



**REPUBLIC OF KENYA**

**In re Estate of Silas Kagina Gichohi (Deceased)**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 167 OF 2014**

**EPCO BUILDERS LIMITED.....PLAINTIFF**

**- VERSUS -**

**KENYA AIRWAYS LIMITED.....DEFENDANT**

**RULING**

1. **EPCO Builders Ltd** (the plaintiff) filed this case seeking orders for financial remedies which it alleged were caused by **Kenya Airways Ltd** (KQ) as a consequence of breach of contract.

2. KQ on being served with the summons and plaint, filed a notice of motion dated **18th June 2014**, which is the application under consideration.

3. By that notice of motion application, KQ seeks that this suit be stayed pursuant to **Section 6 (1) of the Arbitration Act Cap 49**. The second prayer of the notice of motion is that the dispute, between the parties, be referred to arbitration in accordance with **Clause 17 (c) of the Housing Project Agreement (HPA)** dated **16th October, 2009**.

4. The clause 17 of HPA is in the following terms:

*“(a) Save as provided in clause 10 neither party shall assign this Agreement or any part thereof except with the prior written consent of the other party.*

*(b) The parties shall use their best efforts to settle amicably any dispute arising from or in connection with this Agreement or the interpretation thereof.*

*(c) If the dispute has not been settled amicably within fourteen (14) days from when the dispute resolution process was instituted, any party may elect to commence arbitration. Such arbitration 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 a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.*

*(d) Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act, 1995.*

*(e) The award of the Arbitrator shall be conclusive and binding upon the parties.”*

5. It is on the strength of the aforesaid clause that KQ, through the affidavit of **John Rono**, its senior legal counsel, deponed that since the plaintiff's claim was clearly a dispute that arises from HPA, the suit ought to be referred to arbitration by the letter and spirit of HPA.

6. The application was opposed by the plaintiff and through its learned advocate submitted that KQ was using the arbitration clause as a defence and to delay the case.

7. The plaintiff relied on the affidavit of **Ramji Devji Varsani**, its managing director. By that affidavit the managing director stated that following the plaintiff's letter dated **15th June, 2011**, whereby the plaintiff informed KQ that KQ's delay was adversely affecting progress

of the HPA, several meetings were held between the parties. One such meeting was held at the KQ's advocates office. That due to failure to have the matter resolved, the plaintiff by its letter to KQ dated **23rd January, 2014**, informed KQ, that if there was no admission of liability on their part, the plaintiff intended to file suit. The plaintiff proceeded to file this suit.

8. The learned advocate for the plaintiff, **Mr Mwangi**, by his oral submissions before court stated:

*“we agree and concede there is an arbitration clause.”*

9. The learned counsel proceeded to state that the plaintiff's opposition to the notice of motion stemmed from KQ's failure to settle the plaintiff's claim. Further that despite filing the present notice of motion, in **June, 2014**, KQ had delayed to have it fixed for hearing.

10. Learned advocate **Ms Malik** for KQ, responded to the allegations of delay, by stating that that delay was occasioned by illness of the then advocate for the plaintiff.

11. KQ's application is premised on **Section 6 of Cap 49** that section is in the following terms:

*“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.”*

12. The plaintiff in opposing the application relied on the case **Mordekai Mwangi Nadwa vs Provincial Insurance Company Ltd Kisumu High Court Civil Case No. 475 of 1995** which case is reported in the book, Odunga's digest on Civil Case Law and Procedure. The court in that case found that the defendant had taken several steps and after entering appearance was deeply involved in litigation by participation in the case, after entering an appearance. This the court found was manifestation of the defendant's waiver of the right to take the dispute for arbitration.

13. The case is distinguishable from this case, because in this case, KQ has not participated in the matter, and only filed a memorandum of appearance under protest and thereafter proceeded to file the application under consideration. KQ, therefore, fulfilled the conditions of granting a stay as provided under **Section 6 of Cap 49**.

14. It is important to state that both the plaintiff and KQ admit there was an arbitration clause in the agreement; The one reproduced above. They do not allege, at all, that the arbitration clause is null and void or inoperative or incapable of being performed. Both parties also agree that there arose a dispute as contemplated in the arbitration clause.

15. That being the case, there is no basis upon which this court can deny the application by KQ, for stay of proceedings. To do so would go against the wishes of the parties when they entered into their agreement.

16. The Court of Appeal in a five judge bench when considering whether a party has a right of appeal from a High Court decision on section 35 of the Arbitration act, in the case **Nyutu Agrovet Limited v Airtel Networks Limited [2015]eKLR Mwera JA**(as he then was) stated as follows:

*“My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, .....they desired limited participation by the courts in their affairs and that has been achieved..The courts, including this Court, should respect the will and desire of the parties to arbitration.”*

17. That holding of the Court of Appeal bears relevance in this matter. The parties in this matter agreed, by their arbitration clause, to take their dispute for arbitration. This court should respect the will and desire of the parties for arbitration.

18. The plaintiff cannot be allowed to oppose the application on the ground that KQ has delayed in prosecution of its application. It is the plaintiff that has put itself in the predicament it is in. It ought to have respected the arbitration clause in the agreement.

19. In the end, the application succeeds as follows:

*a. This suit is hereby stayed pending the parties dispute being referred to arbitration.*

*b. Parties shall refer their dispute to arbitration as provided in **clause 17** of their **Housing Project Agreement dated 16th October, 2009**.*

*c. The costs of the **Notice of Motion dated 18th June, 2014** are awarded to **Kenya Airways Limited**.*

**DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.**

MARY KASANGO

JUDGE

***Ruling read in open court in the presence of***

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant