IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 138 OF 2013

BETWEEN

MUSIMBA INVESTMENTS LIMITED.....APPELLANT

AND

NOKIA CORPORATION.....RESPONDENT

(Being an appeal from the Ruling of the High Court at Nairobi (Khaminwa, J.) dated 8th June, 2010

in

HCCC No. 536 of 2008)

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JUDGMENT OF THE COURT

At the heart of this appeal is the construction of a term of a contract that provides for the settlement of all disputes arising from the contract by arbitration. In a terse three (3) page ruling delivered on 8th June 2010, Khaminwa, J dismissed with costs the appellant's notice of motion brought pursuant to **section 6** of the Arbitration Act, **section 59** of the Civil Procedure Act and **Order 45 rule 1** Civil Procedure Rules in which it had prayed for an order to stay the proceedings pending a reference to arbitration.

The background first. By a supply agreement executed by the parties on 21st January, 2006, the appellant was appointed by the respondent to be their purchaser and reseller of Nokia-branded mobile phones and accessories in Kenya. Pursuant to this agreement, the respondent contends that it supplied to the appellant various types of Nokia branded phones and accessories for sale; and that by 29th May, 2008 US$3,755,686.51 was outstanding on account of goods supplied. The respondent instituted an action against the appellant to recover this money together with interest.

The appellant responded to the suit by filing the aforesaid notice of motion in which it asked the court to stay proceedings before it so that, in accordance with the terms of the Supply Agreement, the parties could submit the dispute to arbitration.

The learned Judge considered the application, and finding no merit in it, rejected it, holding that although Clause 18 of the Supply Agreement provided for resolution of disputes arising from the agreement through arbitration, the same Clause permitted the respondent to bring any action in any local court of the agreed territory; that, by that clause, the respondent was entitled to bring an action for debt collection in the courts in Kenya; and that the appellant, having contracted not to contest the jurisdiction of the court or seek to raise a counterclaim or set off in another forum, it was bound.

Following that dismissal and being dissatisfied, the appellant has brought this appeal on seven but condensed into three grounds in the written submissions. The appellant contends, first, that the learned Judge, having found that there was a valid agreement with an arbitration clause erred in dismissing the application; that she erred by insisting that courts in Kenya could entertain the dispute; and that she failed to take into consideration the submissions, arguments, the relevant law and authorities.

The appellant insisted that it did not owe the respondent any money and maintained that there\` was indeed a dispute that ought to have been referred to arbitration in accordance with clause 18 of the agreement; that the parties had bound themselves by an exclusive jurisdiction clause ousting jurisdiction of the Kenyan Courts to determine the dispute and instead vested jurisdiction with courts.

Counsel for the appellant relied on the following authorities to persuade us; **United India Insurance Company & 2 Others V. East African Underwriters (Kenya) Ltd**, Civil Appeal No.36 of 1983 for the positon that the exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement. **Kaniti & Co. Ltd V Southern British Insurance Co. Ltd**, Civil Appeal No. 39 of 1980 to urge that it must be an equivocally stated in the contract that jurisdiction to entertain legal proceedings is exclusively conferred or reserved for the court of a particular country to the exclusion of other jurisdiction and; **Kisumuwalla Oil Industries Ltd V. Pan Asiatic Commodities PTE Limited & Another**, Civil Appeal No.100 of 1995 to state that a party in taking advantage of an arbitration clause has to satisfy the court that it was and still is ready to do all that is necessary to the proper conduct of the arbitration.

The respondent, on its part, submitted that the issue in dispute was the respondent's pursuit to recover the debt owed to it by the appellant for goods supplied under the aforesaid supply agreement; that the agreement permitted the respondent to recover the debt by a suit in local court; that reference to "local courts" in clause 18 could only mean Kenyan Courts where the contract was performed and where the appellant carries on business.

At the core of this dispute is Clause 18 of the supply agreement, which we reproduce hereunder. In it, the parties contracted to, among other things, refer all disputes arising out of or in connection with the terms of the agreement to;

> **"18..... one arbitrator appointed in accordance with the said Rules. The arbitration proceedings shall be conducted in Helsinki, Finland in the English language. The award shall be final and binding on the Parties and enforceable in any court of competent jurisdiction.**
>
> **Notwithstanding the foregoing,**
>
> **(i) nothing herein prevents Nokia from applying to the courts of any country for injunctive or other equitable relief to prevent or curtail any breach of these Terms or enforcement of an arbitral award,**
>
> **(ii) Nokia shall have the right to proceed any disputes (also debt collection) in the courts of the agreed Territory, or any other local court. Should Nokia use this right, Buyer agrees not to contest the jurisdiction of the court or seek to raise any counterclaim or set off in another forum."** (Our emphasis).

The language of this clause is plain and straightforward. One of the principles of contractual interpretation is that parties have the freedom to contract; to contract even to resolve their disputes away from the courts; and that courts should not re-write terms of a contract for them.

We restate the words of Lord Neuberger, the former President of the Supreme Court of the United Kingdom, in **Arnold v Britton** [2015] UKSC 36 that:-

> **"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para**
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> **14. And it does so by focusing on the meaning of the relevant words".**

See also the decision of this Court in the **National Bank of Kenya Ltd V. Pipeplastic Samkolit (K) Ltd** [2002]2 EA 503, where the Court reiterated that a court of law cannot re-write a contract for the parties; and the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

The import of Clause 18 is not complex but because of its importance and relevance to the determination of this appeal, we rehash it below by way of paraphrase.

It was envisaged in the agreement that, like all undertakings such as the one in controversy, disagreements do occur. To prepare for this, the parties covenanted that in case of a dispute, it would be settled through arbitration by one arbitrator; that the arbitration proceedings would be held in Helsinki, Finland; that it would be conducted in the English language; and that the award would be final and binding on the parties and enforceable in any court of competent jurisdiction. The requirement for resolving the differences by arbitration notwithstanding, the respondent was, by an express term not precluded from instituting proceedings in the courts of the agreed territory or any other local court, for collection of debt, injunction or other equitable relief or for the enforcement of an arbitration award. The appellant contracted not to protest the jurisdiction of these courts.

Which court or courts did the parties envisage? The clause alludes to **"a court of any country"** in relation to an application for injunction and other equitable relief. It refers to **"the courts of agreed territory"** or **"any other court"** in respect of proceedings for debt collection. There can be no valid debate as to the intention of the parties; that the courts in Kenya would be the forum for the respondent's pursuit to recover the debt from the appellant. This is because the contract was performed in Kenya and the appellant carried out business in Kenya. It could not have been anywhere else.

The motion by the appellant was predicated on the provisions of **section 6** of the Arbitration Act and **Order XLV rule 1** of the repealed Civil Procedure Rules whose combined effect is that parties, who, by agreement, would wish that any matter in difference between them be resolved by reference to arbitration, may apply to the court for an order of reference. A party may, however apply, under **section 6** aforesaid

to stay the proceedings in order to refer the dispute 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".**

Whether or not to grant an order of stay of proceedings is a matter of judicial discretion. In the famous dictum of Lord Mansfield in **Rex v. Wilkes** (1770, K. B.) 4 Burr. 2527, 2539 that has been adopted in many jurisdictions including Kenya, it was declared that;

> **"Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."**

It is for this reason that an appellate court will not ordinarily interfere with the exercise of discretion by the trial judge unless it is shown that the trial judge misdirected himself and arrived at a wrong decision.

Under **section 6** aforesaid, it lies within the discretion of the court whether or not to grant an order of stay of proceedings. As this Court observed in **Esmailiji v Mistry Shamji Lalji & Co** [1980] eKLR, the following four principles lifted from the judgment of Lord Brandon, J. in the English High Court, (Probate,

Divorce and Admiralty Division) in **The "Eleftheria,"** 1969 1 Lloyd's Law Rep 237 at page 242, will guide the court in the exercise of its discretion in situations like this one.

> **"....(1) the court is not bound to grant a stay but has a discretion whether to do so or not.**
>
> **(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.**
>
> **(3) The burden of proving such strong cause is on the plaintiffs.**
>
> **(4) In exercising its discretion the court should take into account all the circumstances of the particular case."**

Did the learned Judge properly apply the principles for the grant of an application for stay under **section 6**? We are, with respect, unable to disagree with the conclusion reached by the learned Judge. Although the agreement explicitly directed that disputes arising out of or in connection with the terms of the agreement would be settled by one arbitrator; and that the arbitration proceedings would be held in Helsinki, Finland, the same agreement also expressly gave the respondent the latitude and liberty to recover by suit instituted in **"a court of any country"**, any money that be outstanding from the appellant or to apply to **"any other court"** or to **"the courts of agreed territory"** for injunction and other equitable relief.

The exclusive jurisdiction clause in this agreement was not entirely exclusive, as it allowed certain disputes to be instituted in courts and in jurisdictions outside Finland.

In conclusion, we are of the considered view that this was not a proper case for staying the proceedings, and the rejection of the appellant's application was a proper exercise of discretion by the learned judge. Accordingly, this appeal lacks merit and is dismissed with costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR