



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 29 OF 2018**

**IN THE MATTER OF REFERRAL OF A DISPUTE TO ARBITRATION UNDER S. 59 (c) OF THE CIVIL PROCEDURE RULES  
CAP 21 LAWS OF KENYA**

**-AND-**

**MAHENZO COMMUNICATIONS LIMITED.....APPLICANT**

**-VERSUS-**

**THE COUNTY GOVERNMENT OF BOMET.....RESPONDENT**

**RULING**

This court in Misc Civil Case No. 19 of 2017 delivered a ruling on 18/5/2018 setting aside a consent order which consent read that the dispute between the applicant and the Respondent is hereby referred to an arbitrator for hearing and expeditious disposal.

Secondly, that the Chairman for the time being of the chartered institute of Arbitrators is hereby identified as the appointing authorities for purposes of appointing a suitable Arbitrator to hear and determine the dispute between the parties.

In the Notice of Motion application dated 23<sup>rd</sup> May 2018 the applicant seeks the following orders.

1. That the parties are hereby directed to commence de novo the necessary arbitral process pursuant to the judgment of the court delivered on 18<sup>th</sup> May 2018.
2. That the chairman for the time being of the chartered institute of Arbitrators be and is hereby identified as the appointing authority for purpose of establishing soon as practicable the necessary arbitral tribunal to hear and expeditiously determine the dispute between the parties.

**The main issue**

In this application is whether there is a valid arbitration agreement.

It has not been demonstrated that there was in existence a valid arbitration agreement. A plain reading of clause 18:2 shows the intention of the parties to have disputes arising from the contract resolved by alternative dispute process which process has to be mutually agreed. This boils down to the issue of consent.

Article 159 of the Constitution requires and encourages the court's to promote settlement of disputes by way of alternative dispute resolution. However, this is not mandatory.

In the case *Martin Otieno Okwach & Anor –vs- Kenya Post Office Savings Bank (2-140 eKLR)* it was held:

***“Unless parties consent to have the matter referred to arbitration under order 46 rule (1) of the civil rules, they are firmly stuck in the court system”.***

S. 3 of the Arbitration Act provides:-

***“Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not”.***

A reading of clause 18.2 does not reveal mandatory reference to arbitration. It therefore falls on the parties to enter into a consent for such referral. This court did find that there was no proper consent before it and did set aside the one entered.

It is not for the court to force the parties to follow the arbitration route.

Parties are still at liberty to enter into negotiations in default of which the matter can be filed in court in accordance with clause 18.2 of the agreement. The application is dismissed. Each party to bear their own costs.

Ruling dated signed and delivered this 3<sup>rd</sup> day of December 2018 in open court and in the presence of learned counsel for the applicant Mr. Opiyo, learned counsel for the Respondent.

Court assistant Mr. Rotich.

**M. MUYA**

**JUDGE**

**3/12/2018**