Case Number:	Civil Appeal 186 of 2013
Date Delivered:	22 Nov 2018
Case Class:	Civil
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Philip Nyamu Waki, Roselyn Naliaka Nambuye, Patrick Omwenga Kiage
Citation:	Mt. Kenya University v Step Up Holdfing (K) Ltd [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	Civil Case 245 of 2011
Case Outcome:	Appeal Dismissed.
History County:	Nakuru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAKURU

[CORAM: WAKI, NAMBUYE & KIAGE JJA

CIVIL APPEAL NO. 186 OF 2013

BETWEEN

MT. KENYA UNIVERSITY.....APPELLANT

AND

STEP UP HOLDFING (K) LTD.....RESPONDENT

(**Being Appeal against the Ruling of the High Court of Kenya at Nakuru (Ouko, J) Dated 27th January, 2012**

in

H.C. C.C. No. 245 of 2011)

****

JUDGMENT OF THE COURT

This is an appeal arising from the ruling of **W. Ouko, J,** (as he was then) dated 27thJanuary, 2012 dismissing the appellants' application for stay of proceedings pending Arbitration.

The background to the appeal is that, both the appellant and the respondent entered into a memorandum of understanding (MOU) containing an arbitration clause which provided as follows:-

"Settlement of Disputes.

(1) The Chairman of Mt. Kenya University and the Chairman of Step up Holdings retain the final say on any matter which calls for interpretation of this MOU and any other agreements related to or incidental to this MOU.

(2) The parties shall use their efforts to settle amicable (sic") ***all the disputes arising out of or in connection with this agreement or interpretations hereof.***

(3) Any dispute, difference or question which may arise at any one time between the parties which cannot be settled amicably within thirty (30) days after receipt by one party of the other party's request for such amicable settlement shall be referred to the decision of a single arbitrator to be agreed upon by the two parties or in default of agreement within fourteen (14) days of each party raising such disputes shall write to the Chairman of the Chartered Institute of Arbitrators, Kenya Branch in accordance with and subject to the provisions of the Arbitration Act, Cap 49 Laws of Kenya or any statutory Modification or re-enactment thereof for the time being in force.

(4) Any party not satisfied with the Arbitration shall have the right to seek redress in a court of law."

The effective date of the MOU was the 1st day of September, 2008, with a life span of ten (10) years. A disagreement arose between the parties with regard to the discharge of their duties and obligations under the said M.O.U, prompting the respondent to file suit against the appellant vide a plaint dated the 6th day of September, 2011, subsequently amended on the 8th day of September, 2011,

based on various averments and seeking various reliefs as particularized therein. Simultaneously with the filing of the plaint, the respondent filed an application for an injunction.

Upon the appellant being served with the amended plaint, it filed a memorandum of appearance dated 13th of September, 2011 and filed a replying affidavit to the respondent's application for injunction on the 14th of October, 2011.On the 25th of October, 2011, the appellant filed a chamber summons dated the 25th October, 2011, brought under **section 6** of the Arbitration Act 1995, **Rule 2** of the Arbitration Rules 1997, **section 3A** of the Civil Procedure Act. Order **46** of the Civil Procedure Rules and all other enabling provisions of the law. The prayers sought were as follows:-

"(1) ……

(2) That there be a stay of all proceedings herein pending arbitration.

(3) That the dispute between the parties be referred to arbitration.

(4) That the defendant/applicant be at liberty to apply for such or other orders and or direction as this Honourable Court may deem fit and just to grant in the circumstances.

(5) That the costs of this application be awarded to the defendant/applicant against the plaintiff/respondent.

The application was supported by the grounds on its body and a supporting affidavit of **Simon Nyutu Gicharu.** It was opposed by a replying affidavit deposed by one **Benard Gikundi Mwarania,** filed on the 31st October, 2011 and was canvased by way of oral submissions.

At the conclusion of the submissions, the trial Judge set out the clause on settlement of disputes as contained in the MOU, considered it in light of the rival submissions of the parties and then proceeded to make findings thereon as follows: That the clause on the settlement of disputes as contained in the MOU satisfied the requirement of a valid arbitration agreement under **section 4** of the Arbitration Act 1995 (the Act); that the existence of the arbitration clause in the MOU notwithstanding, the respondent instituted the suit against the appellant; that simultaneously with the filing of the suit, the respondent also filed a chamber summons seeking an injunction to which the appellant filed a reply before filing the application for stay of the proceedings pending arbitration; that the jurisdiction of the court to intervene was as donated by **section 6(1)** of the Act; that the application for the stay of the proceedings had been brought after entry of appearance by the appellant and the taking of a procedural step in the matters by the appellant, that the conduct of the appellant prior to the initiation of the suit demonstrated clearly that he was not in favour of the parties honouring the arbitration clause in the MOU and was therefore unwilling to submit itself to that process that the existence of a dispute as between the parties to the application was evident; that the suit was instituted before parties resorted to the arbitration clause; that the respondent had generated a letter dated 8th June, 2011 directed at the appellant drawing the appellant's attention to the arbitration clause in the M.O.U; that the appellant's response to that communication through a text message dated the 15th June, 2011 created the impression that according to the appellant there was no dispute in terms of the arbitration clause; that although there was evidence that at one time, the appellant proposed to have the issues in controversy as between them settled out of court, the appellant did not appear to be serious about pursuing that line of action; and lastly, that in an affidavit filed by the appellant on 14th October, 2011, the appellant had insisted that the M.O.U was incomplete.

In light of all the above observations and findings, the Judge concluded as follows:-

"Having categorically stated that there was no dispute and having expressed doubt as to the completeness of the M.O.U, the applicant clearly was not ready and willing to do everything to facilitate arbitration.

Turning to section 6(1) where like in this case, the applicant brings an application for stay of proceedings way after entering appearance, the right to rely on the arbitration clause is lost....."

On account of the above conclusions, the Judge dismissed the appellant's application for reference of the matter to arbitration.

The appellant was dissatisfied with that decision, and filed this appeal raising seven (7) grounds of appeal, namely;

1. That the Honourable learned Judge by declining to grant a stay of proceedings pending referral to arbitration failed to resonate the legal principle that arbitration issues are essentially contractual matters and it is a matter of public interests and judicial policy, that the parties in dispute should be accorded widest opportunity for seeking solutions outside the restrictive procedures of judicial process.

2. That the learned honourable Judge erred in fact by finding that the appellant had not demonstrated readiness and willingness to do everything to facilitate arbitration notwithstanding, the overwhelming evidence to the contrarily including such evidence from the respondent.

3. That the honourable Judge misapprehended and misguided itself on interpretation of section 6(1) of the Arbitration Act, No. 4 of 1995 finding that the Defendant does not bring application for stay of proceedings before and/or during the filing of memorandum of appearance a right to bring the application is lost.

4. That the learned Judge failed to appreciate that the filing of a replying affidavit to an application for injunction did not in itself oust the arbitration clause.

5. That the learned honourable Judge failed to appreciate that where a defendant does not make an application for stay of proceedings pending referral to arbitration before and/or during the filing of a memorandum of appearance in a dispute which is subject to an arbitration agreement, then such application became a matter of discretion of the court to determine whether the matter shall or not be referred to an arbitrator.

6. That the learned Judge erred in law and in fact by failing to appreciate that:

(a) The validity of Memorandum of Understanding was an issue to be determined by the arbitration.

(b) Whether or not there is a dispute was an issue to be determined by the arbitrator.

(c) The filing of the case in court was itself a dispute.

7. That arising from all the above foregoing, the entire decision of the learned Judge refusing to stay proceedings of the suit pending referral to an arbitrator was wrong.

The appeal was canvassed by way of oral submissions. Learned counsel **Mr. Lawrence Karanja** of **Miruki Kariuki & Company Advocates** appeared for the appellant, while learned counsel **Mr. Caleb Nyamwange** of **Masese Nyamwange & Co. Advocates** appeared for the respondent.

In support of the appeal, learned counsel **Mr. Lawrence Karanja** conceded that there was an MOU executed by the parties containing an arbitration clause; that the litigation resulting in this appeal was initiated by the respondent against the appellant prompting the appellant to enter appearance and then subsequently respond to the respondent's application for injunction filed simultaneously with the filing of the plaint before presenting the application for leave of court to refer the matter to arbitration.

Counsel also conceded that there had been an attempt to settle the matter out of court but the negotiations fell through prompting the respondent to initiate the litigation; that the appellant had sent to the respondent the text that the Judge referred to in the ruling but urged us to fault the trial Judge for capitalizing on that text message to reject the reference. In counsel's view, the appellant's denial of existence of a dispute as between them in terms of the arbitration clause should not have been taken by the Judge as proof of the appellant's unwillingness to have the issues in controversy as between them resolved by way of arbitration. It was also counsel's argument that the trial Judge misapprehended the context in which the text was worded; that the Judge arose from the Judge failed to take into consideration the totality of what had transpired between the parties as borne out by the record before the matter finally landed in court. The Judge should not have used the erroneous contents of that text to defeat the appellant's legitimate request to have the matter referred to arbitration.

Counsel cited the case of **University of Nairobi versus N.K. Brothers Limited [2009] eKLR,** in support of the submissions that since the negotiations the parties had initiated to settle their difference, had fallen through, the appellant was entitled to seek the court's intervention to refer the dispute to arbitration in line with the arbitration clause in the MOU; that proof of only one dispute

or difference was sufficient for the court to refer the matter for arbitration; that in the instant appeal, the alleged appellant's indifference to the respondents' invitation for an out of court was a misapprehension by the Judge to defeat the appellant's legitimate request to refer the matter to arbitration and there was a dispute capable of reference to arbitration.

Counsel also relied on the case of **UAP Provincial Insurance Company Ltd versus Michael John Beckett, CA No. 26 of 2007** in support of the submissions that had the trial Judge carried out an inquiry as was expected of him in terms of **section 6 (1)** of the Arbitration Act, he would have arrived at the only reasonable conclusion that there existed a dispute capable of reference to arbitration.

Counsel continued to urge us to fault the Judge for the failure to appreciate, that the respondent failed to serve a demand notice on the appellant before initiating litigation thereby denying the appellant the earliest opportunity to activate the arbitration clause in the MOU; that the appellant was entitled to respond to the respondent's application for injunction to avoid adverse injunction orders being issued against them; that the appellant's response to the respondent's request for negotiations was not an admission; that issues of the validity or otherwise of the arbitration clause contained in the MOU were matters to be determined by the arbitrator; that either party had equal opportunity to initiate the arbitration process. The Judge therefore fell into error when he penalized the appellant alone for the failure to honour the arbitration clause in the MOU.

Counsel cited the cases of A**dopt-A- Light Limited versus Magnate Ventures Limited and 3 others [2009] eKLR Blue Limited versus Jaribu Credit Traders Limited [2008] eKLR; Corporate Insurance Company versus Loise Wanjiru Wachira [1996] eKLR ; Green Hills Investments Limited versus China National Complete Plant Export Corporation (Complaint) t/a Covec [2004] eKLR; Safari Limited versus Ocean Van Beach Hotel Limited & 2 Others [2010] eKLR and Lastly, Africa Spirits Limited versus Prevab Enterprises Limited [2014] eKLR** , all in support of their submissions that a determination with regard to the validity of the arbitration clause contained in the MOU lay in the province of the arbitrator. It therefore mattered not that the appellant had expressed doubt as regards its validity in correspondence~~s~~ exchanged between the parties.

In opposition to the appeal, learned counsel **Mr. Caleb Nyamwange** submitted that the provision of **section 6 (1)** of the Arbitration Act is clear that a party seeking to refer a matter for arbitration must seek leave of court contemporaneously with the entry of appearance which was not the case herein as the appellant entered appearance on the 14th day of September, 2011, while the application seeking leave of the court to refer the matter for arbitration was filed on 25th October, 2011. Secondly, from the correspondence exchanged between the parties, the appellant was not ready and willing to submit itself to the arbitration process a matter that the trial Judge was enjoined not only to inquire into but also to take into consideration in terms of **section 6 (1)** of the Act and he did. Thirdly, allowing the appeal will not serve any purpose as the respondent already has judgment issued by the High Court in its favour and the arbitration process has been overtaken by events.

Counsel cited the cases of **UAP Provincial Insurance Company Ltd versus Michael John Beckett C.A No. 26 of 2007; Charles Njogu Lofty versus Bedouin Enterprises Ltd [2005] eKLR; Corporate Insurance Company versus Wachira [1995 – 1998] IEA 20; and Lastly Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12;** all in support of the respondent's submissions that the appellant moved the court outside the ambit of the prerequisite set out in **section6(1)** of the Arbitration Act, and that on that basis, the Judge acted within the law. The court's decision is therefore unassailable. Counsel urged us to dismiss the appeal with costs to them.

