



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 143 OF 2016**  
**SOSPETER GITONGA NJIRU T/A**  
**STEPPER ELECTRICAL & SUPPLIERS.....PLAINTIFF**  
**-VERSUS-**  
**NATION MEDIA GROUP LIMITED.....DEFENDANT**

**RULING**

[1] The Plaintiff herein, **Sospeter Gitonga Njiru**, trading as **Stepper Electrical Suppliers**, approached the Court vide his Plaint dated **26 April 2016** seeking judgment against the Defendant, **Nation Media Group Limited**, for the following relief:

- [a] Permanent Injunction restraining the Defendant from terminating their Distribution Agreement dated **1 October 2014**;
- [b] Full accounts be carried out on the business between the Plaintiff and the Defendant;
- [c] Damages for breach of contract as shall be assessed by the Court;
- [d] Interest at Court rates and for such period as the Court may deem fit;
- [e] Costs of the suit;
- [f] Such other or further relief that the Court may deem fit and just to grant.

[2] Contemporaneously, the Plaintiff also filed the Notice of Motion dated **26 April 2016**, which is one of the three applications pending herein, seeking restraining orders, *inter alia*, for the suspension of the Distribution Agreement, as well as orders compelling the Defendant to resume the Distribution pending the hearing and determination of both the application and the suit. The application was filed under Certificate of Urgency, whereupon on the **3 May 2016**, upon satisfying itself as to the sense of urgency expressed by the Plaintiff, the Court granted *ex parte* orders in terms of Prayers (2) and (5) of the Notice of Motion pending hearing of the application *inter partes*.

[3] Feeling aggrieved by the aforementioned *ex parte* orders of **3 May 2016**, the Defendant/Respondent filed the Notice of Motion dated **19 May 2016** seeking the following orders:

- [a] spent
- [b] That pending the hearing and determination of the application *inter partes*, the Court be pleased to stay the orders issued on **3 May 2016**;
- [c] That the Court be pleased to vary, discharge and/or set aside the orders issued herein on **3 May 2016**;
- [d] That the Court be pleased to stay these proceedings and to direct that the dispute herein be referred to arbitration in accordance with **Clause 16** of the Distribution Agreement dated **1 October 2014**;

[e] That the Court be pleased to issue any other order as it may deem appropriate;

[f] That the costs of the application be provided for.

[4] The application was supported by the Affidavit annexed thereto, sworn by **Sekou Owino** on **19 May 2016** in which the background to this application was given as follows: That the dispute between the parties relates to the Distribution Agreement dated **1 October 2014** pursuant to which the Defendant agreed to supply the Plaintiff with its publications, including newspapers for distribution and sale in the agreed territory for a fixed term of 12 months ending **1 October 2015**. That it was a term of the Agreement that the Defendant would only supply products against a weekly payment in advance in the sum of **Kshs. 3 million** in addition to the security guarantee given by the Plaintiff.

[5] It was further deposed by the Defendant that, by **Clause 7.2** of the Agreement, it reserved the right to suspend forthwith, without notice, deliveries of any supplies of the products to the Plaintiff in the event of breach of the payment terms; and that on diverse dates in **2015** and **2016**, the Plaintiff failed to pay for products delivered to him by the Defendant, such that by **February 2016**, the Plaintiff was indebted to the Defendant in the sum of **Kshs. 47,826,385.05**. The Defendant averred that on account of the breach, and in accordance with **Clause 13** of the Agreement, it suspended the supply of products to the Plaintiff pending regularization of the Plaintiff's account; and that in the interim, it appointed Caretaker Distributors to ensure that its publications were supplied to the territory previously covered by the Plaintiff.

[6] It was further averred on behalf of the Defendant that following the it proceeded to publish a tender for an alternative distributor, whereupon several applications were received, analyzed and a new distributor appointed in replacement of the Plaintiff. It was thus the contention of the Defendant that the new distributor has already acquired rights under their new agreement which would be detrimentally affected if the interim orders are not vacated; and that, in the same vein, the Defendant suffers the risk of being sued for breach of contract under the new agreement.

[7] The application was also pitched on the averment that, under **Clause 16** of the Agreement, any dispute arising in connection therewith would be resolved reference to arbitration; and therefore this suit was prematurely filed. For this reason, it was contended by the Defendant that the orders of **3 May 2016** were issued without jurisdiction. In support of this averment, the Defendant relied on **Section 10 of the Arbitration Act, Chapter 49 of the Laws of Kenya**. It further contended that the Plaintiff deliberately withheld the fact that there is an arbitration clause in the Agreement with the aim of deceiving the Court into issuing orders which it would otherwise not have granted. Therefore, it was urged, the Court has the inherent power to deprive the Plaintiff of any order or advantage gained by reason of such non-disclosure by setting aside the *ex parte* orders issued herein *ex debito justitiae*; and the power to refuse to proceed any further with the examination of the matter on the merits. It was, thus, the prayer of the Defendant that the orders of **3 May 2016** be set aside so as to enable the parties be heard for a determination on the merits.

[6] The Plaintiff responded to the application and the averments aforesaid vide his Replying Affidavit sworn and filed on **20 June 2016**, in which he deposed that he was rightly granted the orders of **3 May 2016** for the reasons that the Defendant had suspended the subject Agreement and appointed a new distributor without first referring the dispute to arbitration. He added that the Defendant also recalled the Bank Guarantees without audit and without notice, and therefore acted in flagrant breach of the Agreement. He contended that, at all material times, he was one of the top three distributors countrywide, always meeting his targets without default.

