



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.594 OF 2015**

**KABEW KENYA LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**INABENSA - KENYA.....PLAINTIFF/APPLICANT**

**RULING**

1. This Ruling is in respect of the Defendant's application dated **7<sup>th</sup> December, 2015** and filed on **8<sup>th</sup> December, 2015**. The application, filed by way of Chamber Summons, is expressed to have been filed pursuant to **Article 159(2) (c) of the Constitution of Kenya** and **Section 6 of the Arbitration Act, 1995**, for orders that;

- 1) **Pending the hearing and determination of this Application, the Plaintiff's Application dated 1<sup>st</sup> December, 2015 and the proceedings herein be stayed.**
- 2) **The dispute between the Plaintiff and the Defendant herein be referred to Arbitration in accordance with Clause 11 of the Agreement between the parties dated 24<sup>th</sup> March, 2014.**
- 3) **The costs of the suit and of the Application herein be borne by the Plaintiff in any event.**

2. It is Defendant's contention that the Plaintiff's alleged cause of action arises from alleged breach of terms of the Subcontractor's Agreement dated 24<sup>th</sup> March, 2014 and that under Clause 11 thereof it was mutually agreed that in the event of any dispute controversy or complaint arising from the Agreement, the same would be referred to Arbitration.

3. The application was grounded on the affidavit of **Raul Arribas Andres** attached thereto in which it was deponed that the filing of this suit is premature and amounts to abuse of the Court process in view of the arbitration clause in the contract. Accordingly, the Defendant urged for the staying of these proceedings pending arbitration.

4. The suit was filed on 1<sup>st</sup> December, 2015 for inter alia, General and Punitive Damages for breach of contract; an injunction to restrain the Defendant from transferring, leasing or parting with possession of any assets that they hold of own in Kenya until the final hearing and determination of this suit; and an order of extension of any Bank Guarantees issued by any bank in Kenya for the project that is the subject of this suit.

5. The brief background is that the parties had entered into a Subcontractor's Agreement dated 24<sup>th</sup> March, 2014 for the construction of electricity transmission lines in the Kenyan Section of the **Lessos-Tororo Power Interconnection Project**. It has been pleaded that the Plaintiff commenced the works but along the way its demands for payment went unheeded by the Defendant, in breach of the express terms of the Agreement. Accordingly, the Plaintiff felt constrained to file this suit simultaneously with a Notice of Motion dated 1<sup>st</sup> December, 2015 for interim relief during the pendency of the suit.

6. Upon being served with the Notice of dated 1<sup>st</sup> December, 2015 the Defendant's response was to file the instant application for stay of the Application dated 1<sup>st</sup> December, 2015 as well as the hearing of the suit pending referral of the dispute to arbitration. The parties thereafter filed their responses as well as written submissions which the Court has carefully considered.

7. Section 6 (1) of the Arbitration Act, pursuant to which the application has been filed provides that:

***“ 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 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 infact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”***

8. The parties are in consensus that their Agreement, at clause 11.2, did provide for Arbitration. That clause reads as hereunder:

**“Any dispute controversy or complaint that arises or is related to this agreement or operations carried out in keeping with this Agreement, including but not limited to any dispute in relation to the interpretation, validity or breach of this Agreement or demands that can be made of it shall be negotiated between the parties by consultation. If any such dispute cannot be resolved within thirty (30) days, then the Parties agree that said dispute shall be resolved exclusively and definitively by arbitration, and any Party must submit said dispute controversy or complaint to legal arbitration. The arbitration shall be carried out in accordance with the regulations, procedure and processes in the Arbitration Rules of the International Chamber of Commerce (ICC) and the final decision shall be dictated by an arbitrator. The arbitration shall be carried out in the City of Paris (France) and in the English language. The Parties expressly renounce any other jurisdiction that may correspond to them and submit themselves to the arbitration stipulated. The content of the arbitration and the arbitrator's final decision shall be strictly confidential and obligatorily binding for the Parties.**

**In order to legally formalize the arbitration when necessary or for any other matter that by law cannot be subject to arbitration, the Parties expressly submit themselves to the Tribunals and courts of Paris (France) renouncing the jurisdiction of any other court that may correspond to them.”**

However, the Plaintiff/Respondent raised various Grounds of Objection to the application, and I propose to deal with them seriatim: First and foremost, it was the Plaintiff's contention that the application offends provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010 for having been filed by way of Chamber Summons while Rule 1 of Order 51 requires that ***“all applications to the Court shall be by way of motion and heard in Open Court...”***

9. I have no hesitation in rejecting this argument because Order 51 Rule 1 of the Civil Procedure Rules

makes provision for contrary situations that are provided for in the Rules. Order 51 Rule expressly recognizes that procedural guidelines have been set out in other statutes such as the Government proceedings Act. In the instant case in which an approach to the Court has been made via the Arbitration Act, for the purposes of which the Arbitration Rules 1997 in Rule 2 thereof provides that **“Application under Sections 6 and 7 of the Act shall be made by summons in the suit.”** Clearly therefore the instant application is well grounded in terms of form and is therefore competently before the Court for determination.

10. The second ground of objection raised by the Plaintiff is that the application offends the Provisions of Art. 159 (3) (c) of the Constitution of Kenya in that the Defendant/Applicant, instead of responding to the application dated 1<sup>st</sup> December, 2015 in the manner set out in Order 51 Rule 14 (1), Civil Procedure Rules, has instead opted for referral to Arbitration. It was thus argued that the Alternative Dispute Resolution mechanism should not be used in a way that is inconsistent with the Constitution or any other written law. The Plaintiff further argued that the Defendant having filed for insolvency of the Defendant, is simply out to abuse the Court process in a manner that is repugnant to justice and morality.

11. It is noteworthy that one of the enabling provisions relied on by the Applicant/Defendant in Article 159 (2) (c) of the Constitution, which recognizes alternative forms of dispute resolution in the administration of justice. The Defendant/Applicant has shown and the Plaintiff/Respondent conceded that the parties’ Agreement had an Arbitration agreement in Clause 11 thereof. There cannot therefore be anything repugnant to justice and morality in the applicant simply seeking to enforce that agreement and doing so in a manner consistent with Section 6 of the Arbitration Act as read with Rule 2 of the Arbitration Rules. In my view therefore, even this second ground raised by the Plaintiff is completely misplaced and untenable.

12. In the third ground of objection, the Plaintiff contended that the application is misconceived for the reason that it does not conform to the requirements of making a prayer. The Defendant’s prayer (1) is that:

***“pending the hearing and determination of this application the Plaintiff’s Application dated 1<sup>st</sup> December, 2015 and the Proceedings herein be and are hereby stayed.”***

13. The Plaintiff took issue with this and argued that it pre-empts the Court’s work, for the reason that it is framed in the nature of an order. The Plaintiff relied on the case of **Salim Idd Mwasina & 2 Others Vs The Registrar of Trade Unions & 4 Others [2002]eKLR** in which Onyango–Otieno J stated that:

***“the Law requires that an applicant should state clearly what he wants. If he wants restraining orders pending the determination of the suit he should say so, if he wants restraining orders pending the determination of the application, the same should be specifically and clearly stated.”***

14. Looking at prayer (1) of the Defendant’s Notice of Motion dated 7<sup>th</sup> December, 2015, it is plain enough that what is sought thereby is stay of proceedings, including the hearing of the application dated 1<sup>st</sup> December, 2015. The reason for stay is set out in prayer (2), namely to enable the referral of the dispute between the parties to arbitration pursuant to clause 11 of the Parties’ Agreement. While I agree that the words **“be and are hereby stayed”** included at the tail end of prayer (1) are presented as an order of the Court, that would not be reason enough to disallow the application, granted the provisions of Article 159 (2) (d) of the Constitution that justice be administered without undue regard to procedural technicalities. Besides, Order 51 Rule 10, Civil Procedure Rules provides that:

***“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”***

15. The phrase complained of in prayer (1) may appear pre-emptive and presumptuous, nevertheless the effect it has in terms of the substance of the application appears to be nil in my view. The Court is not constricted thereby and the words do not in any way affect the prayer sought in that paragraph which is otherwise unambiguous. I accordingly find no merit in the third Ground of Objection.

16. In Ground Four, the Plaintiff contended that the application is misleading as it proposes to effect orders against parties who are outside the Agreement dated 24<sup>th</sup> March, 2014 and therefore would defy the doctrine of privity of contract. This is particularly in respect of the prayer to stop the Defendant from cashing the Guarantee issued by Ecobank as well as monies owed to the Defendant by Kenya Electricity Transmission Company Limited. It is the Plaintiff's contention therefore if the Court grants the Defendant's application, it would mean that the Arbitration would be addressing aspects of the dispute that are outside the terms of reference of the arbitration, and the award if any may be amenable to ultimate setting aside pursuant to Section 35(2) (iv) of the Arbitration Act.

17. Again, this apprehension appears to be misplaced because Section 35 (2) (iv) of the Arbitration Act provides that:

***“ ...if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside.”***

18. The tenor and effect of Section 35(2) (iv) of the Arbitration Act is therefore explicit that only matters falling for Arbitration under the Arbitration Clause are suitable for arbitration and the Plaintiff as a party would have an opportunity to participate in drawing up the terms of reference. It would be speculative therefore to decline an application for referral to arbitration simply because the scope of the suit appears wider than what was contemplated in the Arbitral Agreement. In any event the Court has the jurisdiction under Section 7 (1) of the Arbitration Act to handle some of the prayers for interim relief pending arbitration. Section 7 (1) aforementioned provides that;

***“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”***

19. I note that prayers 2, 3, 4 and 5 of the Plaintiff's Notice of Motion dated 1<sup>st</sup> December, 2015 are all for temporary relief and therefore can safely be handled by the Court pending arbitration.

20. Finally, it was the Plaintiff's case that the arbitration clause is defective in so far as it recognizes, in Clause 11.1, the local jurisdiction of Kenya while at the same time invoking, in Clause 11.2 thereof, the jurisdiction of the tribunals and Courts of Paris (France) and thereby renouncing the jurisdiction of any other Court. According to the Plaintiff, Clause 11.1 and 11.2 create a conflict of sorts as to which substantive law should bind the parties, granted that the Courts in Paris would be in no position to enforce an arbitration conducted in accordance with the Kenyan Law.

21. All that a party is required to demonstrate at this stage is that there is an arbitration agreement in the manner envisaged by Section 4 of the Arbitration Act. The parties retain the right to agree and make choices as to Rules of Procedure and this is recognized and provided for in Sections 17, 20 and 29 of the Arbitration Act. Indeed, it is now trite that the Arbitral Tribunal has the mandate to determine its own jurisdiction and competence. This matter was well articulated by Nyamu JA (as he then was) in **Safaricom Limited Vs Ocean view Beach Hotel Limited [2010]eKLR** thus:

***“Although the English Arbitration Act, 1996 is not exactly modelled on the Model Law unlike our Act, I fully endorse the principles as outlined in the CHANNEL CASE (Supra) because they are in line with the arbitral tribunal's jurisdiction as set out in Section 17 of the Arbitration Act of Kenya. The Section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national Court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under Section 17 (6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior Court did act contrary to the provisions of Section 17 and in particular violated the principle known as “competence/competence” which means the power of an arbitral tribunal to decide or rule own its own jurisdiction...”***

22. I would thus agree with the Defence Counsel that even this argument on conflict of laws/jurisdictions is premature.

23. For all the reasons aforestated, my considered view and finding is that, the parties in Clause 11 of their Agreement made a separate Arbitral Agreement and committed thereby to refer all the disputes arising between them in respect of that Agreement to arbitration.

It has been demonstrated that the application for referral to arbitration has been made in accordance with the strictures set out in **Section 6 of the Arbitration Act**, in that the application was made at the same time that the Defendant acknowledged the suit. Thus I would allow the application dated **7<sup>th</sup> December, 2015** and grant stay of the proceedings herein pending referral of the matter to arbitration. However, granted the nature of the reliefs sought in the Plaintiff's application dated 1<sup>st</sup> December, 2015 the grant of which would accord well with the powers of the Court under Section 7 of the Arbitration Act, I take the view that the Plaintiff is at liberty to pursue the prosecution of that application for such interim measures of protection as are still relevant and pursuable.

Costs in the cause.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>st</sup> DAY OF JULY 2016**

.....

**OLGA SEWE**

**JUDGE**