



**Aecom South Africa Holdings (PTY) Limited v Kenya National
Highways Authority (Miscellaneous Application E897 of 2021)
[2023] KEHC 21849 (KLR) (Commercial and Tax) (31 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E897 OF 2021
DAS MAJANJA, J
AUGUST 31, 2023**

BETWEEN

AECOM SOUTH AFRICA HOLDINGS (PTY) LIMITED PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT

RULING

1. The Defendant has approached the Court by the chamber summons dated December 1, 2023 made, *inter alia*, under section 6 of the Arbitration Act, 1995 of the Civil Procedure Act (Chapter 21 Laws of Kenya) seeking *inter alia* that this suit be stayed and the dispute between the parties be referred to arbitration. The application is grounded on the supporting affidavit of Eng. David Muchilwa, the defendant's director in charge of the Directorate of Development, sworn on December 1, 2021. It is opposed by the plaintiff through the replying affidavit of its senior legal counsel for africa, Ane Verster, sworn on February 22, 2022. The defendant also filed a notice of preliminary objection dated December 1, 2021 which I directed that it be considered alongside the application.
2. The facts leading to the dispute and the filing of this suit are largely common cause and can be gleaned from the parties' pleadings. On July 21, 2004 the Plaintiff, under its previous name, BKS Group (Pty) Limited, entered into a contract with the Ministry of Roads and Public Works for the Provision of Consultancy Services for the Northern Corridor Transport Improvement Project (NCTIP), Kenya Road Concessioning Study, Phase 3A and for a contract sum of USD 199,765.50 ("the Contract"). The Plaintiff filed suit claiming that the parties executed a further contract dated March 14, 2007 for the contract sum of USD 737,958.00 and that despite successfully performing its obligations under the Contracts, the Defendant has refused to pay it the sum of USD 746,691.00.



3. The defendant now claims that the contract, under clause 7.2 of the Special Conditions provides for mechanisms of resolving disputes arising between the parties, and mandatorily reserves the same for determination by Arbitration. The Defendant avers that the Plaintiff has knowingly filed this suit in violation of the Dispute Resolution Clause in the Contract. The Defendant contends that the Court must not condone the abuse of the court process demonstrated by the Plaintiff. It adds that the Contract and the said Dispute Resolution Clauses remain to be operative, valid and are capable of being performed and that the dispute between the parties as pleaded by the Plaintiff relates to issues arising from the Contract and thus the court ought to allow the application, stay the suit and refer the matter to arbitration.
4. The Plaintiff opposes the application and urges the court to dismiss it on the ground that the court has the discretion whether or not to grant the application for stay. That in exercising such discretion, the court should take into account the circumstances of the particular case and that in considering an application under section 6 of the *Arbitration Act*, the court is to consider whether there is in fact a genuine dispute between the parties. The Plaintiff avers that the nature of its suit against the Defendants is that it is simply seeking to collect the undisputed debt due and owing to it from the Defendant and in this regard, there is no dispute between the parties capable of being referred to an arbitrator.
5. Thus, the Plaintiff states that contrary to the Defendant's claim, the Plaintiff has not by-passed the dispute resolution mechanism provided for under the Contract and that granting the prayers in the application will occasion hardship and injustice on the part of the Plaintiff as the Defendant has never and still does not dispute the amount owed to the Plaintiff.

Analysis and Determination

6. The main issue for the court's determination is whether this suit ought to be stayed and the dispute referred to arbitration. Section 6(1) of the *Arbitration Act*, which the Defendant invokes, 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. [Emphasis mine]

7. The contract is common ground between the parties where clause 7 therein provides as follows

7. Settlement of Disputes

7. 1 Amicable Settlement The parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or its interpretation

7. 2 Dispute

Settlement Any dispute between the Parties as to matters arising pursuant to this Contract that cannot be settled amicably within thirty (30) days after receipt by one party of the other



party's request for such amicable settlement may be submitted by either Party for settlement in accordance with the provisions specified in the SC

8. Clause 7.2 of the Special Conditions of the Contract provides as follows:

Any dispute, controversy, or claim arising out of or relating to this contract or breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the [UNCITRAL Arbitration Rules](#) as at present in force

9. The Plaintiff agrees with the aforementioned provisions but, relies on section 6(1)(b) of the [Arbitration Act](#) to attack the application by stating that there is in fact no dispute between the parties capable of being referred to arbitration as its claim is straightforward and undisputed by the Defendant. In [UAP Provincial Insurance Co. Ltd v Michael John Beckett](#) NBI CA Civil Appeal No. 26 of 2007 [2013] eKLR, the Court of Appeal dealt exhaustively with the meaning of the phrase, "there is not in fact any dispute." The court observed the court must carry out an inquiry to determine whether there is in fact a dispute. It stated 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.

10. The court went further and stated that the court must express a view on the merits of the case in order to determine whether the case falls outside section 6(1)(b). It stated as follows:

(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 undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the 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.

11. Turning to the facts of the case, the Defendant in its deposition, states as follows regarding the dispute presented by the Plaintiff

The Alleged Dispute between the Parties

9. The Plaintiff has raised a claim before the honourable court, that the Defendant owes then USD 746,691.00 interest at the rate of 2.5% per day from 24th February, 2016 until payment in full and costs of the suit.

10. As per Clause 7.2 of the Special Conditions of the Contract, any dispute arising from the Contract was to be mandatorily tabled for Mediation and thereafter, Arbitration under the [UNCITRAL Rules](#).



12. The Plaintiff has presented Invoices and demand letters showing that the Defendant is indebted. On its part, the Defendant has not presented any correspondence or evidence between the parties either intimating or actually demonstrating that it disputes the Plaintiff's claim. The Defendant has not stated why it disputes the Plaintiff's claim in order for the court to determine even on a prima facie basis that there is a dispute worthy of resolution by arbitration. I therefore hold that there is no dispute in fact that ought to proceed for resolution by arbitration as the debt due to the Plaintiff appears to be undisputed. It is on this ground that I reject the Defendant's application.
13. Since I have refused to refer the matter to arbitration, I now turn to consider the issues raised in the Preliminary Objections raised by the Defendant. The first objection that the suit ought to be referred to arbitration has now been resolved by determination of the application for stay pending reference to arbitration has not been dismissed.
14. The Defendant also claims that the suit is incurably defective on the ground that there is no privity of contract between it and the Plaintiff which was not a party to the subject contract as the proper party was BKS Global Limited. In answer to this objection, the Plaintiff filed with the replying affidavit, an Amended Registration Certificate issued by the Companies and Intellectual Property Commission of the Republic of South Africa showing that the BKS Group changed its name to AECOM South Africa Holdings (pty) Ltd. This shows that there was a change of name. As whether BKS Global Limited is one the same of BKS Group is a matter of evidence to be resolved at the appropriate time.
15. The next objection is whether the suit is statute barred by virtue of section 67(b) of the [Kenya Road Act](#), 2007 which provides as follows:
 67. Limitation of actions Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—
 - a. the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent; and
 - b. such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.
16. According to the Defendant, the suit is statute barred as it ought to have been instituted within six months of default. It cites [Lang'at v Kenya Posts and Telecommunications Corporation](#) [2000] eKLR and [Ephantus Mucheru Mwangi v Kenya Railways Corporation and another](#) [2005] eKLR. In the former case, the Court of Appeal held that a suit filed after the time frame provided in a similar worded provision of the Kenya Posts and Telecommunications Act (Repealed) was incompetent. In the latter case, the court struck out the suit on the same basis in terms of the [Kenya Railways Corporation Act](#) (Chapter 397 of the Laws of Kenya).
17. In resolving the issue whether the suit is statute barred the court will be required to engage with the issue when the default occurred and the nature of default which are all matters of evidence. Bearing in mind that the limitation is an affirmative defence, the Defendant will have the opportunity to raise it in its statement of defence and the court, will at the appropriate time, address the legal and evidential aspects of the defence including the question whether such limitation provisions can survive



the provisions of Article 48 of Constitution which protects the right of access to justice (see *Kenya Bus Service Limited and another v Minister for Transport and 2 others* [2012] eKLR). This is an issue that should be left to the trial court.

18. The last objection concerns the failure by the Plaintiff to comply with Order 4 rule 1(4) of the *Civil Procedure Rules*. The Defendant contends that the verifying affidavit of Ane Verster, the Plaintiff's senior legal counsel sworn on 27.07.2021 is not accompanied by a board resolution demonstrating the authority to swear or file the same on behalf of the Plaintiff. This objection was answered by the Court of Appeal in *Makupa Transit Shade Limited and another v Kenya Ports Authority and another* [2015] eKLR, as follows:

In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that "they were duly authorized." It was then up to the appellants to demonstrate by evidence that they were not so authorized".

19. The net result of my finding is the preliminary objection raised by the Defendant is now dismissed.

Disposition

20. The Defendant's application dated December 1, 2021 and the preliminary objections raised in the Notice of Preliminary Objection dated December 1, 2021 are dismissed with costs to the Plaintiff. The Defendant shall file and serve its statement of defence within 14 days from the date hereof.

DATED and DELIVERED at NAIROBI this 31st day of AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Akal instructed by Coulson Harney LLP Advocates for the Plaintiff.

Mr N. Munga, Advocate instructed by the Defendant.

