REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HCC MISCELLANEOUS CIVL APPLICATION NO. 199 OF 2015 (OS)

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CHAPTER 21 LAWS OF KENYA

AND

IN THE MATTER OF THE PARTNERSHIP ACT NO 16 OF 2012

AND

IN THE MATTER OF THE ORIGINATING SUMMONS FOR THE DISSOLUTION OF MUTHAURA MUGAMBI AYUGI&NJONJO ADVOCATES

BETWEEN

MURIUKI MUGAMBI.....PLAINTIFF

VERSUS

1. **SUZANNE MUTHAURA**

2. CAROLYNE AYUGI

3. WARINGA NJONJO

ALL T/A MUTHAURA MUGAMBI

AYUGI & NJONJO ADVOCATES.....DEFENDANTS

RULING

1. Before this court for determination is the respondent/applicants application brought under certificate of urgency and dated 6th July 2015. The application is filed by way of Chamber Summons pursuant to the provisions of Article 159(2) of the Constitution, Sections 6, and 7 of the Arbitration Act No 4 of 1995, Rule 2 of the Arbitration Rules, 1997, Sections 1A and 1B of the Civil Procedure Act, and all other powers and enabling provisions of the law.

2. The applicants seek from this court orders:

1. Spent

2. That there be a stay of proceedings in High Court Miscellaneous Application No 199 of 2015 pending hearing and determination of this application.

3. That the dispute between the parties be referred to arbitration as provided for in the partnership Deed dated 14th March 2005.

4. There be a stay of all proceedings herein pending reference of the dispute between the parties to arbitration, and pending the hearing and final determination thereof.

5. That the applicants be at liberty to apply for such further or other orders and/or directions as the Honourable court may deem fit to grant in the circumstances.

6. Costs of this application be awarded to the applicants.

7. The application is predicated on the grounds on the face of the chamber summons setting out the history of the dispute herein.

3. It is stated that the parties herein by way of a Partnership Deed dated 14th March 2005 (herein after called " the Deed") formed a partnership to practice in the name and style of Muthaura Mugambi Ayugi & Njonjo Advocates, as agreed more particularly set out in the Deed.

4. Further, that clause 27 of the said Deed provides for resolution of all disputes by arbitration; and therefore this suit has been instituted by the respondents in violation and total disregard of clause 27 of the said Deed.

5. The applicants further contend that the application (OS) by the respondents as filed and dated 2nd June 2015 is malicious, vexatious and an abuse of the court process with the sole objective of embarrassing the applicants herein, the firm and its clients causing irreparable reputational image, in order to blackmail and extort money from the respondents, to which the applicant/respondent is not entitled.

6. Further, the applicants contend that Section 6 of the Arbitration Act (NO. 4) of 1995 empowers the court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay proceedings and refer the parties to arbitration; subject to the exception therein, and that none of those exceptions apply to this suit.

7. The applicants are also said to be ready and willing without delay to proceed to arbitration, for determination of the disputes between the parties hereto on the alleged issues raised in the application dated 2nd June 2015.

8. The applicants also contend that a dispute does exist as set out in the supporting affidavit of Suzanne Muthaura and the annexed documents hence it is in the interest of justice that the orders sought herein are granted.

9. The Chamber Summons is further supported by the affidavit sworn by Suzanne Muthaura on 6th July 2015 whose depositions mirror all the grounds upon which the application is predicated. The said affidavit annexes several documents which include the Partnership Deed and maintaining that there is indeed a dispute between the parties capable of being referred to arbitration.

10. According to the deponent, such disputes(s) include:

a. Whether a balance sheet as at succession date and a profit and loss account for the period from the date of the last audited accounts to the succession date have been prepared by the continuing Partners as required by clause 23(c) as read with clause 17(a) of the Deed;

b. Whether the balance sheet has been prepared on the same basis as has been adopted in the partnership accounts as required by clause 23(c) of the Deed;

c. Whether the undrawn balance of the outgoing partner's share of the profits to the succession date has been paid to him as required by clause 23(d) of the Deed;

d Whether the continuing partners have paid to the outgoing partner a sum equal to the balance then outstanding to the credit of the outgoing partner's capital account as required by clause 23(e) of the Deed; and

e. Whether there shall be any accounting for good will in view of the provisions of clause 17(a) and clause 23(e) of the Deed.

11. In addition, Ms Muthaura deposes that the existence of a dispute is borne out of the numerous correspondence exchanged between the respective parties advocates which are annexed to her affidavit and those contained in the respondent's bundle of documents filed together with the Originating Summons herein.

12. It is further deposed that by a letter dated 13th June 2014, the applicants herein set out their final position on the various matters in dispute and inviting the respondent's to refer the outstanding disputes to arbitration but that the respondent has failed to exercise his rights under the said clause 27 of the Deed and is instead seeking to blackmail and extort money from the applicants by attempting to obtain punitive, extreme and destructive orders from this court such as - seeking to prohibit the applicants from dealing with the assets of the firm; appointing a liquidator of the firm under court superior to make payments to the respondent equivalent to any drawings and benefits received by the applicants since 1st January 2014 notwithstanding the fact that the respondent ceased to be a partner of the firm with effect from 30th June 2013; and provision of security for an exorbitant sum of shs 110,000,000.

13. The applicants' affidavit further charges at the respondent for acting in bad faith by making unwarranted complaints against the applicants and their advocates on record to the Law Society of Kenya alleging professional misconduct; and that the respondent is in breach of partnership confidentiality and client confidentiality by annexing documents containing information relating to client/partnership relationship at his pages 59-68 of his supporting affidavit.

14. The deponent further maintains that the parties are bound by their partnership agreement clause 27 on arbitration of disputes and therefore this court should exercise its powers under Section 6 of the Arbitration Act, 1995 to refer the dispute to arbitration for hearing and determination.

15. The application herein is vigorously opposed by the respondent who swore an affidavit in reply, which is undated but filed in court on 27th July 2015. Mr Mugambi's deposition adopts his supporting affidavit filed in support of the Originating Summons dated 2nd June 2015. He deposes that this application is brought in bad faith as it was filed on the eve of the hearing of the Originating Summons which is a deliberate attempt by the applicants herein to further delay, avoid and or fail to meet their obligation to faithfully render a true and accurate account of, and settle his lawful entitlement under the Partnership Deed, and to circumvent the clear provisions of the Partnership Deed without lawful justification.

16. the respondent contends that albeit a settlement was reached to dissolve the partnership between the parties hereto on 30th June, 2013, the respondents have refused to meet their obligations under the Deed or partnership Act and also refused to respond to correspondence since November, 2014 insisting that the matter is minor yet they have refused to render a true, fair and accurate account of the firm's value as at the succession date and his lawful compensation.

17. In addition, that the applicants have only considered this matter as serious after the respondent filed the OS herein.

18. That the applicants withheld material information of files in the List of Work in progress which legitimizes his fears that a true, fair and accurate account of the value of the firm will not be rendered by the applicants.

19. That in view of the above, this application is an abuse of the court process and is based on their unwillingness or inability to raise the finances requisite to settle his lawful entitlement.

20. That only preservatory orders will compel the applicants to render accounts and disclose to an independent party under the supervision of this court the full details of the extent of the firm's accounts and the exact sums due to him

21. That this stay application is a red herring move or concerted effort to further delay the final settlement of the sums which fell due on 31st December, 2013.

22. That clause 27 only generally for the reference to arbitration but is inapplicable to the specific matters the subject matter of the OS. that the respondent is seeking for his statutory crystallized rights under section 30 of the Partnership Act and clause 24 specifically deals with the question of dissolution of the partnership and specifically reserves the matters to the exclusive jurisdiction of the Partnership Act under which the OS is brought.

23. That his OS is devoid of any malice, blackmail or extortion which terms are used to lower his esteem in the eyes of the court.

24. That should the court be inclined to grant stay then a preservation order should be made pending arbitration process.

25. In a further affidavit sworn by Suzanne Muthaura and filed on 24th September, 2015, the applicants maintain that under section 6(1) of the Arbitration Act, an application for stay of proceedings and referral to arbitration can be made at any time prior to the filing of any pleadings in response to the suit by way of defense or replying affidavit.

26. That the application was not filed with undue delay as the applicants had to seek independent legal advise

27. That there was no bad faith in bringing this application.

28. That the depositions by the respondent clearly set out disputed matters of fact which disclose the existence of a dispute between the parties hereto which bring into operation the arbitration clause.

29. That there was no settlement reached on dissolution of the partnership but that the respondent was expelled from the partnership as provided for in the Deed. that the applicants had requested the respondent to attend to their offices to conduct an inspection as per the Deed but that the respondent has not responded. That they have not deliberately withheld any information from him.

30. That the respondent relies heavily on the same deed which provides for arbitration hence he cannot and probate approbate some parts of the Deed for his individual interest and that the Deed ought to be considered as a whole and particularly the dispute resolution clause.

31. That if the firm is wound up there would be nothing to be arbitrated upon. That what is before the court is stay and referral of the dispute to arbitration and not the application for interim relief.

32. The applicants contend that the dispute as per the respondent's own replying affidavit at paragraph 8 involves:

> a. whether a baleen sheet as at the Succession Date and profit and loss account for the period from the date of last audited accounts to the succession date have been prepared by the continuing

partners as required under clause 23(c0 as read with clause 17(a) of the Deed.

b. whether the balance sheet has been prepared on the basis as has been adopted in the partnership accounts as required by clause 23(c) of the Deed.

c. whether the undrawn balance of the outgoing partner's share of the profits to the succession date has been paid to him as required by clause 23(d) of the Deed.

d. whether the continuing partners have paid to the outgoing partner a sum equal to the balance then outstanding to the credit of the outgoing partner's capital account required by clause 23 (e) of the Deed.

e. whether there shall be any accounting for goodwill in view of the provisions of clause 17(a) and clause 23 (e) of the Deed.

33. That not only is the relationship between the parties governed by the Partnership Act but also by the Partnership Deed; that arbitrators interpret statutes and apply the law and hire experts to assist the arbitrators whose decisions are open to challenge under section 35 of the Arbitration Act hence courts do not have exclusive jurisdiction to apply and interpret the law.

34. That the respondent was expelled from the partnership under clause 22 of the Deed and any issues regarding his expulsion are arbitrable under clause 22(b) thereof and not the partnership being dissolved as alleged and that therefore there exists a dispute as to whether or not the partnership was dissolved.

35. That there was continuous communication between the parties before institution of this suit, with a view to amicably resolving the issues hence they never deliberately ignored to respond to any matters raised.

36. That they have fully discharged their fiduciary mandate under the Deed under clause 23.

37. That the arbitral tribunal has wide powers under the Deed including a decision that the partnership shall be dissolved.

38. That the dispute is whether or not the applicants have discharged their obligations under the partnership Deed which issue can ably be handled by an arbitrator.

39. That interim relief can only be sought under section 7(1) of the Arbitration Act. And that in any event the applicants are not in any way wasting assets of the firm which employs 34 workers and any attempt to liquidate it will cause exodus of clients hence loss of employment and livelihoods. That the respondent can adequately be compensated by an award of damages since he is not a partner or person interested in the winding up of the firm or creditor.

40. The parties' advocates argued the application orally in court, reiterating the depositions in the detailed affidavits as above, with Mr Murgor representing the applicants while Mr Sisule represented the respondent.

41. In his brief submissions, Mr Murgor submitted that at the heart of the matter herein is the Partnership Deed and clause 27 thereof which a comprehensive is and all inclusive the arbitration clause mandating that all disputes arising between the partners or outgoing partners must be referred to arbitration. He therefore maintained that the respondent's application dated 2nd June, 2015 cannot be heard and determined by this court as the matter is subject to arbitration as contemplated by clause 27 of the partnership Deed. Further, Mr Murgor submitted that this court is empowered under section 6 of the Arbitration Act to stay proceedings and refer the suit or any part of it to arbitration. Counsel further submitted that the applicants had come to court at the first opportunity as contemplated in section 6 of the Arbitration Act, before taking any other step in the matter. It was further submitted that the respondent was no longer a partner ad that the only issue in contention was what his rights were and or which part of

his claim had not been settled. Mr Murgor maintained that doors for amicable resolution of the dispute remained open even when the matter was pending before the Arbitral tribunal. He added that his clients ran a law firm in very difficult circumstances and that they had not effused to discuss the issues with the respondent but that they were being blackmailed and arm twisted to deposit Kshs 110,000,000 which does not exist and which is neither due to him. He maintained that there was an arbitrable dispute arising from the partnership Deed and that therefore this court lacked jurisdiction to determine the suit as filed and must refer it to arbitration.

