



**COURT OF APPEAL OF KENYA AT NYERI**

**SITTING IN NAKURU**

**(CORAM: G.B.M. KARIUKI, F. SICHALE, & S. KANTAI JJA)**

**CIVIL APPEAL NO. 75 OF 2017**

**BETWEEN**

**ADREC LIMITED.....APPELLANT**

**AND**

**NATION MEDIA GROUP LIMITED.....RESPONDENT**

***(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi (Nzioka, J.) dated and delivered on 19th January 2017***

**in**

***H.C.C.C NO. 448 of 2016)***

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**JUDGMENT OF THE COURT**

1. The appellant, Adrec Limited, is described in this appeal as a Limited Liability Company in Kenya. It was aggrieved by a decision made by the High Court (G. L. Nzioka J.) sitting in Nairobi in Civil Suit No.448 of 2016. It has appealed against it in this appeal.
2. In Nbi H.C.C.C. No.448 of 2016, the appellant sued the respondent, Nation Media Group Limited, described as a limited liability company carrying on business in Kenya allegedly for breach of terms of a distribution agreement.
3. The record of appeal shows that, the appellant entered into a Distributorship Agreement with the respondent. The terms and conditions in the Distributorship Agreement included an arbitration clause to the effect that disputes between the parties would be settled through arbitration.
4. Contemporaneously with the institution of the said (No.448 of 2016), the appellant filed an application by way of a notice of motion dated 4th November 2016 seeking inter alia orders for injunction to restrain the respondent from calling for or realizing the Bank guarantee against it (the appellant) pending the determination of the application and the determination of the suit.
5. The respondent's advocates did not file a defence to the suit but they filed a notice of appointment of advocates on 7th November 2016 and an application dated 16th November 2016 seeking orders for stay of the proceedings and reference of the matter to arbitration in accordance with clause 16 contained in

6. The High Court (Nzioka J) after considering the application by the appellant and the application by the respondent came to the conclusion that the appellant and the respondent were bound by the terms of the Distributorship Agreement that enjoined them to refer the dispute to arbitration and consequently made a finding that it was bound by the provisions of section 6 of the Arbitration Act to stay the proceedings in the High Court. Accordingly, the High Court issued an order staying the suit and referred the dispute to arbitration in line with the arbitral clause in the Distributorship Agreement. This is the decision that provoked this appeal by the appellant.

7. In its memorandum of appeal, the appellant impugns the High Court decision on 15 grounds which we find unnecessary to set out here as they can be summarized. The appellant contends the said grounds that the learned judge erred in not hearing the appellant's application for injunction and instead proceeding to hear and determine the respondent's application for stay; that the respondent argued a preliminary objection before the learned judge and not an application as the learned judge held; that as a result, the appellant was denied his right to be heard contrary to the principles of natural justice; that the learned judge did not correctly interpret section 6(1) of the Arbitration Act; that the learned judge ought to have found that a step had been taken in the suit and the court had jurisdiction to hear the matter; and that the order for stay was made in error.

8. When this appeal came up for hearing before us on 13th November 2017, Mr. Kimandu Gichohi, learned counsel for the appellant, urged that the learned judge misdirected herself in the impugned decision by ruling on the application for stay instead of the preliminary objection. It was counsel's contention that the application for stay was not before the learned judge and parties did not opt for arbitration. Counsel urged the court to allow the appeal and set aside the impugned ruling.

9. On her part, Miss Ogula, learned counsel for the respondent urged that the application for stay by the respondent was on record and as it related to the issue of jurisdiction, it took priority. It was the respondent's counsel's submission that the learned judge cannot be faulted as the issue of jurisdiction came first.

10. This being a first appeal, we have a duty to give the parties a retrial by re-evaluating the evidence and making our own findings and conclusions on the basis of the evidence adduced at the trial. In this appeal, no oral evidence was tendered. The facts and evidence were contained in the pleadings and depositions placed before the trial court. The facts not in contest are that the parties had a Distributorship Agreement that contained an arbitral clause that enjoined the parties to refer to arbitration disputes between them arising from the Distributorship Agreement. When, according to the appellant, the respondent breached the Distributorship Agreement by, allegedly arbitrarily changing the sales territory (that is to say altering the geographical area in which the appellant was entitled under the agreement to sell the respondent's goods, to wit newspapers) the appellant took the matter to the High Court by filing the said suit against the respondent seeking, inter alia, injunction to restrain the respondent from changing the sales territory and from calling for or realizing the Bank Guarantee. Consequent upon service of the pleadings being effected, the respondent ostensibly instructed its advocates, messrs Iseme, Kamau and Maema who filed on 7th November 2016 a notice of appointment of Advocates and an application seeking an order for stay of the suit as aforesated.

11. In the impugned ruling dated 19th January 2017, the learned judge found that the respondent did not waive or lose its right to rely on the arbitral clause in the Distributorship Agreement and therefore stayed the suit and referred the dispute to arbitration, thus allowing the respondent's application.

12. The issue in this appeal is whether in the circumstances of this case, the learned judge was right in staying the suit as he did. The answer to this is to be found in the Arbitration Act, Chapter 49 of the Laws of Kenya whose Section 6 states-

***“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 matters agreed to be referred to arbitration.***

***6. (2) proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.***

***6. (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.***

13. The genesis of the dispute relating to the High court suit No.448 of 2016 was the Distribution Agreement dated 26th March 2014 between the appellant and the respondent whose clause 16 stated –

**“ARBITRATION**

***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, (1995) Laws of Kenya or any act amending or replacing such Act. The said arbitrator shall be agreed upon mutually between the parties and failing agreement within fourteen***

***(14) days from the date of the notice of dispute the arbitrator shall be appointed at the request of either party by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch).”***

14. It is not in dispute that the Distribution Agreement was valid and that it contained in clause 16 the above arbitral clause. It is also a fact that a dispute exists between the appellant and the respondent with regard to the question whether the respondent has breached the Distributorship Agreement by arbitrarily charging the sales territory two times, once to Thika Road and currently to Donholm. The suit brought in the High Court by the appellant relates to a matter which is the subject of an arbitration agreement, vide clause 16 of the Distributorship Agreement. Consequently, in pursuance with Section 6(1) of the Arbitration Act, it was open to the respondent to apply “not later than the time when the respondent entered appearance or otherwise acknowledged the claim against which the stay of the suit was sought. The record shows clearly that the respondent merely filed a notice of appointment of advocates and proceeded to apply for stay of the suit. Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the Arbitration Act. It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position.

15. In **FAIRLANE SUPERMARKET LIMITED VERSUS BARCLAYS BANK LTD NBI HCCC NO.102 OF 2011**, this court held that –

***“the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE***

**COMPANY VS. WACHIRA (1995-1998) IEA 20, it was held that 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 and that the appellant had lost its right to rely on the arbitration clause by filing a defence ...**

**any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”**

16. In this appeal the learned judge was entitled to deal as a matter of priority with the issue of stay as it related to jurisdiction. In the memorable words of justice of appeal Nyarangi JA in the case of OWNERS OF MOTOR VESSELS LILIAN V. CALTEX OIL KENYA LTD [1989]

**“...jurisdiction is everything. Without it, a Court has no power to make one more step... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

17. The Constitution of Kenya 2010 recognizes alternative dispute resolution mechanisms including arbitration. Parties have the freedom of contract and even to resolve their disputes away from the courts subject to supportive court intervention in specific areas of law to ensure fairness in the arbitral process. The respondent was perfectly entitled to seek and obtain stay of the suit as it did. It is our finding that the learned judge was spot on her decision (in ordering stay). We uphold that decision.

18. We find no merit in this appeal. We dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 15th day of December 2017.**

**G. B. M. KARIUKI SC**

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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**