REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 402 OF 2018

NEW INTERNATIONAL CONSULTANCY

COMPANY LIMITED (Suing by a power of Attorney No. P/A65175/1 of

APEXVISION LIMITED)............................PLAINTIFFS/RESPONDENTS

VERSUS

TELKOM KENYA...1ST DEFENDANT

SUNDARARAMAN PATTABIRAMAN............................2ND DEFENDANT

RULING

1. The plaintiff herein **NEW INTERNATIONAL CONSULTANCY COMPANY LIMITED**, sued the defendants herein **TELKOM KENYA LTD** and **SUNDARARAMAN PATTABIRAMAN** seeking the following orders:

> ***a) A finding that the defendant is in breach of contract together with an injunction to restrain the defendants, by any of them, servants, agents, employees, and or otherwise howsoever described from diverting paying out the monies from the funds in its bank accounts for paying and reimbursing the plaintiffs outgoings, maintenance fee, staff salaries and other creditors and/or paying the same to a third party until the plaintiff has been paid in full.***
>
> ***b) An order that the defendants do make an immediate interim payment of a sum of Kenya Shillings Seven Hundred and Forty Seven Million Eighty Two Thousand Three Hundred and Twenty (Kshs 747, 082,320,000/=), or such sum as may be found due and owing, together with interest at the commercial rate, of 17% and compounded monthly to monthly from June, 2017, until payment in full.***
>
> ***c) An injunction order to freeze the credit balances in the bank accounts (provided in the plaint hereinabove under paragraph 16), of 1st defendants, to stop 1st defendant from withdrawing, transferring, alienating and/or embezzling of the funds for the payment to Apexvision Limited to other unconnected purposes.***
>
> ***d) General damages for the business opportunity losses and reputation losses for a sum of money to be assessed by the Honourable Court.***
>
> ***e) In addition, to the aforesaid preliminary orders, and without prejudice thereof, make orders directing that the other disputes between the parties hereof be referred to arbitration.***
>
> ***f) Costs of these proceedings.***
>
> ***g) Any other relief that this Honourable Court may find fair and just.***

2. The defendants did not file a defence but engaged lawyers who filed a Notice of Appointment of Advocates together with an application dated 20th November 2018 in which they sought orders that:

1. This application be heard in priority to or together with the plaintiff's application dated 8th November 2018.

2. There be a stay of the proceedings filed herein pending the hearing and determination of this application.

3. There be a stay of the proceedings filed herein pending the reference to arbitration of the dispute arising between the plaintiff and the defendants.

4. The costs of this application be provided for.

3. Concurrently with the plaint, the plaintiff also filed an application dated 8th November 2018 in which it sought orders that:

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2. That an interim injunction be issued to restrain the defendants, by any of them, servants, agents, employees, and or otherwise howsoever described from withdrawing, diverting, paying out or alienating and/or having the funds applied to the credit of a third party, repudiating, cancelling, withdrawing, and /or undertaking such conduct as amounts to repudiating, terminating, or alienating, or other mechanisms intended to release the funds held to its credit upto a sum of Kshs 747,082,320/= in bank account numbers;

a) KCB bank, account No. 1107181632.

b) Stanbic bank, account No. 0100005197672

c) Standard Chartered bank, account No. 0104023376700

d) NIC Bank, account No. 100119962.

to any third party and/or such other entity howsoever described, pending the hearing inter partes of this application or further orders of this Honourable court.

3. The honourable court be pleased to issue an interlocutory injunction restraining the defendants, by way of them, servants, agents, employees, and or otherwise howsoever described from withdrawing, diverting, paying out or alienating and/or having the funds applied to the credit of a third party, withdrawing, and/or undertaking such conduct as amounts to repudiating, terminating, or alienation, or other mechanisms intended to release the funds held to its credit in bank account numbers KCB bank, account No. 1107181632,Stanbic bank, account No. 0100005197672,Standard Chartered bank, account No. 0104023376700 and NIC Bank, account No. 100119962 pending the hearing and determination of this suit and/or further orders of this honourable court.

4. That a temporary mandatory injunction order be issued directing the defendants, by any of them, servants, agents, employees, and or otherwise howsoever described details and statements of the bank accounts into which the incomes earned from the data services transmitted by the satellite infrastructure, repaired and serviced by the 2nd plaintiff is remitted and reasons as to why these funds are now not available to pay the plaintiff, and/or directed to produce and place at the disposal of the court, when required, the credit balances in its bank accounts to the extent of a sum of Kshs 747,082,320/=, and/or such as the court may consider sufficient to satisfy the decree, pending the hearing and determination of this case and/or further orders of the court(and/or hearing and determination of the process of the contractual arbitration).

5. Alternatively, and without prejudice t the above there be an order of attachment of the defendants assets, properties and credit balances in bank accounts KCB bank, account No. 1107181632, Stanbic bank, account No. 0100005197672, Standard Chartered bank, account No. 0104023376700 and NIC Bank, account No. 100119962 pending the hearing and determination of this suit (and/or arbitration proceedings – if referenced to) and /or further orders of this honourable court.

6. The plaintiffs do hereby given an undertaking to indemnify or compensate the defendants for any damages that it may lawfully suffer during the interim injunction orders issued herein.

7. The costs of this application be provided for.

4. On 9th April 2019, the plaintiff filed a request for judgment, in default of appearance and/or statement of defence, for the sum of Kshs 747,082,320/= together with interest at 17%. On 29th April 2019, the court entered a default judgment against the defendants thereby precipitating the institution of an application dated 6th May 2019 wherein the defendants seek orders for the setting aside and stay of execution of the judgment entered on 29th April 2019.

5. This ruling is therefore in respect to the defendants applications dated 20th November 2018 (hereinafter "**the first application")** and 6th May 2019 (hereinafter "the **last application").** The applications are supported by the affidavit of **Nelson Mogaka** and **Robert Irungu** respectively.

6. The first application is premised on the grounds that the plaintiff and the 1st defendant entered into an agreement dated 23rd April 2015 which agreement, at Clause 24 thereof, provides that all disputes arising out of it would be referred to arbitration. It is the defendants'

argument that the court should give effect to the said arbitration clause by staying the instant proceedings pending the determination of the dispute by the arbitration tribunal.

7. The last application, on the other hand is premised on the grounds that the judgment entered in default of appearance on 29th April 2019 ought not to have been entered in the first place owing to the fact that the defendants had already filed the first application dated 20th November 2018 seeking to refer the matter to arbitration under Section 6(1) of the Arbitration Act (hereinafter " **the Act**"). The applicant contends that Section 6(2) of the Act provides that *"proceedings before the court shall not be continued after an application under Subsection (1) has been made and the matter remains undetermined."*

8. It is the defendants' case that in light of the provisions of Section 6(2) of the Act, the judgment in default of appearance and defence entered on 29th April 2019 is void *ex-debito justiciae* and is for setting aside since the request for judgment is a proceeding in a matter which is expressly restricted by the section of the Act.

9. The plaintiff opposed both applications through Preliminary Objections and Grounds of Opposition filed on 14th May 2019. It states that both applications are fatally defective as the same were filed after the defendants had filed an affidavit in which they admitted the plaintiffs claim which admission amounts to taking a step.

10. The plaintiffs contend that the defendants are estopped from belatedly invoking the arbitral clause in the agreement as a delaying tactic having already answered the claim by making denials and admissions. It is the plaintiff's case that the defendants have repeatedly stopped the plaintiff from collecting its dues and have failed to take any concrete steps to refer the disputed part of the debt to arbitration within the time provided for in the arbitral clause.

11. The plaintiff also filed the replying affidavit of its Director of commercial operations, one **Mr. Kiogora Murithi Muriuki**, in response to the applications. He concedes that, the plaintiff had a contract with the 1st defendant for the provision of power and air conditioning management services but contends that the 1st defendant defaulted in making the payments which remain overdue thereby causing substantial loss and damage to the plaintiff.

12. He avers that the contract arbitration clause was time bound and that the defendants failed to refer the dispute to arbitration when the demand and notice of the dispute over the delayed payments was made through a letter dated 5th October 2018. He adds that the contractual arbitral jurisdiction is therefore spent.

13. He further states that the arbitration clause is limited substantively to matters in dispute, timely appointment of an arbitrator, parties to the agreement and that the dispute should be in regard to the annexes and/or contractual agreement.

14. He states that the instant case concerns both the matters arising between the parties and third parties and the contested extension beyond the contract period including the disputed and undisputed defaults. He further avers that the defendants admit being in default and even proposed to make payments by installments and that it is therefore unreasonable for the defendants to contest the entry of judgment on the admitted part of the claim upon their failure to enter appearance and file a defence.

15. Parties filed written submissions to the applications which I have carefully considered. I note that the main issues for determination in both applications are:

> ***a) Whether the defendants have made out a case for the exercise of this courts discretion to set aside the interlocutory judgment entered on 29th April 2019.***
>
> ***b) Whether the dispute between the plaintiff and defendants should be referred to arbitration.***

16. In determining the first issue, the court is also called upon to determine whether the interlocutory judgment entered on 29th April 2019 was regular. The law governing the setting aside of interlocutory judgment in default of appearance or defence is Order 10 Rule 11 of the Civil Procedure Rules which stipulates as follows:

> ***"11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

17. In addition to the above provision, it is also trite law that the courts power to set aside exparte default judgment is a discretionary power vested on the courts in recognition of their function of dispensing justice to the parties so as to avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice. (See ***Shah v Mbogo & Another*** [1967] EA 116.*)*

18. The above position was restated in the of cited case of ***Patel v EA Cargo Handling Services Ltd*** [1974] EA 75 as follows:

> ***"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it " a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication".***

19. In ***Sebei District Administration v Gasyali & Others*** [1968] EA 300 it was held;-

> ***"The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court".***

20. The above cited authorities relate to instances where the defendant has a formidable defence but has for one reason or the other been unable to give it or enter appearance upon service with the plaint and summons to enter appearance. The circumstances of the instant case are however slightly different because upon service with the plaint, even though service is disputed by the defendants, the defendants did not enter an appearance or file a defence but opted to file a notice of appointment of advocates and an application dated 20th November 2018 seeking to refer of the dispute to arbitration.

21. On the question of whether or not the defendants were served with summons to enter appearance and plaint, I find that the said service was effected on the defendants and this explains why they opted to instruct their advocates to file the notice of appointment of advocates together with the application under Section 6 (1) of the Act seeking to stay all proceedings in the suit pending its determination through arbitration.

22. A perusal of the court record shows that when the matter came up for mention before Makau J. on 21st November 2018, **Mr. Ondieki** informed both the court and Mr. Kihara advocate for the plaintiff that he had filed an application to refer the matter to arbitration and at the same time sought for time to enable parties agree on a payment plan for the undisputed sum of Kshs 223,000,000/=. Counsel suggested that the disputed sum of Kshs 407,000,000/= could be referred to arbitration in accordance with the agreement between the parties.

23. A perusal of the proceedings that were conducted from 21st November 2018 shows that the plaintiff was served with the application dated 20th November 2018 but still went ahead to file another application dated 28th January 2019 and a request for judgment on 9th April 2019 that led to the entry of the impugned default judgment that is the subject of this ruling.

24. While the plaintiff argues that the interlocutory judgment entered on 29th April 2019 is regular in view of the defendants' admission of the claim and failure to enter appearance or file a defence, the defendants maintain that the default judgment should not have been entered in light of the pending application to refer the matter to arbitration.

25. In order to determine this matter, it is necessary to examine the provisions of the Act that are under discussion and the clause (s) of the agreement that is the subject of the suit. Section 6(1) and (2) of the Act stipulates as follows;

> ***1) If a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any-court against any other party to the agreement, or against a person claiming through or under him. in respect of a matter agreed to be referred –***
>
> ***(a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings; and***
>
> ***(b) that court, if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.***
>
> ***(2) Notwithstanding anything in this Part, if a party to a reference to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule applies, or a person claiming through or under him, commences any legal proceedings in any court against any other party to the reference, or against a person claiming through or under him, in respect of any matter agreed to be referred –***
>
> ***(a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings apply to the court to stay the proceedings; and***
>
> ***(b) that court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.***

26. Clause 24 of the Agreement that the parties herein signed on 23rd April 2015 provides that any disputes arising out of the Agreement are to be referred to arbitration. The said clause stipulates as follows.

> ***24.1. Any dispute arising between the parties with regard to the annexes and/or the Agreement shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of such dispute by either party to the other, upon application by either party to the Chairman, for the time being, of the Kenya Branch of the Chartered Institute of Arbitrators.***
>
> ***24. 2. Every award made under this Clause shall be subject to and in accordance with the provisions of the Arbitration Act 1995 or any other or subsequent Act or enactment for the time being in force in Kenya.***
>
> ***24. 3. The arbitration shall be designed to have the result (if practicable) that the arbitration be commenced within twenty one***

(21) business days after the appointment of the arbitrator.

24. 4. The award or determination of the arbitrator shall be final and binding upon the parties. Save for the arbitral award, each party shall bear their own legal and other incidental costs.

24. 5. The Clause shall be severable from the rest of this Agreement and remain effective even in the event that this Agreement is terminated.

27. In the instant case, it is not contested that the dispute between the plaintiff and the defendant arises out of the Agreement of 23 April 2015. It thus follows that any dispute arising out of the Agreement needed to have been referred to arbitration. Indeed, one of the prayers sought by plaintiff in the plaint was for "orders directing that the other disputes between the parties hereof be referred to arbitration".

28. I note that while the defendants were clear, in the affidavit in support of the application dated 20th November 2018 on the part of the plaintiff's claim that they do not contest which they offered to pay by installments, they were also clear on the contested amount. In the circumstances of this case, I find that the best approach would have been for the plaintiffs, if they deemed it necessary, to request for judgment for the admitted sum and refer the disputed sum to arbitration.

29. My above findings notwithstanding, the bottom line is that the moment the defendants filed the application under Section 6(1) of the Act, it became clear that no proceedings were to be undertaken as long as the said application remained undetermined.

30. I am guided by the decision in ***Kenya Broadcasting Corporation v National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA)*** [2015] eKLR wherein the court held:

> ***"I am also in agreement with the decision in Niazons (K) Ltd v China Road & Bridge Construction (K) (2001) 2 EA 302 and add 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".***

31. Similarly, in the case of ***West Mont Power(K) Ltd v Kenya Oil Company Ltd*** C.A. 154/2003, the Court of Appeal held:

> ***"We are unable to agree with Mr Esmail's proposition that it was incumbent upon the appellant to demonstrate that he had a good defence to the claim for the exparte judgment to be set aside. There is no question here of the appellant wanting to, or being subjected to, the filing of a defence, when the appellant says clearly that the parties are subject to an arbitration agreement and have chosen to resolve their dispute in a different forum. That was the only issue that the superior court was obliged to determine, that is whether the matter was one that ought to be referred to arbitration, but it chose to ignore the application dated 13th March 2002, and entered exparte judgment. We repeat that this court said in the case of Omino v Lalji Meghji Patel & Company Ltd (1995-1998) IEA 264 that when an application under Section 6(1) of the Act is made by a party to an arbitration agreement, it is incumbent upon the court to which such application is made to deal with is so as to discover whether or not a dispute or difference arises within the arbitration agreement and if it does, then it is for the opposing party to show cause why effect should not be given to the agreement…….***
>
> ***We would emphasize strongly that it was incumbent upon the Learned Judge to allow the application for referral to arbitration dated 13th March 2002 to be heard on its merits and that could only be possible if the exparte judgment was vacated. It is in dealing with the application that Mr. Esmail's other arguments such as the application being time barred, and the futility of referral to arbitration, could have been ventilated. However in taking the course he did, the learned judge denied the appellant the opportunity to be heard on its application, and condemned it unheard. The exercise if judicial power imposes upon a court the duty to hear both sides on merit. It was wrong, in our judgment, for the learned judge not to have set aside the exparte judgment in the face of an undetermined application to refer the matter to arbitration."***

32. In ***MITS Electrical Company Ltd v Mitsubishi Electric Corporation*** [2018] eKLR the court observed that as long as there is an application for stay of proceedings in a suit pending its reference to arbitration the court should not proceed with the suit before determining the application.

33. Guided by the above cited authorities and the provisions of the Act, I find that it was irregular for the Deputy Registrar to proceed and enter default judgment against the defendants in the face of a pending application for referral of the dispute to arbitration.

34. I further find that the defendants herein took the earliest opportunity, upon becoming aware of the filing of this case, to seek the reference of the dispute to arbitration. My take therefore is that the issue of the reference being overtaken by events does not arise.

35. Needless to say, the parties herein, under Clause 24 of their said Agreement chose to bind themselves to the arbitration clause and this court cannot therefore be seen to remove them from the terms of their agreement by determining this case as to do so would be tantamount to rewriting the agreement between the parties. (See ***Musimba Investments Ltd v Nokia Corporation*** [2019] eKLR.)

36. I further find that having filed an application to refer the dispute to arbitration, the defendants were not expected to enter appearance or file a defence in the suit until and unless the court determines the referral application by dismissing it thereby paving way for the filing of the defence and hearing of the suit. (See ***Niazons K Ltd v China Road & Bridge Construction (K)*** (2001)2 EA302).

37. For the above reasons and having found that there was the issue of the disputed amount of money due to the plaintiff, I find that both the

applications dated 20th November 2018 and 6th May 2019 are merited and allow them, albeit partly, in the following terms.

> ***a) There shall be a stay of the proceedings filed herein pending the reference to arbitration of the dispute arising between the plaintiff and the defendant in accordance with Clause 24 of their Agreement.***
>
> ***b) For avoidance of doubt, the reference to arbitration is only in respect to the disputed sum of Kshs 407,000,000/= in accordance with the agreement between the parties.***
>
> ***c) Judgment entered against the defendants herein on 29th April 2019 in respect to the disputed sum of Kshs. 407,000,000 together with all consequential orders are hereby set aside, while the judgment entered in respect the admitted sum of Kshs 223,000,000/= is hereby upheld.***
>
> ***d) The costs of the application shall abide the outcome of the arbitral award.***

Dated, signed and delivered in open court in Nairobi this 14th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. C. N. Kihara for the plaintiff.

Mr. Frazer for Ondieki for the defendant

Court Assistant – Sylvia