IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO 247 OF 2012

BETWEEN

LAISER COMMUNICATIONS LIMITED…..……1ST APPELLANT

WIRSOFT AGENCIES LIMITED……..……..2ND APPELLANT

AYOON COMMUNICATIONS LIMITED……...3RD APPELLANT

EMERALD LIMITED ……..……4TH APPELLANT

TAICOM LIMITED…….5TH APPPELLANT

SASHAMONEY LIMITED……..……6TH APPELLANT

AND

SAFARICOM LIMITED…….…….RESPONDENT

(*an appeal from the ruling and order of the High Court of Kenya at Nairobi (Musinga, J.) dated 11th June 2012*

in

H.C.C.C. No 196 of 2011)

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JUDGMENT OF THE COURT

The appellants and the respondents were parties to dealer agreements and M-Pesa agency agreements through which the appellants provided customers with the respondent's products and services. At some point in time, each of the appellants separately dealt with one Abdifatah Ali Alio who ordered an array of the respondent's products. It later emerged that the said Abdifatah Ali Alio was a fraudster who had colluded with some of the respondent's employees to defraud the respondent. The appellants alleged that thereafter, the respondent unlawfully, unfairly and uncontractually held them liable for the fraud. The respondent penalized the appellants by purporting to reverse the payments made and by suspending their dealer agreements and M-Pesa accounts.

This prompted the appellants to sue the respondent in the High Court, where they claimed that as a result of the respondent's actions, they suffered massive financial losses and damage. They also filed an application for injunction in which they asked the court to prohibit the respondent from acting in a manner that would prejudice their dealer and M-pesa agency agreements. That application was dismissed with costs to the respondent. In addition, the court also made the following remarks:

> ***"In order to balance the interests of both sides it is the considered opinion of this court that the parties should eat humble pie and subject themselves to arbitration within 60 days to enable them resolve their differences. The issue of arbitration has been covered extensively under clause 22 of the Dealer Agreement."***

It appears that the parties did not follow the course suggested by the court, and that the appellants seemed keen on prosecuting their suit. Thus, the respondent filed an application pursuant to the provisions of section 6 of the Arbitration Act seeking an order of stay of proceedings pending arbitration in accordance with the provisions of the dealer and M-Pesa agency agreements entered into between the parties.

In support of the application, the respondent claimed that the appellants had instituted the suit prematurely and without the dispute being referred to arbitration as required by the agreements. In opposition to the application, the appellants contended that the arbitral clauses in the agreements were not worded in mandatory terms and that the appellants had the discretion to apply to court. They further alleged that they had suffered great business loss, so arbitration was too expensive a course for them to follow, and that in view of the alleged fraud, the suit had public policy connotations that were best addressed in a civil suit in court.

This application was heard and allowed by Musinga J. (as he then was) with the result that proceedings in the High Court were stayed pending the outcome of arbitral proceedings between the parties. It is this order that has prompted this appeal.

In their memorandum of appeal, the appellants raise eight grounds of appeal which, briefly summarized, include that the learned judge erred in: applying clause 19.4 of the M-pesa agreements to defeat Clause 22.2 of the dealer agreements without recognizing that the suit was founded on breach of the dealer agreement; interpreting Article 159 of the Constitution in a manner that watered down the effect of Articles 25, 48 and 50; and failing to assert the appellants' right to opt for court process despite recognizing that the arbitral clause in the dealer agreement was not mandatory. Based on these grounds, the appellants have asked the court to allow the appeal, set aside the ruling and order of Musinga J. (as he then was) and award them costs of both the application and the appeal.

These grounds of appeal were argued by Mr. Kanjama on behalf of the appellants. Learned counsel submitted that the learned judge failed to appreciate that the appellants' suit was founded on breach of the dealership agreement, and could only be resolved out of the construction and operation of the dealer agreement, and thus clause 19.4 of the M-pesa agreement could not be used to override clause 22.4 of the dealer agreement. Under clause 22.2 of the dealer agreement, reference to arbitration was not mandatory as it is framed using the word 'may' and not 'shall' meaning that the parties had the right to elect to go for arbitration or to commence court proceedings.

Mr. Kanjama further submitted that the parties herein had failed to commence arbitration proceedings and as such, the respondent had waived its right to rely on the arbitration clause for failure to invoke it appropriately. The appellants also faulted the court for holding that a stay of proceedings should be automatic where there is an arbitral clause. For this proposition, they rely on the decision of the Court in ***Esmailji v Mistry Lalaji Shamji & Co. [1984] KLR 150*** where the Court held that:

> ***"it is a condition precedent that before the Court can exercise its discretion to make an order staying proceedings the Applicant must satisfy the Court that he is and was at all times willing to do everything necessary for the proper conduct of arbitration. Failure to show this to the satisfaction of the Court will result in refusal of a stay order."***

The learned judge erred in holding that allegations of fraud do not rob an arbitrator of his jurisdiction despite sufficient evidence by the appellants showing that the fraudulent claims went beyond the level of mere allegations. In addition, the claim is founded on contract and tort, in particular defamation, fraud, restitution, unjust enrichment, restrictive trade practices, abuse of dominant position and public policy issues. These are issues that are beyond the arbitral scope and it is only the court which is vested with sufficient jurisdiction to deal with them. In view of the seriousness of the matters raised, the suit can only be properly advanced in court.

In counsel's view, a stay of as provided under section 6 of the Arbitration Act cannot override clear constitutional guarantees like the right to access justice as enshrined under Article 48 of the Constitution of Kenya.

Opposing the appeal on behalf of the respondent was learned counsel Mr. Nyaburi, who submitted that the suit was founded on the two agreements. He further submitted that the court was right to stay the proceedings to enable the arbitration proceedings because all courts must promote alternative dispute resolution under Article 159 of the Constitution. In his view, the fact that the parties will go to arbitration will only serve to promote access to justice, and should the parties disagree with the outcome of the arbitration proceedings, then they have the option to pursue the court process as provided under sections 35 and 36 of the Arbitration Act.

In this appeal, our role is to re-evaluate, re-assess and reanalyze the record and then determine whether the conclusions reached by the learned trial Judge are correct or not and give reasons. In that regard, see the discussion on the role of this Court in a first appeal in

> ***Abok James Odera T/A A.J Odera & Associates v John Patrick***
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> ***Machira T/A Machira & Co. Advocates* [2013] eKLR (Civil Appeal**
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> ***No. 161 of 1999).***

The question we are required to determine is whether or not the learned trial judge was right in ordering a stay of proceedings. To do this, we must consider the relevant clauses in the M-pesa agreements and dealership agreements and the application of the law.

The relevant portion of clause 22.2 of the dealer agreement provides that:

"Arbitration

a. If the dispute has not been settled pursuant to the amicable settlement process in clause 22.1 above within 30 days or such longer period as the parties may agree then any party may elect to commence arbitration…."

The M-pesa agency agreement provides that

> ***"Any dispute arising out of or in connection with this Agreement shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within sixty (60) days of the notification of a dispute, upon the application of either Party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom. It is agreed that notwithstanding any arbitral award either party will meet its costs incurred in exercising this provision."***

The application for stay of proceedings was brought under section 6 of the Arbitration Act which provides as follows:

> ***"(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.

(2) That the arbitration agreement is null, inoperative or incapable of being performed or

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

By virtue of the agreements herein, it is clear that the parties envisage that the disputes arising out of the agreements would, in the first instance, and where appropriate, be dealt with by an arbitrator. In the present case, the appellants alleged that this was not a proper case for arbitration. In determining whether this was indeed the case, we need to inquire into and confirm whether the conditions under section 6 of the Arbitration Act have been fulfilled. In ***UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR (Civil Appeal No. 26 of 2007)*** this Court addressed the point and rendered itself as follows:

"17. 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."

