hereto then such dispute (if not resolved by mutual agreement within fourteen(14) days)shall be referred for arbitration to a single arbitrator chosen by mutual agreement of the parties. In default of agreement or failing such agreement upon an arbitrator within seven (7) days from the time when the appointment of the arbitrator is proposed by either party to the other, then the dispute shall be referred to a single arbitrator (being an Advocate of the High Court of Kenya of not less than 10 years standing in practice) appointed by the chairman for the time being of the chartered institute of arbitrators (Kenya branch) and the provision of the Laws of Kenya then in force as to arbitration shall apply to such dispute."*

26. It is therefore clear that, the Plaintiff and the 1st Defendant entered into the said agreements and that deals with the first issue. Indeed said MCAs contain an arbitral clause, which recognize arbitration as the dispute resolution mechanism over any dispute arising in relation to the MCAs.

27. It suffices to note that, the provisions of Article 159 (1) of the Constitution of Kenya, clearly stipulates that, Judicial authority is derived from the people and vested in, and shall be exercised by the courts and tribunals established by or under the Constitution. That, in exercising the judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism.

28. Further, the statutory provisions of; **Section 10** of the Arbitration Act No. 4 of 1995, limits the Court's intervention in arbitral process and states as follows:

> *"Except as provided in this Act, no court shall intervene in matters governed by this Act*."

29. It therefore follows that the court's intervention in arbitral process is limited. I note the application herein, is premised on the provision of Section 6 (1) of the Act, which states 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".

30. The key factors under these provisions are that, an Applicant seeking to stay proceeding and referral thereof to arbitration should make an application for the same at the time of entering appearance or before acknowledging the claim in question.

31. The question is; what constitutes an acknowledgement of a claim. In the case of; *Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR*, the Court held that, the filing of a defence constitutes acknowledgment of a claim, within the meaning of the provisions of section 6(1) of the Arbitration Act. In that matter, the 1st, 2nd and 3rd Respondents had already filed and even amended their statements of Defences while the 4th and 5th Respondent had entered appearance and filed their statements of defences. The Court held that, the Defendants had already submitted to the jurisdiction of the Court and the matter could not be referred to arbitration.

32. In the instant case, it is alleged that the Applicant was served with the pleadings on 5th March 2018, and entered appearance on 9th April 2018. He then filed a Replying affidavit in response to the Plaintiff's application for injunction which was sworn on 9th April 2018, and an application dated 9th April 2018, seeking to strike out the suit on the grounds stated herein.

33. The question that arises is; does the filing of the replying affidavit and the application amount to an acknowledgment of a claim? The Respondents argue it does and that in the circumstances; the Applicant is stopped from raising the issue of jurisdiction, having failed to raise the same promptly, as required by Section 6 (1) of the Arbitration Act.

34. However as already stated, the Applicant argued that, it has neither filed a memorandum of appearance nor a statement of defence and that the filing of a "notice of appointment of advocates" cannot be construed to amount to submission to the Court's jurisdiction. However, it suffices to note that the Applicant did not refute the Respondent's submissions that, he filed a Replying affidavit to the application for an injunction order and an application seeking that the suit to be struck out, as aforesaid.

35. However, the question remains; does filing of the Replying affidavit and the subject application amount to submission to the court's jurisdiction? Before I answer this question I will to address the issue of whether this subject application was filed in compliance with the provisions of Section 6 of the Arbitration Act.

36. I find that the documents filed herein, reveals that, the Applicant entered appearance in this matter on 9th April 2018. The said provisions required that he should have filed this application promptly and/or immediately after entering appearance. However, he did not file this application until 23rd July 2018, three (3) months, thereafter. By that time he had already responded to the Respondent's application for injunction and filed an application for striking out of the suit.

37. The Court in the case of; *Charles Njogu Lofty –vs- Bedouin Enterprises Ltd (supra)* concurred with the views of Githinji J; in *Civil Case No. 1756 of 2000, Bedouin Enterprises Ltd–vs- Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments* , where the Judge had rejected the argument that, an application for reference to arbitration can be made at three stages, namely: at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The learned judge expressed himself as follows:

"*In my view, section 6(1) of the Arbitration Act,1995, which court is construing means that, any Application for stay of proceedings cannot be made after the Applicant has entered appearance or after the Applicant has filed pleadings or after the Applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the Applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act 1995 was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of proceedings". (emphasis mine).*

38. The Court of Appeal in concurring with the sentiments above expressed itself on the issue and stated that:

"*We respectfully agree with these views so that even if the conditions set out in paragraph (a) and (b) of section 6(1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof for arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings" (emphasis mine).*

39. Thus, case law on Section 6(1) of the Arbitration Act, is settled that an application thereunder should be filed promptly. In the case of; *Eunice Soko Mlagui –vs- Suresh Parmar& 4 others (supra),* (Makhandia, Ouko & M'lnoti JJA) held that:

Section 6 (1) of the Arbitration Act obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings." (Emphasis added).

40. Therefore, the Applicant having failed to file this Application promptly, he did not comply with the provision of section 6(1) Arbitration Act, and this Application fails on that ground alone. Even then his conduct of filing an Application for the suit to be struck out, for inter alia; failure to disclose a cause of action and being an employment matter disentitles him to the claim that the Court has no jurisdiction to entertain this matter.

41. However, it suffices to note that, generally an action to resist interim injunction is not a step in proceedings. Applications for interim injunction order are interlocutory proceedings. (See the Court of Appeal of England decision in *Patel-v-Patel [1998] 3 WLR 322)*. Therefore the filing of the Replying Affidavit to the Application for injunction order will not be deemed to be an acknowledgment of the Court's jurisdiction.

42. Even then, the Court upheld as extant in the matter, the grounds upon which a Court may refuse to stay proceedings and refer a matter to arbitration (see; *Emden & Gills: Building Contracts and Practice 7th Edition, at page 363,)*:

a) where there are questions of law involved;

b) where there is multiplicity of proceedings and (it is necessary to avoid) inconsistent findings of facts;

c) where the arbitration is appropriate, (as was obviously the case in the matter) for only a part of the dispute.

43. The other issue raised by the Respondent is that, the 2nd Defendant is not a party to the arbitral agreement and cannot be subjected to the arbitral proceedings. It is noteworthy that, it is trite principle of law that, Arbitration is dependent on the existence of an agreement between the disputant parties. This is a reflection of the role of consent as the basis of arbitration.

44. In the case of; *Eunice Soko Mlagui –vs- Suresh Parmar& 4 others (supra)* the court held that an arbitral clause in the subject contract applied in the event of; disputes between members and the company and between members per se. That it did not apply to disputes with employees like the 4thand 5th respondents, who were external auditors of the company. To that extent therefore, and as contemplated by Section 6 (1)(b) of the Arbitration Act, there was no dispute between the appellant and the 4th and 5th Respondents, which the parties had agreed to be referred to arbitration.

45. Thus the position seems to be that, where a third party is involved, the Court may refuse to stay the proceedings as the case will only be appropriate for only part of the dispute. However, it is noteworthy that the position in UK has changed and involvement of third party is no longer a reason to refuse stay.

46. It is not in dispute that the 2nd Defendant is not a party to the arbitral and neither did it participate in the hearing of the application, obviously for the simple reason that, it is not bound by the arbitral agreement. Therefore, the claim in relation to the second Defendant cannot be referred to arbitration.

47. All in all, I find that the Applicant did not comply with the provisions of Section 6 of the Arbitration Act No. 4 of 1995, for the reasons that, he did not file the this application promptly, after entering appearance and/or the filing of the application to strike out the suit as stated herein. The Applicant has therefore, submitted to the jurisdiction of the Court.

48. The upshot is that, this application lacks merit and is dismissed. However, the costs thereof shall abide the outcome of the main suit.

49. It is so ordered.

Dated, delivered and signed in an open court on this 6thday of March 2019

G. L. NZIOKA

JUDGE

In the presence of;

Mr.Ouma ----------for the Plaintiff/Respondent

Mr.King'ori ----------for the 2nd Defendant/Respondent

Mr.King'ori holding brief for Mr. Mutubwa ---------for the 1st Defendant/Applicant

Dennis ----------Court Assistant