REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 654 OF 2009

ABDIRAHMAN AFFI ABDALLA …… PLAINTIFF

VERSUS

OSUPUKO SERVICE STATION LTD. ……..……1ST DEFENDANT

MOHAMED HASSAN YUNIS ……..…… 2ND DEFENDANT

R U L I N G

The application before the Court is brought by a Chamber Summons dated 7th September, 2009 and taken out under **Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 7 of the Arbitration Act, 1995 and all** other enabling provisions of the law. The Applicant thereby applies for orders that –

(1) … (Spent)

(2) … (Spent)

(3) … (Spent)

(4) That, a temporary injunction do issue restraining the Defendant by himself or his servants or agents or any of them from managing, interfering with and/or dealing in any manner with the affairs of Osupuko Service Station Limited and or taking possession of the service station on Land Reference Number 4101 at Ololulunga in Narok, pending the hearing and determination of the Arbitral Proceedings between the Plaintiff and the Defendants.

(5) That the 2nd Defendant, his servants or agents be restrained from selling, charging, disposing off and/or interfering whatsoever with the movable property namely two under ground Oil Tanks, Four (4) pumps, Generator, Compressor, offices and storage facilities erected and/or developed on Plot Number 4101 at Ololulunga, Narok pending the commencement, hearing and determination of Arbitral Proceedings between the Plaintiff and the Defendants.

(6) That, the Plaintiff be appointed immediately to run and manage the company Osupuko

Service Station Limited ***to enable the said company to operate pending the commencement, hearing and determination of Arbitral Proceedings between the Plaintiff and the Defendants.***

(7) That the Plaintiff do give an undertaking as to damages.

(8) That the costs of this application be provided for.

The application is supported by the annexed affidavit of Abdirahahman

Affi Abdalla and is based on the grounds that –

a) The 1st Defendant Company was incorporated on 9th May, 2005 with a share capital of Kshs.100,000.00 with 1000 shares of Kshs.100 each.

b) The Plaintiff owns 85% of the issued shares in the 1st Defendant Company and is therefore the majority shareholder in the company. Despite having the majority shareholding, the 2nd Defendant is now controlling the affairs and management of the Company to the exclusion of the Plaintiff.

c) The Plaintiff has made an investment of Kenya Shillings Eight Million (Kshs.8,000,000.00) in the acquisition of assets being utilized by the 1st Defendant Company but the 2nd Defendant has prevented the Plaintiff from recouping his investment in the Company.

d) The 2nd Defendant has diverted the funds of the Company into his own private accounts to the detriment of the Plaintiff and his investment in the Company.

e) That the 2nd Defendant has refused to furnish audited accounts of the Company to the Plaintiff and has completely shut out the Plaintiff from the management of the affairs of the Company.

f) A dispute has therefore arisen between the Plaintiff and the 1st Defendant Company as well as between the Plaintiff and 2nd Defendant as shareholders and Directors which ought to be referred to arbitration as provided for under the Articles of Association of the 1st Defendant Company.

g) That it is therefore in the interests of justice that the Plaintiff be granted interim measures of protection pending the commencement, hearing and determination of Arbitral proceedings between the Plaintiff and Defendants.

Opposing the application, the 2nd Defendant swore and filed a replying

affidavit dated 16th September, 2009 in which he claims that the application is incompetent and fatally defective. He attests in the said affidavit that in the instance case, the Plaintiff has no *locus standi* to institute this suit since it is in the nature of a derivative action which ought to be brought by minority shareholders to safeguard the interests of the Company, yet the Plaintiff is the majority shareholder and his action is therefore intended to benefit him alone and not the 1st Defendant. He also avers that the Plaintiff has not explained to the Court what prevented him from calling the 1st Defendant's General Meetings yet he had full and unfettered control over the affairs of the Company. Consequently, the deponent has been advised by his Advocates that the Applicant is undeserving of this Court's equitable remedies. Furthermore, there is no arbitration agreement to resolve disputes between the Plaintiff and

the 2nd Defendant and therefore the Plaintiff has no remedy against the 2nd Defendant under the arbitration clause in the 1st Defendant's Articles of Association.

With leave of the Court, the Plaintiff and the 2nd Defendant filed their respective skeleton submissions which were highlighted by Mr. Issa for the Plaintiff and Mr. Chelanga for the 2nd Defendant. After considering the pleadings and the respective submissions of the parties, I find that the main issues for determination are whether there is a binding arbitration clause between the parties; whether the Plaintiff has exhibited an intention to become a member; whether Article 31 of the Company's Articles of Association gives rise to an arbitration agreement; and whether the Plaintiff is entitled to temporary orders of injunction as prayed.

Mr. Chelanga for the 2nd Defendant contended that Article 31 of the Company's Articles of Association is not an agreement between the Plaintiff and the 2nd Defendant to refer disputes to arbitration. For the avoidance of any doubt, the said Article falls under the sub-heading entitled **"ARBITRATION – DIFFERENCES TO BE REFERRED",** and states as follows –

"31. Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching on the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching on any breach, or alleged breach, of these Articles or to any statutes affecting the Company, or to any of the affairs of the Company, every such differences (sic) shall be referred to an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator then to two arbitrators, of whom one shall be appointed by each of the parties in difference."

With respect, Mr. Chelang'a's contention overlooks one fundamental principle of Company Law. That principle ordains that a Company's Articles of Association give rise to a contract not only between every member and the Company, but also among the members of the Company *inter se*. The logical conclusion to be drawn from that principle is that the members of the 1st Plaintiff Company are bound by that Company's Articles among themselves, and therefore Article 31 becomes an arbitration agreement among all the members.

Mr. Chelang'a also took the view that the Plaintiff had not exhibited an intention to become a member. How would one exhibit an intention to become a member of a Company" It is instructive that the very last paragraph in the 1st Plaintiff/Company's Memorandum of Association is couched in the following words –

"We the several persons whose names and addresses are subscribed hereto, are desirous of being formed into a company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names. …"

The only persons whose names and addresses are appended therein are those of the Plaintiff and the 2nd Defendant who, between themselves, took 850 shares and 150 shares, respectively. There cannot be a better manifestation of an intention to become a member of a Company than by appending one's signature to signify one's intention to become a subscriber.

Furthermore, **Section 28 (1) of the Companies Act** defines a member of a Company as follows –

"28 (1) The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members."

It is clear beyond peradventure that both the Plaintiff and the 2nd Defendant agreed to become members of the Company and therefore they are bound by the Companies Articles of Association.

Although this may not be strictly relevant, Mr. Chelang'a referred to the memorandum of understanding and agreement between the parties as drawn by the Plaintiff's lawyers as an illegal contract. However, I also note that at the same time he relied on Clause 6 thereof to say that there was only an agreement to agree on the mode of settling any dispute that might arise thereafter. I will content myself by observing that one cannot approbate and reprobate in the same breath. In sum, I find that there is an arbitration clause in terms of Article 31 of the 1st Defendant's Articles of Association and that this matter should be referred to arbitration under the said Article.

However, I note that the nature of the orders sought is such that if those orders are granted as prayed, the operations of the Company will automatically grind to a standstill which is not beneficial to anyone, least of all to the Company. Furthermore, it does not assist matters to change the management of the Company from one faction to another pending arbitration. It only deepens the animosity between the parties. Furthermore, the grant of prayer 6 of the orders sought could easily amount to granting a temporary mandatory injunction which is normally granted very grudgingly. In **LOCABIL INTERNATIONAL FINANCE LTD. v. AGRO EXPORT & ORS [1986] All ER 901,** it was held that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases … where the Defendant has attempted to steal a march on the Plaintiff. No such special circumstances have been made out in this matter.

For these reasons, I direct that this matter be and is hereby referred to arbitration. However, I decline to grant the injunctions sought and hereby dismiss the rest of the application with costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of December, 2011.

L. NJAGI

JUDGE