In reply to the respondent's submissions, learned counsel **Mr. Karanja** reiterated the earlier submissions that the determination as to the validity of the arbitration clause contained in the MOU lay with the arbitrator; that the appellant's request for the court's intervention to refer to matter to arbitration was proper; that the respondent's request for Judgment in the High Court proceedings is not a bar to the success of the appeal; that no prejudice will be suffered by either party if the matter were to be referred to arbitration as there is in place an order by the High Court staying the proceedings. Counsel also maintained that the appellant sought the court's intervention to refer the matter for arbitration when negotiations fell through and; lastly, that the Court should look at the entire circumstances of the appeal and find merit in this appeal. On that account he urged us to allow the appeal with costs to them.

This is an appeal arising from the Judge's exercise of discretionary jurisdiction when he disallowed the appellant's application to refer the matter for arbitration. The principles that guide the Court of Appeal when determining whether to interfere with the exercise of such discretionary power have now been crystalized by case law. See **United India Insurance Company Limited Vs. East African Underwriters Kenya Ltd** [1985] KLR 898, where **Madam JA** (as he then was) stated.

"The Court of Appeal will interfere with discretionary decision of a Judge appealed from where it is established that the Judge:

(a) misdirected himself in law,

(b) misapprehended the facts,

(c) took account of consideration which he should not have taken into account,

(d) failed to take into account a consideration of which he should have taken into account,

(e) his decision, albeit a discretionary one, is plainly wrong."

We have considered the record in light of the above mandate, the rival submissions together with principles of law relied upon by either side. In our view, only one issue falls for our determination namely; whether the trial Judge misapprehended both the facts and the law when he declined to allow the appellant's application to refer the matter for arbitration in terms of the Arbitration Clause.

The substantive provision under which the appellant sought the courts intervention is **section 6 (1)** of the Act. It 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 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.

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

(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"

The obligation of the court upon being moved in terms of the above provision has been crystalized by case law. We find it prudent to highlight a few as follows. In the case of **Niazsons(K) Ltd versus China Road & Bridge** (supra) the court held *inter alia* that:

"**All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:**

(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;

(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

(c) Whether the suit intended concerned a matter agreed to be referreed to arbitration"

In **Corporate Insurance Company versus Wachira** (supra) the court held *inter alia* that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In **UAP Provincial Insurance Company Ltd versus Michael John Beckett** (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the

Arbitration Act. In the said case, the court had this to say:

"16. In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the Arbitration Act was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the Arbitration Act under which UAP's application for stay of proceedings was presented provides in the relevant part:

.....

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, and 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.

18. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b) , to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to under"" an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

19. the provisions in section 6 (1) (b) of the Arbitration Act are similar to the provisions of Section 1(1) of the Arbitration Act, 1975 of England before its amendment by the Arbitration Act, 1996."

In **Adrec Limited versus Nation Media Group Limited [2017] eKLR**, the court added that:

"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"

See also **Eunice Soko Mlagui versus Suresh Parmar& 4 others [2017] eKLR,** for similar reflections on this provision as follows;

"Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration. See also the ruling of the High Court, (Gikonyo, and J) in Dioceses of Marsabit Registered Trustee –vrs Techno trade Pavilion Ltd, HCCC No. 204 of 2013.

.....

The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.

Be that as it may, to the extent that after amendment section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty versus Bedouin Enterprises ltd, CA No. 253 of 2003, this court considered section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence. (See also Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12, Corporate Insurance Co. versus Loise Wanjiru Wachira, CA 151 of 1995 and Kenindia Assurance Co. Ltd versus Patrick Muturi, CA No. 87 of 1993).

We have construed **section 6** of the Arbitration Act on our own and considered it in light of the case law highlighted above. We adopt the position taken by the Court in the above pronouncements as in our view; they represent a correct interpretation of the provision. Considering the above in light of the findings of the trial Judge, it is our finding that the trial Judge correctly exercised his discretion and properly appreciated both the facts and the law and arrived at the correct conclusion on the matter. We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed.

The upshot is that the appeal has no merit. It is dismissed in its entirety with costs to the respondent both on appeal and in the court below.

Dated at Nakuru this 22nd day of November, 2018.

P.N. WAKI

……

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

P.O. KIAGE

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR