



**Crje (East Africa) Limited v Cytonn Investment Partners 11 LLP (Commercial Case E105 of 2023) [2024] KEHC 10319 (KLR) (Commercial and Tax) (20 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10319 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E105 OF 2023**

**PM MULWA, J**

**AUGUST 20, 2024**

**BETWEEN**

**CRJE (EAST AFRICA) LIMITED ..... PLAINTIFF**

**AND**

**CYTONN INVESTMENT PARTNERS 11 LLP ..... DEFENDANT**

**RULING**

1. The defendant has approached the Court by the Chamber Summons dated 27<sup>th</sup> November 2023 made, inter alia, under Section 6 of the *Arbitration Act*, Rule 2 of the *Arbitration Rules*, Sections 1A & 1B of the *Civil Procedure Act* and Article 159(2)(c) of *the Constitution*. It seeks that this suit be stayed and the dispute between the parties be referred to arbitration. The application is supported by the grounds set out on its face and the affidavits of Solomon Maina Kimani, the defendant's Project Manager, sworn on 27<sup>th</sup> November 2023 and 26<sup>th</sup> April 2024 respectively.
2. The application is opposed by the plaintiff through the replying affidavit of its authorized representative, Kong Jing Ming, sworn on 5<sup>th</sup> January 2024. The parties have also buttressed their arguments by filing written submissions.
3. The plaintiff on its part filed the Notice of Motion dated 28<sup>th</sup> February 2023 made under Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* where it seeks judgment on admission in its favour for an admitted sum of Kshs. 68,881,781.00 together with interest from 25<sup>th</sup> October 2021 until payment in full. The application is supported by the grounds on its face and the supporting affidavit of Kong Jing Ming sworn on 28<sup>th</sup> February 2023. The defendant did not file any response to this application.
4. It is common ground that the parties entered into a contract dated 30<sup>th</sup> April 2018 for the building and construction of a project known as The Ridge to be erected on the property known as L.R. NO.



28223/3 Ridgeways, which was a mixed-use development. On 15<sup>th</sup> March 2023, the plaintiff filed this suit claiming that as the main contractor of the project, and in line with the contract, it engaged third party companies and individuals to offer various services that were necessary for the completion of the project.

5. It was the plaintiff's case that on or around 6<sup>th</sup> December 2018, the project works were suspended owing to the defendant's financial challenges and its inability to finance the project at the time. The project was therefore, stalled up to or around 25<sup>th</sup> October 2019, by which time the defendant had managed to get the funding and the project works resumed.
6. The plaintiff claims that due to the interference with the project works, it became necessary for the parties to renegotiate and review some of the contract terms, culminating to an Addendum to the Contract dated 27<sup>th</sup> January 2020, signed by both parties. Phase 1 of the project which was to be completed on or around the 14<sup>th</sup> February 2020 was now to be completed on or around the 5<sup>th</sup> May 2023. And that under Clause 8.9 as read with Clause 8.8 of the Contract, the plaintiff had the right to claim and be paid for costs arising out of suspension of the works.
7. The plaintiff now claims the defendant has breached the contract in failing to settle its claims, despite acknowledging the existent and quantum thereof. As such, it Kshs. 68,881,781 being the sum due and owing and special damages for breach of contract.

#### **Defendant's application**

8. The defendant states that it is a condition of the contract that any dispute arising from breach of contract shall be settled through mediation and subsequently arbitration which shall be final and binding on the parties and that by executing the contract, the plaintiff willingly submitted to the provisions thereto.
9. The defendant contends that it is desirous of invoking the Dispute Resolution mechanism as per Clause 20.2 of the contract which expressly provides that any dispute of claim arising out or in connection with the agreement shall be resolved amicably between the parties' failure to which it shall be referred to arbitration. That the plaintiff has instituted this suit in total disregard of the terms of the contract.
10. The defendant further argues that Section 59C of the Civil Procedure Act provides that any suit may be referred to any other method of dispute resolution where the parties agree, or the court considers the case suitable for such referral. And as per Order 46 Rule 20(1) of the Civil Procedure Rules the Court is not precluded from adopting and implementing on its own motion or at the request of the parties, any other appropriate means of dispute resolution for the attainment of the overriding objective. It prayed that the Court give effect to the terms of the contract by staying these proceedings and referring matter forthwith to arbitration.

#### **Plaintiff's response**

11. The plaintiff states that the instant application is bereft of merit and a futile attempt by the defendant to use the Court's process to delay justice and calls for its dismissal.
12. According to the plaintiff, the application offends the express provisions of Section 6(1) of the Arbitration Act, as it was filed five (5) months after the defendant entered appearance as opposed to 'as at the time of entering appearance'. That on the 22<sup>nd</sup> June 2023 the defendant was granted 14 days leave by the court to put in the instant application which lapsed on or around 6<sup>th</sup> July 2023. That



the defendant has neither sought nor been granted an extension of the leave granted and as such the application is incompetent.

13. Nevertheless, the plaintiff depones, there exists no dispute between the parties and it was forced to come to court due to the deliberate inaction of the defendant. That Clause 20.2 as relied upon by the defendant gives room for parties to resolve a dispute amicably between themselves prior to the subsequent steps provided for therein. That the plaintiff performed its duty under the contract and the defendant neglected and/or ignored to pay it.
14. It was averred that as envisioned under the contract, the parties had negotiations, held several meetings and exchanged correspondence which confirmed there are outstanding sums that the defendant needed to settle. Further that the defendant expressly in its letter dated 25<sup>th</sup> October 2021 acknowledged this and even paid partial sums towards settling the debt.
15. For these reasons, the plaintiff asserts that there is no dispute between the parties as envisioned under the arbitration clause since the same was amicably settled. The plaintiff asks the court to find the application is untenable and dismiss it.

### **Analysis and Determination**

16. Although the plaintiff urges the court to dismiss the application on a technicality, that it was filed outside of the timeline set out by the court, I propose to deal with the substance of the application in the interest of justice and completeness. The main issue for the court's determination is whether the instant suit/dispute ought to be referred to arbitration.
17. The defendant's application is reliant on the exhaustion doctrine which posits that where a dispute resolution mechanism exists outside the court, it ought to be exhausted before the court's jurisdiction is invoked (see *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR and *In the Matter of the Mui Coal Basin Local Community* [2015] eKLR).
18. This principle is consistent with Article 159 of *the Constitution* which enjoins the court to promote alternative dispute resolution mechanisms and where possible give it full effect.
19. Section 6(1) of the *Arbitration Act* provides as follows:
  - 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. (my emphasis)
20. The parties agree that the contract provide for settlement of disputes by way of mediation and arbitration as the first point of call rather than the court. The plaintiff however states that there is in fact no dispute between the parties capable of being referred to arbitration as its claim is admitted by the defendant. It has exhibited a letter dated 25<sup>th</sup> October 2021 by the defendant where the latter states that it had evaluated the plaintiff's claim and found an evaluated sum of Kshs. 72,881,781.00 which the defendant stated was "...only able to pay 50% (i.e. Kshs. 36,440,890.50) in 6 equal monthly



installments from January 2022. The Client thus requests you to give a discount of 50% given the very difficult financial situation that it is facing.”

21. The defendant has not disputed authoring this letter or its contents which if anything, is an implied admission of the plaintiff’s claim. The defendant has also not specified the dispute and the nature thereof which it desires to be referred to arbitration (see [County Government of Kirinyaga v African Banking Corporation Ltd](#) [2020] eKLR).
22. In the foregoing, I agree with the plaintiff that there is in fact no dispute to be referred to arbitration and there is no valid reason for the court to stay these proceedings.
23. I now turn to the plaintiff’s application for judgment on admission. Order 13 Rule 2 of the [Civil Procedure Rules](#), states thus:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.”

1. The jurisprudence relating to applications made for judgment on admission is set out in the case of [Choitram v Nazari](#) (1984) KLR 327 where Madan JA., stated as follows:

“For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”

25. In the same judgment, Chesoni Ag. JA. stated:

“Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral...a judgment on admission is in the discretion of the court and not a matter of right (and) that discretion must be exercised judicially.”

26. The plaintiff states that the defendant’s letter of 25<sup>th</sup> October 2021 is evident that the defendant owes the it the sum claimed and that the defendant has gone a step further and partially paid the plaintiff. I am in agreement that indeed, this letter is plain, obvious and unequivocal that the defendant owes the plaintiff Kshs. 72,881,781.00. The plaintiff has demonstrated that this has been partly paid (less Kshs. 4,000,000.00) leaving a balance of Kshs. 68,881,781.00 which it now claims. There are no valid reasons put forth by the defendant why the plaintiff should be denied this sum.

## **Disposition**

27. In the foregoing, I make orders as follows:
  1. The defendant’s Chamber Summons application dated 27<sup>th</sup> November 2023 is dismissed.
  2. The plaintiff’s Notice of Motion application dated 28<sup>th</sup> February 2023 is allowed.



3. Judgment on admission be and is hereby entered for the plaintiff against the defendant for the sum of Kshs. 68,881,781.00 together with interest from 25<sup>th</sup> October 2021 until payment in full.
4. The plaintiff is awarded costs of the suit and both applications.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI This 20<sup>th</sup> day of August 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Mwachofi for plaintiff

Ms. Koile for defendant

Court Assistant: Lilian/Julia

