



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 295 OF 2015

MILICONS LIMITEDPLAINTIFF/RESPONDENT

VERSUS

MUMIAS SUGAR COMPANY LIMITED...DEFENDANT/APPLICANT

RULING

1. The Defendant's Chamber Summons Application dated **20th August, 2015** seeks orders that:
 1. **The Court do grant a stay of any further proceedings herein.**
 2. **The Court do direct that the dispute herein between the parties be referred to arbitration.**
 3. **The costs of the application be provided for.**
2. The application was filed pursuant to **Section 6 of the Arbitration Act**, and **Rule 2 of the Arbitration Rules 1997** and is supported by the affidavit of **RONALD LUBYA** annexed thereto. From that affidavit and the grounds set out in the Chamber Summons, it is the Defendant/Applicant's case that the dispute emanates from a construction works agreement which the parties executed on **30th May, 2011** for the construction of an Office Block for the Defendant Company at a total cost of **Kshs. 298,983,922,265/=**.
3. It is the case of the Defendant/Applicant that, by a letter dated **20th March, 2015**, the Plaintiff/Respondent lodged a claim for **Kshs. 99,409,032/=**, alleging that the same was still outstanding in respect of the aforesaid contract, which claim was unwarranted from the standpoint of the Defendant/Applicant. Accordingly correspondence was exchanged between the parties advocates to the aforesaid effect, the Defendant's position being that the additional works the subject of the claim, were undertaken without the Company's prior authorization. On account of the stand-off that ensued between the parties, the Plaintiff/Respondent filed this suit on the **16th June, 2015** for recovery of the outstanding sums together with interest and costs.
4. Since the construction agreement at Clause 45.1 provided that any dispute between the parties be determined by way of arbitration, the Defendant/Applicant, upon filing Memorandum of Appearance and Defence, brought the instant application in enforcement of that provision.
5. The Plaintiff/Respondent opposed the application on the grounds that:
 1. **Under Section 6(1) of the Arbitration Act (Cap 49 of the Laws of Kenya) an application to stay proceedings and refer the dispute to arbitration must be brought not later than**

the time when the Defendant enters appearance or otherwise acknowledges the claim against it.

2. **The Defendant/Applicant entered appearance on 21st July, 2015, filed a Defence on 13th August, 2015 and thereafter filed the instant application on 15th September, 2015.**
3. **Having filed a Defence to the suit, the Defendant/Applicant had waived his right to the arbitration clause and is therefore estopped from invoking the provisions of Section 6 of the Arbitration Act.**

The Plaintiff/Respondent therefore urged for the dismissal of the Chamber Summons dated 20th August, 2015.

6. The Court has carefully considered the instant application in the light of the supporting documents, the response thereto as set out in the Grounds of Opposition filed by the Plaintiff/Respondent on 8th October, 2015 the pleadings as well as the Written Submissions filed herein.
7. A perusal of the Court record does confirm that the Defendant/Applicant filed a Memorandum of Appearance on 21st July, 2015 and a Defence on 13th August, 2015. The instant Chamber application was not filed until 15th September, 2015 after close of pleadings, yet Section 6(1) of the Arbitration Act provides 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 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..."**

8. It is not the Plaintiff's contention that the arbitration agreement is null, void, inoperative or incapable of being performed or that there is no dispute between the parties. Accordingly the only issue to determine is whether the application for stay of proceedings and referral of the dispute for arbitration is time-barred.
9. A plain reading of Section 6 (1) of the Arbitration Act shows that such an application must be filed contemporaneously with the Memorandum of Appearance for it reads: **"...not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought."** (Emphasis supplied)
10. The aforesaid provision is couched in mandatory terms and authorities abound to support the position that such an application cannot be made after filing appearance or pleadings. In the Court of Appeal case of **Charles Njogu Lofty Vs Bedowin Enterprises Limited [2005]eKLR**, the Court expressed itself thus:

"...even if the conditions set out in paragraphs (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 to 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 pleadings or at the time of taking any step in the proceeding."

11. A passionate appeal was made by the Defendant/Applicant pursuant to Article 159(2)(c) of the Constitution, for the court to exercise its judicial authority with a view of promoting alternative forms of dispute resolution by referring this matter to arbitration, notwithstanding the specific requirements of Section 6(1) of the Arbitration Act and that by so doing, the court would be, in

effect freeing up time and other meager resources for other deserving cases. I however take the view that Section 6(1) of the Arbitration Act was not enacted in vain but to champion efficiency and due dispatch. The provisions therefore aid rather than hinder expeditious disposal of cases. Indeed in the case of **Raila Odinga vs. the Independent Electoral & Boundaries Commission & 3 Others** Supreme Court Petition No. 5 of 2013 the Court held that:

"The provisions of Article 159(2)(d) were never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law."

12. It follows then that the **Chamber Summons** dated **20 August 2015** having been filed almost three months after the Defendant filed his Memorandum of Appearance is clearly untenable and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF APRIL, 2016.

OLGA SEWE

JUDGE