42. In opposition thereto, Mr Sisule counsel for the respondent submitted relying on his client's replying affidavit and the authorities and annextures as filed, contending that jurisdiction was not contested but the question was whether parties should go to arbitration. Further, it was contended that despite the arbitration clause, the respondent chose to file suit in court because he left the firm on 30th June, 2013 under clause 23 of the Deed and was to be paid all his dues within 12 months but that it was clear from Ms Muthaura's affidavit and annextures that he had not been paid all the sums due to him and only part payment had been made by cheque. In addition, Mr Sisule submitted that no dispute had been declared by the respondent capable of being referred to arbitration as at the time of filing of the OS since the respondents letters to the applicants were never responded to until after he had instituted these proceedings. That the respondent had complied with clause 23 (a) of the Deed not to solicit or start a firm to try and get employees or clients of the former firm and he has not even taken out a practicing certificate. Counsel further submitted that whereas there was clause 27, there was also clause 24 dealing with dissolution of the partnership under the partnership Act so the respondent did not require going to arbitration. Further, that Article 159(2)(c) of the constitution asks the court to promote ADR but does not bind the court to send parties to ADR where the court has jurisdiction and can do justice by intervening. That the same article abhors delayed justice. In this case, it was submitted that the respondent had waited for 8 months and therefore this application for stay of proceedings is intended to delay justice since no dispute was declared. Further, that section 6 of the Arbitration Act was inapplicable to this case because no dispute had been declared and as no accounts had been given. Secondly, that section 6 does not apply in cases where the claim had been admitted as was in this case where there is part payment made and thirdly, that there is persuasive case law such as the Indian Supreme Court case of **Booz Allen Hamilton Inc v SBI Home Finance Ltd & others** that even if there is an arbitration clause the court will deal with the matters before it because an arbitrator cannot grant an injunction and winding up cannot be granted by an arbitrator. Fourth, that under section 7 of the Arbitration Act, the court has jurisdiction where it is just and equitable to grant interim reliefs which should be granted during the pendence of the arbitral proceedings should this court be inclined to refer the matter to arbitration, since the applicants continue to draw earnings while the respondent suffer. Mr Sisule also relied on the case of **Hezekiah Ndungui Njenga and Cylus Omula Ndewa** which enunciates the **Giella V Cassman Brown** Principles of grant of injunctions in the context of partnerships. Mr Sisule submitted that interim reliefs would put both parties at par since the respondent has no resources to deal with arbitration process. In his view, this application for stay of proceedings was made with the intention of frustrating the course of justice contrary to Article 159 (2) (b) of the Constitution. He therefore urged the court to dismiss the application with costs.

43. In a brief rejoinder, the applicants' counsel submitted that the OS never referred to section 6 and or 7 of the Arbitration Act but the Partnership Act hence the Arbitration Act was not available to the respondent to seek for interim relief where he had not invoked the court's jurisdiction to grant such orders. It was further submitted that there was no admission of the claim by the respondent as everything is contingent upon certain events happening. M r Murgor further submitted that it was upon the respondent to mitigate any loss since he was a qualified advocate to practice law. Further, that the issue of arbitration clause was not dependent on a party declaring that there was dispute and that no party to the Deed could avoid that arbitration clause by choosing to come to court, and that the applicants had identified areas of disagreement necessitating arbitration. He further submitted that the respondent not being partner could not apply to dissolve a partnership but that should any money fall due to him a s a former partner he will be paid. He maintained that the authorities cited by the respondent had no relevance to this case.

DETERMINATION

44. I have carefully considered the application by the applicants who are also the respondents in the main OS seeking to have these proceedings stayed and the dispute herein referred to an arbitral tribunal in accordance with section 6 of the Arbitration Act and clause 27 of the Partnership Deed. I have also considered the serious objections raised by the respondent/main applicant in the OS, the annextures relied on by each of the parties and the applicable instrument-Deed and the authorities cited by both parties advocates in their brief submissions.

45. the main issue for determination is whether this application is merited with several ancillary questions to be answered.

46. Section 6(1) of the Arbitration Act Cap 49 is the section that empowers the court to stay proceedings and to refer disputes for arbitration. For the court to stay proceedings under that section there must be a dispute between the parties. Section 6 provides:

> ***6. (1) 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 maters agreed to be referred to arbitration.***
>
> ***(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.***

47. The Court of Appeal had occasion to consider the provisions of that section in the case ***UAP PROVINCIAL INSURANCE COMPANY LTD –V- MICHAEL JOHN BECKETT [2013] eKLR*** *as follows:.*

> ***"It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.***
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> ***The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.***
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> ***The provisions in Section 6(1) (b) of the Arbitration Act are similar to the provisions of Section 1(1) of the Arbitration Act, 1975 of England before its amendment by the Arbitration Act, 1996…….***

In interpreting that provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no "real dispute." Lord Swinson Thomas LJ, captured the significance of the words "there is not in fact any dispute between the parties'"as used in the 1975 English Arbitration Act, and which appear in our section 6(1)(b), in the English case of Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 W l R 726 which presents striking similarly with the circumstances in the present appeal. We bear in mind that that case was decided under the 1996 Arbitration Act of England.

In Halki Shipping Corpn v Sopex Oils Ltd, ship owners applied for summary judgment against charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties and the charterers applied to stay those proceedings pending reference to arbitration. The issue in that case was whether there was a dispute within the meaning of the arbitration clause. Lord Swinton Thomas LJ stated at page 755 that:

"The words used in clause 9 of the charterparty in relation to a referral to arbitration were "any dispute." The words in section 1 (10 of the Act of 1975 are: "there is not in fact any dispute between the parties." To the layman it might appear that there is little if any difference between those words. However the legislature saw fit to draft section 1 using the phrase "not in fact any dispute." The legislature did not use the words "there is no dispute" and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrases "any dispute" and "not in fact any dispute" is of central importance in understanding what underlined the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words "not in fact any dispute" as opposed to "no dispute" have from time to time been interpreted by the courts as meaning "no genuine dispute," "no real dispute," "a case to which there is no defence." "there is no arguable defence", and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed "is indisputable due." The approach of the courts has on occasions been similar to that adopted by them in Order 14 proceedings in cases where there is no arbitration clause.

In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord. 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence."

48. The Court of Appeal in **Niazsons (K) Ltd versus China Road and Bridge Corporation (K) Ltd (2001) 2 EA 502 (CAK)** detailed the general guidelines when considering an application for stay of legal proceedings and a reference to arbitration. The Court held (*inter-alia*) as follows:

"All that that an applicant for stay of proceedings under section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application PROMPTLY. The Court will be obliged to consider three things: whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there is any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration."

49. Similarly in the case of **Corporate Insurance Co. vs. Wachira, [1995-1998] EA Pg 21,** the Court of Appeal held as follows:

"The arbitration clause was in the nature of Scott v Avery clause, which provides that all disputes shall be referred to arbitration ....a Scott v Avery can provide a defence to a claim but the party relying on it CANNOT circumvent the statutory requirement to apply for a stay of proceedings. If the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading. By filing a defence the appellant had lost the right to rely on the clause…'

50. The above position was echoed by Hon. Lady Justice J Kamau in the case of **Martin Otieno Okwach & Charles Ong'ondo Were T/A Victoria Cleaning Services vs Kenya Post Office Savings Bank [2014]e KLR** , wherein she stated that:

> ***"..although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having duly filed its statement of defence in this matter...unless parties consent to have the matter referred to arbitration under Order 46 Rule 1 of the Civil Procedure Rules 2010, they are firmly stuck in the court system. Indeed while Article 165 of the constitution gives the High Court Supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of section 10 of the Arbitration Act which provides that: except as provided in this Act, no court shall intervene in matters governed by this Act."***

51. **In Midroc Water Drilling Co. Ltd v National Water Conservation & Pipeline Corporation [2015] eKLR(** the defendant had filed defence before applying for stay of proceedings and referral to arbitration. the court rejected application for referral as it was seized of the matter

52. Applying the above principles, this court has to determine *whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there is any legal impediments on the validity, operation or performance of the arbitration clause in the Partnership Deed and whether the suit indeed concerns a matter agreed to be referred to arbitration.*

53. The first point of entry is that this court has jurisdiction under section 6 of the Arbitration Act No 4 of 1995 to stay proceedings filed in court pending the referral and hearing and determination of arbitral proceedings.. However before making such orders staying proceedings, the court has to satisfy itself that:

> a. The application seeking a stay of the proceedings with a view to having the matter referred to arbitration is presented to the court not later than the time when the applicant enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.
>
> a). That the arbitration agreement is not null and void, inoperative or incapable of being performed or
>
> b). That there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

54. It is not in dispute that this application was filed promptly and before the filing of any defence or other step taken in the proceedings. Although the respondent laments that it was filed on the eve of a hearing, suits originated by OS are never heard before directions are taken and in this matter, no directions as to the mode of hearing had been taken.

55. Secondly, there is no dispute that the parties' relationship is governed by the partnership Deed annexed hereto and that clause 27 thereof deals with resolution of disputes. None of the parties have alleged that ***there is any legal impediments on the validity, operation or performance of the arbitration clause or that the clause is*** void or inoperative.

56. What the respondent contends is that there is no dispute that has been declared by the parties to warrant referral to arbitration. That being the case, It is the duty of this court, as was held in the ***UAP PROVINCIAL INSURANCE COMPANY LTD –V- MICHAEL JOHN BECKETT [2013] eKLR*** to inquire and establish whether there is any real dispute or an arguable dispute between the parties hereto as envisaged in clause 27 of the Deed.

57. Clause 27 of the Deed provides-

> ***"27. Arbitration***

if at any time any dispute or question shall arise between the partners (including any Outgoing Partner) about the partnership or its accounts or transactions or its dissolution or arising out of or in connection with this Deed or its validity construction or performance then the same shall be referred to the decision of a single arbitrator to be agreed upon between the parties or in default of agreement within fourteen (14) days to be appointed at the request of either of them by the Chairman for the time being of the chartered Institute of Arbitrators (Kenya Branch) in accordance with and subject to the provisions of the Arbitration Act No.4 of 1995 or any statutory modification or reenactment thereof for the time being in force and the decision of the arbitrator(including a decision that the partnership shall be dissolved) shall be final and binding on all the partners and any Outgoing Partner.

58. From the foregoing authorities, statutory provision and clause 27 of the Deed, no doubt, the parties agreed to refer any dispute or question arising between them about the partnership or its accounts or transactions or dissolution, or construction of the Deed to arbitration by a single arbitrator.

59. The respondent in his OS claims that the applicants have totally refused to meet their fiduciary obligations due to him under the Deed and therefore not only seeks for the rendering of true accounts to enable a determination of what sums are due to him by the firm and disclosure of information, but also seeks for the winding up and dissolution of the partnership.

60. The above prayers by themselves are not of a plain case for recovery of a specific sum of money due to the respondent. It will involve the auditing of all the financial affairs, taking of accounts to determine how much the firm owes him, as well as appointment of a liquidator to wind up the affairs of the firm.

61. On the other hand, the applicants maintain that they have discharged their obligations under the Deed. That being the case, I find that there is real and genuine dispute as to what is due and owing to the respondent Outgoing partner by the firm. there is no undisputable specific sum due or admitted that it can be said that the applicants have no defense to the OS and are therefore using arbitration as a delaying tactic to avoid paying. Having brought this application at the first opportunity simultaneous with the filing of memorandum of appearance and before filing any defence, I find the application well founded in law.