[7] The Plaintiff denied that he is indebted to the Defendant in the sum of **Kshs. 47,826,385.05** as alleged, contending that he would make payments on a weekly basis for his weekly supply of products from the Defendant, and therefore there was no way he could have accumulated such a debt. The Plaintiff exhibited his bank statements to augment his averment that it was the Defendant who breached the terms of the Distribution Agreement by unfairly suspending supply on the basis of a disputed debt without giving any proof in support of the alleged amount and without reference of the dispute to arbitration. He added that he only learned of the alleged termination and subsequent appointment of a new distributor from the Affidavit of **Sekou Owino** filed in support of the Notice of Motion dated **19 May 2016**, as no notice of termination was ever served on him by the Defendant.

[8] The Plaintiff therefore urged the Court to conclude that the Defendant, having acted in breach of the said Agreement, is precluded from relying on it for the purposes of arbitration. He contended that the orders of **3 March 2016** were made with requisite jurisdiction, from the standpoint of **Section 7(1) of the Arbitration Act**, which grants the Court the jurisdiction to grant interim orders before or during arbitral proceedings.

[8] The Defendant put in a Further Affidavit on **14 July 2016** in rebuttal of the Plaintiff's averments in the Replying Affidavit. He averred therein that the suggestion by the Plaintiff that the Defendant suspended the Agreement was untrue, and that it was the Plaintiff's status as a distributor which was suspended. The Plaintiff's claim that the Defendant called in the Guarantees without referring the dispute to arbitration and without carrying out an audit was similarly refuted, on the ground that there was no requirement in the Agreement for the Defendant to submit to any audit for sums due to it; and on the ground that reconciliation was to be done on a weekly basis, whereupon invoices would be sent to the Plaintiff.

[9] At paragraph 14 of the Further Affidavit, the Defendant provided details of dishonoured cheques that were issued to it, contending that it provided the Plaintiff with weekly detailed and itemized account of what was owing, and that the statements expressly provided that any queries be raised within 10 days of receiving each of the statements, which was not done. It was thus averred that the attempt by the Plaintiff to belatedly raise the issue of accounts amounts to wilful abuse of the Court process and should therefore not be entertained.

[10] Having carefully considered the application and the averments in the various affidavits filed in respect thereof within the backdrop of the Plaintiff and the written as well as the oral submissions made by Learned Counsel, it is indubitable that the parties

herein did enter into the Distribution Agreement dated **1 October 2014**. It is also not in dispute that vide **Clause 16** of that Agreement, the parties covenanted to have any dispute arising in connection with the Agreement referred to arbitration. That Clause reads thus:

**"This Agreement shall be governed and construed in accordance with the laws of the Republic of Kenya. In case of any dispute or difference arising between the parties hereto as to the construction of this Agreement or the rights duties or obligations of either party there under every such dispute and matter in difference shall be referred to a single arbitrator in accordance with the Arbitration Act..."**

[11] The foregoing being the case, the key issue that falls for determination is whether, in view of the arbitration agreement, the Court has the jurisdiction to entertain this matter, and by extension, whether the orders of **3 May 2016** should continue in place. In **Owners of Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA**, made this point thus:

**"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

[12] When the Plaintiff approached the Court on **27 April 2016** vide his Plaint and application dated **26 April 2016**, he sought interim orders to stay the suspension of the Agreement, and was thereupon granted interim orders. He did not disclose then that the said Agreement has the Arbitration Clause aforementioned, and he did not approach the Court for an interim measure of protection pending arbitration, pursuant to **Section 7(1) of the Arbitration Act**. It is now trite that, where parties have in their contract agreed that disputes be settled by way of arbitration, that agreement ought to be respected by the Court. This is not only a constitutional imperative, but is the only way available in such situations, for **Section 10 of the Arbitration Act**, provides thus:

**"Except as provided in this Act, no court shall intervene in matters governed by this Act."**

[13] The above provision was underscored by the Court of Appeal in the case of **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR**, in the following words of **Karanja, JA**:

**"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."**

[14] In the premises, it is manifest that this is a matter in which the Court has no jurisdiction to entertain, for the reason that the Plaintiff's invocation of the jurisdiction was not made in accordance with the provisions of the **Arbitration Act** as required by **Section 10** thereof. I note that Counsel for the Plaintiff did raise the question as to whether the Agreement, which was for 12 months from **1 October 2014** was still valid when this suit was instituted and in the face of the contention by the Defendant that it was terminated on **22 February 2016**.

[15] I take the view that that termination, whether by effluxion of time or by the Defendant, would not affect the arbitral agreement, given the principle of separability of the arbitral agreement. The principle was explained thus by **Nyamu, J** (as he then was) in the case of **Midland Finance & Securities & Another vs. Attorney General & Another [2008] eKLR**:

**"This means that the arbitration clause is regarded as constituting a separate and autonomous contract. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole. By surviving the termination of the main contract, the clause constitutes the necessary agreement by the parties, that any disputes between them should be referred to arbitration."**

[16] In the result, it is my considered finding that, in view of the clear mandatory provisions of **Section 10 of the Arbitration Act**, this Court lacks the jurisdiction to entertain the Plaintiff's application dated **26 April 2016** on the basis of which the interim orders of **3 May 2016** were made. Accordingly, the Defendant's application dated **19 May 2016** is hereby allowed and orders granted in terms of prayers 3 and 4 thereof.

Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2016**

**OLGA SEWE**

**JUDGE**