REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 750 of 2008

- ***Section 6(1) of the Arbitration Act No. 4 of 1995 and Rule 2 of the Arbitration Rules, 1997, Section 3A of the Civil Procedure Act***
- ***Application for temporary stay of proceedings pending hearing and determination of application***

LAVINGTON SECURITY GUARDS LIMITED……PLAINTIFF

VERSUS

KENYA ELECTRICITY GENERATING COMPANY…… DEFENDANT

R U L I N G

The application is a Chamber Summons dated 29th January, 2009 expressed to be brought under section 6(1) of the Arbitration Act No. 4 of 1995 and Rule 2 of the Arbitration Rules, 1997 and Section 3A of the Civil Procedure Act. The Plaintiff, who is the Applicant in this application seeks the following orders:

2. That there be a temporary stay of proceedings pending the hearing and determination of the present application.

3. That the Honourable court be pleased to issue a stay of any further proceedings in this matter and thereupon do order that the matter herein be referred to arbitration.

4.That the Defendant/Applicants be at liberty to apply for such further or other orders and directions as this Honourable Court may deem fit to grant in the circumstances.

5. That the costs of this application be awarded to the Defendant.

The application is premised on the following grounds:

(a)Notwithstanding the existence of an agreement to refer disputes between the parties to arbitration for determination, the Plaintiff contrary thereto has invoked the jurisdiction of this Honourable Court.

(b) That the contract entered into between the Plaintiff and the Defendant contained an arbitration clause.

(c)That pursuant to the above cited clause, ANY dispute arising between the Defendant and the Plaintiff should be settled in accordance with the Arbitration Act.

(d) That it is therefore necessary to have the matter referred to Arbitration as the preferred mode of dispute resolution adopted by the parties in the contract entered into betwixt them.

The application is supported by an Affidavit sworn by the Company Secretary of the Defendant Company, one REBECCA MIANO dated 28th January, 2009. There is a further affidavit sworn by DENNIS ONWONGA dated 6th March, 2009 in answer to the replying affidavit.

The application has been opposed. MR. PIUS CHELIMO, the Managing Director of the Plaintiff has sworn a replying affidavit dated 3rd February, 2009. I have considered the application, the affidavits by both parties and the submissions made by the counsels, Mr. Odera for the Defendant/Applicant and Mr. Njuguna for the Plaintiff/Respondent.

This application has been brought by the Defendant and it seeks a stay of the proceedings and a reference of the matter to an arbitrator. It is the Applicant's contention that the contractual relationship governing the two parties to this suit was governed by an Agreement Contract Document annexed to the application. Under clause 15 of that contract it is contended that the parties chose a forum for dispute resolution. The Applicant's contention is that as provided under the Agreement, both parties were to endeavour to resolve the matter amicably, and that where the parties were unable to settle amicably the matter must be refereed to arbitration without any exemption whatsoever.

The Respondent who is the Plaintiff in this case has opposed the application on two grounds. The first ground is that the application is incompetent for reason it was not filed within the stipulated time. Under section 6 (1) of the Arbitration Act, it is the Plaintiff's contention that the Applicant should have filed for stay of the proceedings simultaneously with the entry of Memorandum of Appearance, before taking any step in the matter. The Plaintiff contends that the Defendant having filed an appearance on 15th January, 2009 and the application on 29th January, 2009, it lost its right to apply for stay of proceedings. For this preposition the Defendant relies on two cases: TM-AM Construction Group Africa, vs. Attorney General, Milimani, HCCC No. 236 of 2001 and Timothy M. Rintari vs. Madison Insurance Co. Limited, Milimani, HCCC No. 208 of 2004. The Plaintiff relied on a Court of Appeal Case, Civil Appeal No. 253 of 2003 [2005] eKLR, Charles Njogu Lofty v Bedouin Enterprises Limited. In that case, the Court of Appeal upheld the decision of the High Court on the grounds that the application for reference to arbitration must be filed not later than the time of filing appearance which was not the case.

In response to that point Mr. Odera argued that the Court of Appeal decision cited in the case of TM-AM Construction Group, supra, was not properly captured. Mr. Odera submitted that the Court of Appeal held that a Defendant could seek stay of proceedings at any time after filing appearance but before delivering any pleading. The Court of Appeal case cited in the TM-AM case, supra, was the case of Corporate Insurance Company v. Loise Wanjiru Wachira CA No. 151 of 1995. The Court of Appeal held:

"In the present case the appellant did more than just enter an appearance. It delivered a defence, which is of course a pleading, raising clause 10 of the policy as a defence. The appellant made no application for stay of proceedings. The appellant was a party to an arbitration agreement within the meaning of section 6 of the Act….Arbitration clauses such as clause 10 in the policy are known as "Scott v. Avery" arbitration clauses named after a leading case decided by the House of Lords in England way back in 1856 in which their efficacy was considered and have long been accepted as valid. These clauses do more than provide that disputes shall be referred to arbitration. They also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favourable award has been obtained.

…..In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause."

I have considered the arguments by both counsels. Section 6 (1) of the Arbitration Act 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 files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds –

(e) that the arbitration agreement is null and void, inoperative and incapable of being performed; or

(f) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made."

Under that section, a Defendant is permitted to apply for reference of the proceedings to arbitration either at the time of entering appearance or at any time before filing any pleadings, or at any time before taking any step in the proceedings. The three conditions set under section 6(1) of the Act are disjunctive and not conjunctive, which means that the argument by Mr. Njuguna for the Defendant is incorrect. The Court of Appeal put it very clearly in the Corporate Insurance Company Limited case, supra, where it stated:

"In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause."

The Applicant in this case entered appearance and then subsequently before taking any further step in the proceedings filed the instant application seeking to have the matter refereed to arbitration. I am satisfied that the application is not incompetent, that the Applicant has not waived its right to invoke the arbitration clause and have the matter referred to arbitration, and that therefore this application should be considered.

The second point by Mr. Njuguna is that there is no dispute to be referred to arbitration. Mr. Njuguna argued that the Defendant terminated the contract under ground 6 of the contract which provided for termination of a contract by giving a one month notice or three months fees in lieu of notice. Mr. Njuguna argued that the Letter of Termination/Notice gave the Plaintiff only 12 days notice and not the 30 days provided for under the contract. Mr. Njuguna argued that in those circumstances, the notice given by the Defendant did not comply with the terms of the contract and that there was no dispute as the contract was clear, a party was to pay for three months' fees in lieu of notice as set within the contract and that is what the Plaintiff has sued the Defendant for. Counsel argued that the mere refusal to pay the fees does not amount to a dispute. For that preposition counsel relied on the cases of TM-AM Construction Group case, supra, and High Court Civil Case No. 1691 of 2000, Express Diaries Ltd. vs. Tetra Park Limited and Another. At page 6 of the latter case, Justice Heweitt quoted with approval from Russell on Arbitration in Geomax Consulting Engineers vs. KPT, HCCC No. 1210 of 1996, as follows:

"Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a 'dispute' calling an arbitration clause into operation. It does not follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying."

Mr. Odera in response urged the court to refer to clause 6 of the Agreement, paragraph 2 where he submitted that the clause provided that where there is a breach, the Defendant could terminate the contract and that no notice period is given. Clause 6 states:

"6. TERMINATION

This Agreement shall unless extended by both parties terminate at the end of two (2) years from the date

hereof HOWEVER either party may terminate the Agreement by giving to the other party Thirty (30) days notice in writing or payment of Three (3) months the set fees and charges in lieu of such notice;

KenGen may without prejudice to any other remedy according to it for breach of contract terminate this Agreement in writing in whole or in part if: -

i) The Security Company frequently fails to provide services of high standards in the performance of this Agreement and

ii) The Security Company fails to perform any other obligation under this Agreement."

I have considered clause 6 of the Agreement between the parties. This clause provides for three modes of termination. The first mode is where the Agreement will stand terminated at the end of the two years contract period. The second mode is where either party terminates the Agreement by giving the other party 30 days notice in writing or pays 3 months' the set fees and charges in lieu of the notice. The third mode under this clause is exclusive to the Defendant. The clause provides that KenGen may without prejudice to any other remedy accruing to it by breach of contract terminate this agreement in writing, one, if the Security Company fails to provide services of high standard, and two, if the Security Company fails to perform any other obligation under the contract.

The letter of termination of the contract is annexed to the replying affidavit of Pius Chelimo. The letter provides in part:

"you have failed to perform the contract as required by the terms and conditions of the contract signed between us and yourselves and we therefore give you notice that this contract is terminated with effect from 30th September, 2008."

The letter is dated 17th September, 2008. It is very clear that the Defendant Company terminated the contract between it and the Plaintiff under the third mode as explained herein above. I do not agree with the Plaintiff that there is no dispute between the parties and that the case is plain and obvious; that the Plaintiff's claim against the Defendant is for fees as determined under the contract and therefore there is no dispute to refer to arbitration. I do find that there is in fact a dispute. The first dispute is whether there has been any breach between the parties and in line with that issue, whether any money is payable, and if so to which of the two parties.

Clause 15 of the contract between the two parties provides that all disputes without exemption should be referred to arbitration. I am satisfied that under Clause 15, the dispute in this matter should be referred to arbitration.

Having come to this conclusion, I find merit in the application dated 29th January, 2009 and issue the following orders.

1. That a stay of further proceedings in this matter be and is hereby issued and the matter herein referred to arbitration.

2. Costs to the Defendant

Dated at Nairobi this 8th day of May 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Oraro holding brief Mr. Odera for the Applicant

Mr. Ongicho holding brief Mr. Njuguna for the Respondent

LESIIT, J.

JUDGE