



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 135 OF 2011

TWIGA CHEMICAL INDUSTRIES LIMITED.....PLAINTIFF

-VERSUS-

ROTAM LIMITED.....DEFENDANT

RULING

1st APPLICATION

The Defendant/Applicant, by a Notice of Motion Application dated 28th June 2017 and filed on 4th July 2017, brought under the provisions of **section 3A of the Civil Procedure Act, Cap 21, Order 17 Rule 2(1) and 2(3) of the Civil Procedure Rules 2010**, and all other enabling provisions of the law and procedure sought orders;

- a) That this suit be dismissed for want of prosecution;
- b) That consequently, it be declared that the order given herein on the 20th day of December 2011 by Hon. Mr. Justice Njagi referring this matter to Arbitration, has now lapsed;
- c) That the Defendant be awarded the costs of this Application and of the entire suit.

The application is based on the following grounds;

- a) That the Plaintiff filed this suit on 8th April 2011 by way of Plaintiff and together with the Plaintiff, also filed an application seeking interim orders of injunction and for orders seeking that the matter be referred to Arbitration;
- b) That by the ruling delivered on the 20th day of December 2011 by Hon. Mr. Justice Njagi, the Plaintiff's Application for an Injunction was dismissed but the plaintiff was granted liberty to pursue its claims, if any via Arbitration;
- c) Since then, almost 6 years ago, the Plaintiff never took any steps to initiate or commence such Arbitration and it is fair that this matter be now brought to an end;
- d) It is apparent that the Plaintiff lost interest in the case and the same should therefore be dismissed particularly since the Defendant's witnesses are now no longer readily available.

REPLYING AFFIDAVIT

The Plaintiff opposed the application vide a Replying Affidavit dated 29th October 2017, sworn by Anantharaman Ramamurthy director of the Plaintiff. He avers that on 10th April 1997, the Plaintiff and the Defendant entered into an exclusive distributorship agreement whereby the Plaintiff was to be the distributor of the Defendant's products. The Plaintiff was to purchase the Defendant's products and exclusively sell them in Kenya.

That on 7th January 2011, without just cause, the Defendant issued a Notice of non-renewal of the distributorship agreement upon the Plaintiff. The Plaintiff was aggrieved by the aforesaid action taken by the Defendant and as a result the Plaintiff filed the present suit seeking *inter alia*;

i) Special damages for Ksh 43,872,197/-;

ii) General damages for loss of business and future expected earnings and indemnity for clientele;

iii) Exemplary punitive and aggravated damages

That the distributorship agreement contains an arbitral clause which is set out at **Article 13** as follows;

“In the event of any dispute arising out of or relating to this Agreement or in case of breach thereof the parties shall try in the first instance to arrive at an amicable settlement. Should this fail the dispute or breach shall be referred to and finally settled by arbitration by an arbitrator agreed by the parties.”

That the Plaintiff filed a notice of motion dated 7th April 2011 seeking inter alia that the dispute between the parties herein be referred to arbitration. Parties presented their respective submissions and the court reserved the ruling for 20th December 2011.

That the Defendant in a bid to circumvent the decision of the court in respect to the application for referral of the dispute to arbitration filed **HCCC NO. 553 OF 2011, Rotam Agrochemical Company Ltd –vs- Twiga Chemical Industries Ltd** on 8th December 2011. By the aforesaid suit, the Defendant sought a sum of **USD 597,600.41** being the alleged compensation for unpaid invoices of goods delivered to the Plaintiff as per the Distributorship Agreement.

That the ruling in respect to the Plaintiff’s notice of motion dated 7th April 2011 seeking *inter alia* that the dispute between the parties herein be referred to Arbitration was delivered on 20th December 2011. By the aforesaid ruling the Honourable Court directed that the dispute was accordingly referred to Arbitration.

That upon delivery of the aforesaid ruling, the Plaintiff filed its defence in respect to **HCCC NO. 553 OF 2011, Rotam Agrochemical Company Ltd -vs- Twiga Chemical Industries Ltd** and pleaded that the alleged debt which was the subject matter of the suit arose from the Distributorship Agreement between the parties and that an order had been issued in **HCCC NO. 135 OF 2011, Twiga Chemical Industries Ltd –vs- Rotam Agrochemical Company Ltd** directing that the dispute arising from the Distributorship Agreement be referred to Arbitration.

That despite the foresaid averments having been raised in the defence, the Court struck out the defence and entered judgment in favour of Rotam Agrochemical Company Ltd in the sum of **USD 597,600.41**.

That the Plaintiff was aggrieved by the aforesaid decision and a result filed an appeal against the decision being **Civil Appeal No. 16/2016; Twiga Chemical Industries Ltd -vs- Rotam Agrochemical Company Ltd**. The Appeal was scheduled for hearing on 29th November 2017.

That the Defendant’s act of instituting **HCCC NO.553 OF 2011, Rotam Agrochemical Company Ltd -vs- Twiga Chemical Industries Ltd** was mischievous. The Defendant ought to have awaited for institution of the arbitral proceedings and upon counterclaim whereat it would have presented its alleged claim against the Plaintiff. All the rival claims by the parties arising from the distributorship agreement would have been presented to the Arbitral Tribunal so that a final determination is made.

That parties have expended substantial time in litigation whereas the correct position was for both parties to have their rival claims determined in one arbitral process.

That despite the existence of the pending proceedings between the parties at the Court of Appeal ; in a bid to expedite the resolution of the dispute between the parties arising from the non-renewal of the Distributorship Agreement, the Plaintiff’s counsel wrote to the Defendant’s counsel on 5th June 2017 and suggested three (3) names of persons to be appointed as Arbitrators. The Defendant’s counsel was requested to nominate one (1) person to act as the sole Arbitrator.

That the aforesaid letter elicited no response from the Defendant’s counsel. Consequently, by a letter dated 21st July 2017, the Plaintiff’s counsel requested the Chairman of the Chartered Institute of Arbitrators to appoint an Arbitrator as per the provisions of the Arbitral clause.

That as at 12th September 2017, the Chairman of the Chartered Institute of Arbitrators had not yet appointed an Arbitrator. By a letter dated 13th September 2018, Counsel for the Plaintiff requested the Chairman to respond to the request of appointment of an arbitrator.

That by letter dated 19th September 2017, the Defendant’s Counsel requested the Chairman of the Chartered Institute of Arbitrators not to appoint an Arbitrator as requested by the Plaintiff’s counsel.

That the Plaintiff has a valid claim against the Defendant which is to be heard and determined by an Arbitral Tribunal. The Plaintiff has commenced the process of appointment of an Arbitrator, however the aforesaid process has been obstructed by the Defendant’s Counsel as deposed in the above paragraph.

That the Plaintiff’s previous advocate on record did not request for appointment of an Arbitrator on the basis that the appeal before the Court of Appeal should be concluded before commencement of Arbitration.

That the delay in referring the dispute to Arbitration is excusable and it would be unjust and indeed a miscarriage of justice to have the order issued herein directing that the dispute be referred to Arbitration vacated. The Defendant has not demonstrated any prejudice that it would

suffer if the dispute between the parties is referred to Arbitration and heard on its merits. Thus the orders sought herein by the Defendant ought not to issue.

2ND APPLICATION

The Plaintiff/Applicant filed an application dated 20th September, 2017 brought under **Section 12 (7) of the Arbitration Act, Order 46 Rule 5 of Civil Procedure Rules** and all enabling provisions of the law and sought the following orders;

1. The Court appoints as a sole Arbitrator any one of the undersigned Arbitrators.
2. The sole Arbitrator do proceed to hear and determine the dispute between the parties thereto
3. In the alternative, the Court to appoint any other sole Arbitrator to hear and determine the dispute between the plaintiff and Defendant.

By a Ruling delivered herein, the Court directed that the dispute between the parties referred to arbitration.

The plaintiff's Counsel wrote to Defendant's Counsel and suggested appointment of a sole Arbitrator from a list of names of persons that was submitted for that purpose. The Defendant's Counsel declined to nominate the Arbitrator to date.

The Plaintiff's Counsel requested the Chairman of Chartered Institute of Arbitrators to appoint an Arbitrator as per the provisions of the Arbitral clause.

The plaintiff has a valid claim against the Defendant which is to be heard and determined by the Arbitral Tribunal.

PLAINTIFF'S SUBMISSIONS

ONCE THE SUIT WAS REFERRED TO ARBITRATION, THERE IS NO PENDING SUIT BEFORE THE HIGH COURT

The Plaintiff submitted that Section 6 (1) of the Arbitration states;

“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.”

That there was no application made seeking stay of proceedings. Instead, the court by its Ruling of 20th December 2011 directed that the suit is referred to Arbitration. An invocation for stay cannot be by implication. It has to be by application as provided in **Section 6 of the Arbitration Act**.

The Plaintiff further submitted that the essence of filing the suit herein was to seek interim measures of protection under **Section 7 of the Arbitration Act** pending the hearing and determination of the arbitration. A ruling on the application was delivered on 20th December 2011 whereat the court declined to grant interim measures of protection and referred the matter to arbitration. Once the matter was referred to Arbitration, there is no suit before this Honourable Court that is capable of being dismissed.

In the case of **Safaricom Limited –vs- Ocean View Beach Hotel Limited & 2 Others**[2010]eKLR, the Court of Appeal stated as follows;

“In addition, after the grant or failure to grant an interim measure under section 7 of the Arbitration, there is no pending suit because the substance of the suit under section 7 is grant or refusal of interim measure itself.”

In the case of **Iris Properties Limited & Another –vs- Nairobi City Council** [2002] eKLR, the court held;

“It is implicit from Rule 8 of the Arbitration Rules, 1997 that the effect of staying the suit and referring dispute to Arbitration under section 6 of the Arbitration Act is to terminate the suit save the question of costs of the suit. If parties in a pending suit reach an agreement that the matters in dispute be referred to Arbitration and be determined in accordance with the Arbitration Act, the Arbitral Tribunal under the Arbitration Act supersedes the court in which the dispute is pending.

Further, the arbitral proceedings supersede the suit and the suit becomes spent save the question of costs of the suit.”

That the Plaintiff had a valid claim against the Defendant which was to be heard and determined by an Arbitral Tribunal. The Plaintiff had commenced the process of appointment of an Arbitrator, however that process was obstructed by the Defendant's Counsel.

That the Plaintiff's previous advocate on record did not request for appointment of an Arbitrator on the basis that the appeal before the Court of Appeal being **Civil Appeal No. 16/2016; Twiga Chemical Industries Ltd –vs- Rotam Agrochemical Company Ltd** should be concluded before commencement of Arbitration.

In the case of **Richard Ncharpi Leiyagu –vs- Independent Electoral Boundaries Commission & 2 Others [2013]eKLR**, the Court of Appeal held;

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

In the case of **Equity Bank Limited –vs- Andrew Kariuki (trading as Andrew Kariuki (A.K) & Co. Advocates [2016]eKLR**, the court states;

“I hold the view that dismissing the appeal without affording the appellant an opportunity to be heard will occasion serious prejudice to the appellant and will amount to driving a litigant from the seat of justice without a hearing. The interests of justice dictate lenient exercise of the discretion of the court in favour of the appellant considering the reasons offered to the delay.....”

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter....it would be unjust and a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of being heard especially so when the party has expressed a desire to be heard.”

DEFENDANT'S SUBMISSIONS IN SUPPORT OF NOTICE OF MOTION DATED 28TH JUNE 2017

The defendant submitted that the Plaintiff filed this suit on 8th April 2011 by way of Complaint and together with the Complaint, filed an Application seeking for orders that the matter be referred to Arbitration. The Plaintiff also sought for Interim orders of Injunction pending hearing and determination of the Arbitration. By the Ruling delivered on the 20th December 2011 by Hon. Justice Njagi, the application for an injunction was dismissed but the Plaintiff was granted liberty to pursue any further claims, if any, under Arbitration. However since then more than 6 years ago, the Plaintiff never took any steps to initiate or commence such Arbitration.

That it is only fair that this matter be now brought to an end particularly since as deposed in the Affidavit, the Defendant's witnesses, based in Hong Kong, are no longer traceable. As the Plaintiff took no action for more than 6 years and thereby made the Defendant believe that it had abandoned the Arbitration. It is apparent the Plaintiff lost interest in the case and it is unfair for the Defendant to continue having the suit “hovering over its head” indefinitely without closure.

The defendant in Response to **paragraph 7 to 14** of plaintiff's replying affidavit, reveals that instead of addressing the said simple issues, the Plaintiff has chosen to dwell on side –shows, irrelevancies and unsubstantiated criticism of the Defendant. For instance, the Plaintiff has unnecessarily devoted almost all the Affidavit to arguing and analyzing the merits and demerits of the substantive suit and giving a long history of the dispute herein. Which analysis and history do not answer the issue of want of prosecution raised herein.

Further, the Plaintiff refers to a separate and independent suit which is not before this court for determination and which is not in issue herein i.e **HCCC No. 533 of 2011** and the Appeal arising from that suit, **Civil Appeal No. 16 of 2016**. The existence of this other suit and Appeal thereto do not explain the issue of want of prosecution arising herein, since the party in that other suit and Appeal, **Rotam Agrochemical Co. Ltd** is clearly different from the present Defendant herein, **Rotam Ltd**.

That the present application should be limited to only the issue of “want of prosecution” and the Plaintiff should not therefore be allowed to convert this into a forum to reopen, re-litigate and/or complain about past decisions made by Judges in the other suit.

That Regarding the Plaintiff's purported sudden vigour to refer the matter to Arbitration, at paragraphs 14-18 of its Replying Affidavit, the Plaintiff admits and confirms that it was in 2017, that it had purported to commence steps to refer this matter to The Arbitration. Considering that the Orders of Njagi J. giving the plaintiff the liberty to refer the matter to dispute was made in December 2011, there is absolutely no explanation offered as to why it has taken the Plaintiff more than 6 years to do so.

The Plaintiff is hoping to scuttle and frustrate the present application by attempting to rush the appointment of an Arbitrator.

That apart from the Plaintiff's earlier statements made in the same affidavit, this attempted explanation is clearly misplaced and falls flat since as aforesaid, there is no Appeal pending in this matter. The Appeal referred to by the Plaintiff, **Civil Appeal No. 16 of 2016**, arises from a separate suit. **HCCC No. 553 of 2011** which concerns a different party, **Rotam Agrochemical Co. Ltd** and a different cause of action.

At paragraph 20 of its Replying Affidavit, the Plaintiff claims that the Defendant will not suffer any prejudice if the suit is retained. This statement clearly fails to take into account ground (d) of our application and paragraph 6 and 7 of our Supporting Affidavit in which it is clearly deposed that **“the Defendant's witnesses are now no longer easily traceable”** and the **“Plaintiff took no action for 6 years and thereby made the defendant believe that it had abandoned the Arbitration”**

In support of its submissions, it relied on the Court of Appeal decision in **Rajesh Rughani –vs- Fifty Investments Limited & Another [2016] eKLR**; the Judge in a unanimous decision states;

“In the instant appeal, the question is whether the appellant has given a satisfactory explanation for the over five (5) years delay in prosecuting the suit before the High Court and whether the delay was inordinate. The learned judge held that the delay was inordinate and no excusable and satisfactory explanation was given. The appellant in explanation for the delay states that it is due to inaction on the part of his previous advocate. In the memorandum of appeal, an explanation is offered by the appellant’s present advocate stating that he was not on record at the material time;....

In our analysis, the present advocate on record offers no explanation for the delay in prosecuting the suit between 24th October 1998 when the pleadings closed and 7th April 2005 when the application to dismiss the suit for want of prosecution was made. The period between these two dates needs explanation as this is the period of delay. Our re-evaluation of the records shows that no satisfactory explanation for the delay between 24th October 1998 and 7th April 2005 has been given all that is stated is that the delay is due to inaction by the appellant’s former advocate on record. There is no evidence on action taken by the appellant as the litigant and owner of the suit; all the appellant did was to change advocates in May 2005 after the delay; there is no explanation for inaction on the part of the appellant himself as the litigant who took the risk that his suit could be dismissed for want of prosecution.

It relied in the case of Argan Wekesa Okumu –vs- Dima College Limited & 2 Others [2015]eKLR, the Judge stated as follows;

“In paragraph 22 of the Supplementary Affidavit by the 3rd Defendant. It was stated that the 3rd Defendant had been prejudiced by the delay in the prosecution of this case as the suit continues to hang over it due to the inaction on the part of the Plaintiff. Even though I find that it is prudent to save a suit if justice will be done to the parties. It must be noted that justice delayed is justice denied. This court is enjoined by Article 159 2(c) of the Constitution of Kenya to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a Defendant that the dispute against it will be determined timeously. This is the view taken by Ochieng J. in Venture Capital and Credit Ltd –vs- Consolidated Bank of Kenya Ltd (2006)eKLR when the quoting from the case of Allen –vs- Sir Alfred McAlpine (1968) 1 All ER 543 at page 546 as follows;

“Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:

“The delay of justice is a denial of justice... to no one will we deny or delay right or justice. Over the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc.1). Dickens tells how it exhausts finances, patience, courage, hope (bleak house, C.1). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain.”

Cases cannot remain in court forever. They are for determination. There have been no action between 13th May 2010 until the present application was filed, and this suit is for dismissal for want of prosecution. Accordingly, I find the 3rd Defendant’s application to be meritorious. I will therefore allow the Application dated 12th Mach 2013 by the 3rd Defendant and order that the suit be and is hereby dismissed with costs to the Defendant’s

In Mobile Kitale Service Station –vs- Mobil Oil Kenya Ltd & another [2014]eKLR, Warsame J. states;

“I now come to the backbone of the application which is whether to dismiss the suit for want of prosecution. In my view dismissal of suit for want of prosecution is meant to prevent injustice and/or abuse of the process of the court.

The law permits before the court exercise its discretion it has to differentiate what is shadow and what is substance in order to exercise the discretion judicially. However a court can only revert to the discretion when there is valid reasons, excuses, mistakes, errors which are excusable but when there is no proper explanation then the court’s powers are limited. It becomes a judicial obligation to do what is expected under the situation. In my view there must be sufficient explanation for the delay so that the court may exercise its discretion to excuse the delay and not to dismiss the suit.”

DEFENDANT’S SUPPLEMENTARY SUBMISSIONS IN SUPPORT OF NOTICE OF MOTION DATED 28TH JUNE 2017

The Defendant submitted that the Plaintiff in its submissions raised an argument that there is no suit before the court capable of being dismissed, because the suit was referred to Arbitration which point was never raised in its Replying affidavit and procedurally, it is improper to introduce and/or sneak it in at this late stage, by submissions.

Further that this matter was not commenced by way of **Originating Notice of Motion** in which the only prayer that would have been sought would have been an order to refer the matter to Arbitration and perhaps, an additional interim order of Injunction pending the Arbitration. Had the Plaintiff commenced the matter in that procedure, then the proceedings before the court would have been spent once such Notice of motion was determined.

The Plaintiff chose a different route by commencing a formal suit by way of an ordinary Plaintiff. In the Plaintiff, Plaintiff sought substantive reliefs including a permanent injunction, special damages, exemplary, punitive and aggravated damages, costs and interest. The Plaintiff has no prayer whatsoever, to refer the matter to Arbitration.

That it is misleading for the Plaintiff to state at **paragraph 3.2** of its submissions that “the essence of filing the suit herein was to seek

interim measures of protections under **Section 7 of the Arbitration Act** pending the hearing and determination of the Arbitration". In view of the cited prayers made in the Complaint, this is clearly a deliberate misrepresentation.

That if this suit were to proceed to Arbitration, be heard and determined, the Arbitral Award will still have to be filed and registered in this same existing suit (cause) for the Court to adopt it and issue a Decree. Reference is made to **Rule 3 and 4 of the Arbitration Rules** which provides;

"3. (1) Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a judge in chambers and shall be served on all parties at least fourteen days before the return date.

(2) any other application arising from an application made under sub-rule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date.

4. (1) any party may file an award in the High Court.

(2) All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date.

(3) if an application in respect of the arbitration has been made under rule 3 (1) the award shall be filed in the same cause; otherwise the award shall be given its own serial number in the civil register"

DETERMINATION

The parties through their respective advocates sought to have both applications, one by the plaintiff and the other by the Defendant to be heard and determined together.

This Court considered the pleadings filed and submissions by both parties and the issues that emerge for determination are as follows;

a) Should the instant suit be dismissed for want of prosecution?

b) Is there a dispute for hearing and determination before the Arbitral tribunal?

c) Should the Court appoint the Arbitrator

a) Should the instant suit be dismissed for want of prosecution?

Order 17, rule 2 CPR 2010 provides;

"2. Notice to show cause why suit should not be dismissed

(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order."

The Plaintiff submits that there is no suit for dismissal as the Ruling by Justice Njagi of 20th December 2011 invoked **Article 13 of the Plaintiff's and Defendant's Distribution Agreement** which provides for arbitration as the forum of choice by the parties in dispute resolution. By virtue of the parties' Arbitration Clause/ Agreement the dispute was referred to arbitration.

Therefore, the dispute ought to have been arbitrated by now, 8 years later; there is no suit pending before Court as by virtue of the Arbitration Agreement the Court lacks jurisdiction to hear and determine the dispute.

The Court Ruling of 20th December 2011 is by a Court of equal and competent jurisdiction and can/may be appealed against only in the Court of Appeal. The Court Ruling has not been reviewed, set aside varied or amended in any way. In the absence of any of the above processes, the Ruling of 20th December 2011 remains a valid, legal and regular order of the Court and ought to be complied with. The evidence on record discloses that parties have not complied with the Court order even after the parties agreed that the dispute shall be heard and determined through arbitration.

National Bank of Kenya Ltd vs Pipeplastic SamKolit (K) Ltd & Anor [2000] eKLR 112;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract; unless coercion, fraud or undue influence are pleaded and proved...”

The court cannot change and/or interfere with the contracting parties' choice of forum in dispute resolution. The evidence pleaded confirms the uncontroverted facts that the Defendant declined to appoint an Arbitrator as provided in the Arbitration Clause. It is not prudent for parties to fail by design or default in complying with the Ruling of 20th December 2011 but seek to have the Court file where the Applicant filed for interim orders under **Section 7 of Arbitration** to be closed and the matter is not for Arbitration as ordered without any explanation. The Defendant declined to pursue and participate in arbitration. This conduct amounts to abuse of Court process. Due to these circumstances on non-compliance of the Court Ruling, although there is no suit for hearing by the Court; the application for the dismissal of the suit for want of prosecution is valid and has merit.

The Plaintiff pleaded that through his advocate wrote to the defendant on 5th June 2017 to appoint any of the 3 proposed Arbitrators and the defendant failed to respond.

When the Plaintiff's advocate wrote to Chairman of Chartered Institute of Arbitrators to appoint Arbitrator, the Defendant through his advocate wrote to the Chairman of Chartered Institute of Arbitrators on 19th September 2017 not to appoint an Arbitrator.

The Defendant while waiting for the Ruling of 20th December 2011, lodged Court proceedings in **HCCC 553 of 2011** and after Ruling of 25th March 2013, the Plaintiff lodged an appeal in **Court of Appeal No 16 of 2016**. Therefore, an Arbitrator could not be appointed awaiting the outcome of the appeal. This Court was not furnished with any documents to show parties and/or subject matter in the instant matter and **HCCC 553 of 2011** and **Court of Appeal No. 16 of 2016** are similar or separate matters. Secondly the outcome of **Court of Appeal No. 16 of 2016** was not disclosed to this Court. Therefore the Defendant's claim that the suit ought to be dismissed for want of prosecution without full frank disclosure of orders of the other matter mentioned, this court cannot conclusively determine the Plaintiff's claim to await decisions of this court pending appointment of Arbitrator was misplaced.

The Plaintiff's explanation for non-prosecution of the matter is credible, satisfactory and sufficient in the circumstances above. Whereas there is no suit for the Court to hear, the dismissal for want of prosecution shall take effect upon commencement of Arbitration proceedings as per the Arbitration Clause in The Distribution Agreement and as per the Ruling of 20th December 2011.

b) Is there a dispute for hearing and determination before the Arbitral tribunal?

The Defendant objected to Arbitration proceedings for the following reasons;

- a) That there is no dispute because the distribution Agreement terminated;
- b) The Plaintiff did not pursue arbitration from 2011 to date and the prolonged wait is a source of anxiety about a dispute hanging on;
- c) The potential witnesses cannot be reached/traced they returned to Hongkong.

To these issues, this Court reiterates the fact the parties freely contracted the Distribution Agreement. Its termination is the cause of action; it is/one of the issues of the dispute. Although the Distribution Agreement terminated, the Arbitration Clause /agreement is the subject of Arbitration by virtue of **Section 17 1 (a) Arbitration Act** which provides;

“The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement...”

Therefore, the issue of whether there is a dispute or not is to be determined at the parties forum of choice in dispute resolution-Arbitration.

On the issue of inordinate delay of the matter in Court, the circumstances disclosed confirm that both parties engaged in either another/similar dispute that stalled these proceedings as the parties await outcome of the appeal. Since the Defendant was/is aware /was involved in other proceedings with the Plaintiff over the same dispute, the Defendant cannot successfully plead inordinate delay.

Thirdly, the parties failed to comply with the Court orders vide the Ruling of 20th December 2011, the Defendant has also been part of circumstances that caused delay, the Defendant cannot then claim the matter has delayed and that the dispute's existence continues to cause uncertainty to the Defendant.

On the issue of the potential witnesses residing out of the country, again that fact will not vitiate the fact of whether there is a dispute or not and/or whether arbitration proceedings ought to take place or not, as the parties freely contracted terms of dispute resolution to be arbitration. It is an issue to be canvassed before the Arbitral Tribunal.

d) Should the Court appoint the Arbitrator?

The plaintiff's application is to the effect that this Court ought to appoint an Arbitrator on the basis of the fact that various attempts to appoint the Arbitrator pursuant to the Arbitration Agreement were futile because the Defendant declined to participate in appointment. The Plaintiff attached correspondence to confirm these facts. When the Plaintiff wrote to the Chairman of Chartered Institute of Arbitrators to appoint an Arbitrator, the Defendant through Counsel wrote to the Chairman of Chartered Institute of Arbitrators and instructed them not to

appoint an Arbitrator. There is an apparent stalemate between the parties.

This Court shall rely/refer to **Clause 13 of the Distribution Agreement** that provides;

“In the event of any dispute arising out of or relating to this Agreement or in case of breach thereof the parties shall try in the first instance to arrive at an amicable settlement. Should this fail the dispute or breach shall be referred to and finally settled by Arbitration by an Arbitrator agreed by the parties. Failing such Agreement the Arbitrator shall be appointed by the Chairman of the Kenyan Branch of the Chartered Institute of Arbitrators. Such arbitration shall be held in Nairobi in accordance with the Arbitration Act of 1995 as amended from time to time (Cap 49, of Kenya) and all rules prevailing thereunder. The Arbitrator shall have power to rule on his competence and on the validity of the Agreement to submit to arbitration. The costs of Arbitration shall be borne by the party against whom the judgment is entered and the ruling of the Arbitrator shall be final and binding on both parties.”

The Court and parties in the absence of a successful appeal or review are bound by the Ruling of 20th December 2011 that the matter is to be heard and determined by Arbitration.

Similarly, the Court is bound by the terms the parties contracted on appointment of Arbitrator in **Clause 13 of the Distribution Agreement** failure to which the Court shall as a last resort by virtue of **Section 12 (7) of Arbitration Act** appoint the Arbitrator which provides;

“The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.”

DISPOSITION

1. The application of 28th June 2017 has been partly granted and partly dismissed as follows;

a) The Suit will be dismissed for want of prosecution upon commencement of Arbitration proceedings

b) The orders of Justice L.Njagi vide the Ruling of 20th December 2011 cannot be declared to have lapsed in referring the matter to arbitration as this Court lacks appellate powers to sit on appeal of orders granted by a Court of equal and competent jurisdiction.

2. The application of 20th December 2017 is also partly granted and partly dismissed on the following grounds;

a) The appointment of Arbitrator shall be by Clause 13 of Distribution agreement; 30 days from today the appointment shall be by the parties;

b) If not, within 30 days thereafter, the appointment shall be by either party requesting the Chairman of Chartered Institute of Arbitrators;

c) If there is a deadlock/stalemate, either party may move this Court to appoint Arbitrator under Section 2 (7) of the Arbitration Act.

3. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 8TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MS NYAGA HOLDING BRIEF NGATIA FOR THE PLAINTIFF

N/A FOR THE RESPONDENT

MS JASMINE – COURT ASSISTANT