62. Then there is the issue of the respondent seeking dissolution and winding up of the partnership. The applicants contend that the partnership cannot be wound up or be dissolved on application by the respondent since he is not a creditor or a partner thereof and that in the absence of any evidence that the firm is unable to settle quantified sums due to him. This court has examined both the Deed and the affidavits on record. In his affidavit, the respondent deposes that the partnership was dissolved, whereas the applicants contend that he was expelled from the partnership pursuant to clause 22 of the Deed. The question here is whether the partnership was dissolved as alleged by the respondent who is said to have been expelled from the partnership, *even when Clause 2: (a) thereof provides that the termination of the partnership with regard to a partner shall not terminate the partnership with regard to the other partners.* Clause 24 of the Deed provides that if the partnership shall be otherwise be dissolved the winding up of the business and undertaking of the partnership shall be administered in accordance of with the Partnership Act Cap 29 Laws of Kenya. The question is whether winding up administered under the Partnership Act belongs exclusively to the domain of the courts, which issue, again is a matter that the arbitral tribunal can determine whether it has the jurisdiction to give effect to the respondent's statutory rights under the Partnership Act, particularly when the said clause 27 goes further to provide that even ***a question concerning dissolution of the partnership shall be referred to arbitration*.**

63. The issues pointed out above also concern construction of the Deed and therefore fall within the ambit of the clause on arbitration. This court further finds that this is not the kind of case where the claim is admitted out rightly or where summary judgment can be given in favor of the respondent on the ground that the applicants herein have no arguable defense, since they contend that they invited the respondent for inspection of the books of accounts but he was nonresponsive.

64. This case, unlike in the **Julius Maina Kinoko v Hezekiiah Ndinguri Njenga T/A Tabby Services [2012[eKLR**, does not concern a simple issue of merely taking of accounts of the partnership/firm. It

calls for the winding up and dissolution of the firm.

65. The view of this court is that the arbitral tribunal too has jurisdiction to determine the extent of its jurisdiction and that from the many correspondence exchanged between the parties annexed to the original OS and the filing of this present application seeking referral of the dispute to arbitration was in itself an acknowledgment of the existence of a serious dispute between the respondent and his former partners, the applicants herein, wherein attempts to resolve the matter in an amicable manner had failed prior to institution of the suit.

66. The applicants herein were therefore in order when they filed this application seeking stay of proceedings to have the dispute between them and the respondent referred to arbitration in accordance with Section 6 of the Arbitration Act, 1995, to give effect to clause 27 of the Partnership Deed which binds parties thereto. The application was filed at the earliest opportunity, simultaneous with the filing of a Memorandum of Appearance as required under the Arbitration Act. There was also no assertion by the respondent that the arbitration clause which, like all arbitration agreements is governed by the doctrine of separability was null and void, inoperative or incapable of being performed.

67. The respondent did not demonstrate to the satisfaction of this court at what stage that clause would be enforceable if not at this stage when there is indeed an apparent disagreement between the applicants and the respondent Outgoing partner of the MNW partnership as to what is due and payable to the Outgoing partner and on the construction and enforcement of the terms of the Deed.

68. In the absence of any evidence to the contrary, it is the conclusion of this court that the arbitration clause was not null and void or incapable of being performed and the present application, which was brought timeously is competent and valid for determination.

69. This court does not phantom any bad faith or intention on the part of the applicants in bringing this application to overreach or steal a match on the respondent. Neither do I decipher any intention to delay or derail justice for the respondent advocate who is entitled to practice law and eke a decent living. I have also not seen any part of the partnership deed that bars him from engaging in independent legal practice after his departure from the partnership. If there was any such restriction, nothing prevents the respondent from seeking for orders to nullify that part of the Deed as being oppressive and denying him the right to work and eke a decent life, which in itself would be an unconstitutional restriction against the Bill of Rights. The applicants have also indicated that any monies being collected and due to the respondent shall be paid to him which then means that the applicants will not wait until the matter is resolved by arbitration before paying any monies that might fall due since the firm is a going concern.

70. The jurisdiction of this court to refer this matter to arbitration is also derived from the Constitutional enactments of Article 159(2) (c) of the Constitution which enjoin this court, in exercising judicial authority to be guided by the principles among others, that alternative dispute resolution mechanisms including reconciliation, mediation, **arbitration and** traditional dispute resolution mechanisms shall be promoted subject to clause (3).

71. In addition, Section 59 of the Civil Procedure Act Cap 21 Laws of Kenya too gives this court latitude to refer any suit to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.

72. In addition, Order 46 Rule 20 (1) and (2)of the Civil Procedure Rules 2010 stipulate that: ***"(1) Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution including mediation for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act."***

> ***(2) the court ay adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution."***

73. Under **Section 10 of the Arbitration Act, the** Court is prohibited from accepting arbitral matters where there are valid arbitration clauses but may assume jurisdiction on temporary basis in order to rule on the limits of its jurisdiction and play a supportive role (court no other body). Thus, the respondent or any of the parties are permitted under section 7 of the Arbitration Act to invoke the jurisdiction of this court for interim relief such as injunction among others to preserve the subject matter which is in danger of wastage or destruction, pending the hearing and determination of the arbitral proceedings. As the jurisdiction of this court has not been invoked under the said provisions, this court would not make any gratuitous orders in favour of any party.

74. It is clear from the above provisions that the court is mandated by the law to promote the use of ADR and the court is also vested in civil disputes to refer any matters it deems suitable for resolution by such appropriate methods for the attainment of the overriding objectives of the law as stipulated in Sections 1A and 1B of the Civil Procedure Act.

75. This court will therefore be acting within the legal confines to refer, on its own motion, this matter between the parties to an alternative dispute resolution mechanism under the parties' own binding agreement as it was a mandatory requirement under clause 27 of the partnership agreement that any dispute between them be referred to arbitration and that the decision of the arbitral tribunal would be binding upon them and would be final.

76. The above clause 27 which is binding on both parties to the partnership Agreement is clear that, parties are bound by the agreement for referral of "***any dispute or question arising between partners(including any outgoing partner) about the partnership or its accounts or transactions or its dissolution…..or its validity construction or performance ….***" Under the said clause, the parties also confer jurisdiction on the arbitrator to decide on whether the partnership shall be dissolved.

77. It therefore follows that in this case, referral of the dispute to arbitration was the only available avenue for the disputants herein to resolve their differences or questions arising between/among them, and outgoing partners concerning the partnership, and this court has not been availed with any contrary view.

78. From the foregoing, it becomes necessary to refer all disputes arising between the parties hereto that relate to the partnership to arbitration for the arbitral tribunal to determine the dispute, having found that the dispute herein is arbitral. See S **C of India CA 5440 of 2002 BOOZ ALLEN AND HAMILTON INC V SBI HOME FINANCE LTD AND OTHERS**. The issues that an arbitration body might deal with are contractual and any other defined legal relationship between the parties, since the Partnership agreement establishes a contractual relationship between the parties.

79. I find the authority of **ELCC 142 OF 2010 CYLUS OMULWA T/A FORT SMITH HIGH SCHOOL V ONDIEGI FRANCIS AUKA & ANOTHER[2010] EKLR** not useful to this application as it concerned the grant of injunction against managing partners and not whether or not the dispute between them was arbitrable.

80. In the end, I grant the application by the applicants staying this suit and referring it to arbitration as provided for under clause 27 of the Partnership Deed between the parties hereto dated 14th March, 2014 for a decision of a single arbitrator to be agreed upon between the parties or in default of agreement within fourteen (14) days from to date to be appointed at the request of either of them by the Chairman for the time being of the chartered Institute of Arbitrators (Kenya Branch) in accordance with and subject to the provisions of the Arbitration Act No.4.

81. The arbitral procedure including the constitution of the arbitral tribunal shall be governed by the will of the parties save that parties shall not confer powers causing conduct in a manner contrary to the mandatory rules and principles of public policy.

82. Each party to bear their own costs of this application**.**

Dated, signed and delivered in open court at Nairobi this 10th day of November, 2015.

R.E.ABURILI

JUDGE