There is no question that a dispute has arisen between the parties herein that eventually saw the termination of the agreements between the parties herein. One of the allegations by the appellants is alleged fraud. We are aware, as stated by the Court in ***Telkom Kenya Ltd vs Kam Consult Ltd [2001] 2 EA 574*** that

"An arbitrator does not lose jurisdiction to handle a matter by the mere allegation of fraud in the pleadings. The arbitrator would be entitled to hear evidence and determine whether fraud had been established. It would be against public policy to enforce a contract including an arbitration clause, where fraud was established. However, it would defeat the purpose of the legislature if the mere allegation of fraud, no matter how mischievous, was enough to oust the arbitrator's jurisdiction".

Parties who submit disputes to arbitration impliedly clothe the arbitrator with jurisdiction to give effect to their rights and remedies to the same extent and in the same manner as a court subject to the known exceptions in regard to the grant by an arbitrator of injunctive orders. Arbitrators, just like the courts, are concerned with the business of administration of justice. It is complementary to the formal dispute resolution process and we do not perceive, as Mr. Kanjama suggested, that a reference to arbitration would automatically defeat the constitutional guarantees relating to access to justice

The cause of action between the parties arose sometime in the year 2011. The suit was filed on 27th May 2011. In his impugned ruling made on 27th November 2011, the learned judge directed that the parties subject themselves to arbitration within sixty days so as to resolve their differences. No further action was taken by the respondent towards the suit until it filed a formal application for stay of proceedings under section 6 of the Arbitration Act in 2012. In arguing that application, the respondent contended that the parties had not agreed on the modalities of arbitration, but it was not demonstrated to the court what measures had been taken towards that course.

It also provided that either party could have moved to court in the event of a grievance arising from the agreement. Here the appellants were actually the party who were aggrieved with the conduct of the respondent in the manner it cancelled the two dealership agreements. In the absence of a mutual

agreement between the parties as to the manner and mode of resolving the apparent and actual dispute, it was entitled to move to court in order to seek justice from court for what they thought or believed to irreconcilable differences and dispute between the parties. In such circumstances the dispute would not be fairly and conclusively determined by the parties in view of the divergent positions of the parties. We therefore think, that the appellants are legitimately entitled to seek and have their day in court.

There is another reason why arbitration, in this particular case, would be inappropriate. We have noted that a criminal investigation was commenced, and the person who was found culpable was an employee of the respondent. We are doubtful that the responsibility and consequences of the actions of an agent of the respondent can now be transferred onto the applicants. In view of the seriousness of the matters raised, the suit can only be properly adjudicated in court. Most significant to this appeal is that there is a clause in the dealer agreement which states as follows:

> ***"17. Limitation of Liability***
>
> **…**
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> ***17.2 Without prejudice to the exclusions in clauses 17.1 above, Safaricom's liability shall not whether in contract, tort or otherwise exceed in aggregate for any breach or breaches arising under this Agreement the sum of Kshs 100,000.00 (Kenya Shillings One Hundred Thousand Only.) Safaricom shall have no liability in respect of any claim unless notice therefor shall have been given with one month of the cause of action arising and proceedings in respect of the same shall have been issued no later than 6 months thereafter."***

In light of this clause limiting liability of the respondent to only Kshs 100,000.00 we are of the considered view that enforcing the arbitral clauses would seriously impede the applicants' right to access justice. The cause of action as set out by the appellants involves large sums of money. If that clause is enforced, and the respondent is successful, it would be prejudicial. An arbitral clause that is oppresive or repugnant to justice is one that disadvantages one side. It is clear that the respondent herein would have the upper hand; it would amount to undue influence and an unfair bargaining power on the respondent's part. The arbitration clauses would therefore lead to an injustice. Arbitration ought to be a simple, straight forward and non- protracted process. In this case, there are vast differences and disagreements between the parties. For this reason, we find and hold that the learned judge fell into error when he ordered that the proceedings in court be stayed pending arbitration. In the result, we find that this appeal has merit. We therefore allow it as prayed, with each party bearing its own costs.

Dated and Delivered at Nairobi this 4th day of November, 2016

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR