



**Sogea-Satom SAS v National Irrigation Authority formerly
National Irrigation Board (Commercial Case E320 of 2022)
[2023] KEHC 22767 (KLR) (Commercial and Tax) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E320 OF 2022
DAS MAJANJA, J
SEPTEMBER 26, 2023**

BETWEEN

SOGEA-SATOM SAS PLAINTIFF

AND

**THE NATIONAL IRRIGATION AUTHORITY FORMERLY NATIONAL
IRRIGATION BOARD DEFENDANT**

RULING

Introduction and Background

1. On August 26, 2016, the parties herein entered into contract number NIB/T/096/2011- 2012 where the Plaintiff undertook to carry out civil works being; the construction of Link Canal III and related structures, irrigation and drainage facilities, farm roads and ancillary works; improvement of existing Link Canals I and II and building works including the construction of a permanent Engineer’s site office and permanent house at the Mwea Irrigation Development Project in Kirinyaga County at an agreed Contract price of Kes 3,534,724,981 (“the Contract”).
2. The Contract was based upon the General Conditions of Contract (“the General Conditions”) under the FIDIC Conditions of Contract for Construction MDB Harmonized Edition, FIDIC 2010 (“the FIDIC Pink Book”) as amended by the Particular Conditions thereto (“the Particular Conditions”). As per the FIDIC Pink Book, any dispute arising out of the Contract was to be referred to a Dispute Board in accordance with sub-clause 20.4 of the General Conditions. The Dispute Board was to be appointed according to sub-clause 20.2 of the General Conditions as amended by the Particular Conditions, which provides for a sole member Dispute Board. Disputes arose over the performance of the Contract which led constitution of the Dispute Board. The Plaintiff terminated the Contract with effect from February 6, 2020 in accordance with its letter dated January 22, 2020 due to non-payment



3. On November 17, 2020, August 12, 2021, March 14, 2022 and May 25, 2022 the Dispute Board issued four decisions; Contractual Referral Number 5, Contractual Referral No. 6, Contractual Referral No. 7 and Contractual Referral No. 8 awarding the Plaintiff Kes 191,005,283.00, Kes 383,750,624.25, Kes 150,814,745.30 and Kes 16,721,426.16 respectively.
4. Based on the decisions, the Plaintiff filed this suit by way of its Complaint dated August 23, 2022 seeking judgment for the aforesaid amounts together with costs and interest. Contemporaneously, the Plaintiff has filed the notice of motion dated October 13, 2022 made, *inter alia*, under order 36 rule 1 of the [Civil Procedure Rules](#) seeking summary judgment for these sums claimed in the Complaint. The application is grounded by the facts set out on its face, the supporting affidavit sworn on October 13, 2022 by the Plaintiff's Country Director, Mathieu Georges and the supplementary affidavit sworn on April 18, 2023 by the Plaintiff's Contracts Manager and Business Development Lead East and Southern Africa, Henry E. Sisye. This application is opposed by the Defendant through the replying affidavit of Eng. Stephen Mutinda Wambua, its Senior Irrigation Engineer, sworn on March 28, 2023.
5. In order to pre-empt further proceedings, the Defendant filed the Chamber Summons dated October 13, 2022, *inter alia*, under section 6(1) of the [Arbitration Act](#), 1995 seeking to refer the matter to arbitration in line with the contract and for the court to stay these proceedings pending determination of the dispute. The application is grounded on the facts set out on its face and the supporting affidavit of Eng. Stephen Mutinda Wambua sworn on October 13, 2022. It is opposed by the Plaintiff through the replying affidavit of Mathieu Georges sworn on December 7, 2022.
6. Apart from oral submissions, the parties have also filed written submissions in support of their respective arguments in the applications to which I now turn.

The Plaintiff's Application for Summary Judgment

7. The Plaintiff's case is that it is entitled to summary judgment on the basis that its claim is for payment following the 4 Dispute Board decisions, 2 of which are Binding and 2 of which are Final and Binding within the meaning of Clause 20.4 of the General Conditions of the Contract. That by this provision, the Defendant is required to promptly give effect to the decision of the Dispute Board, whether the decision is Binding or Final and Binding hence the Defendant does not have any reasonable defence for the non-payment of the sums awarded by the Dispute Board.
8. The Defendant opposes the motion for summary judgment and urges the court to dismiss the application as there are triable issues which in any event ought to be referred to arbitration as contemplated and in accordance with the Contract and the FIDIC Pink Book.
9. The defendant urges that under the FIDIC Pink Book, the decision of the Dispute Board is not final as it is still open to a review and/or appeal through arbitration and that this decision of the Dispute Board can only be enforced once the mechanism of arbitration has been exhausted under the terms of the Contract. That enforcing decisions of the Dispute Board directly without exhausting the mechanisms set out in the Contract would lead to a perverse outcome being that either employers will avoid nominating Dispute Boards in the contract or they will ensure that Dispute Boards so appointed lean towards the employer with the consequence that the intended objective of having Dispute Boards will have been lost.
10. The Defendant reiterates that the contract and the FIDIC Pink Book sets out a three-pronged dispute resolution mechanism being: determination by the Dispute Board, amicable settlement and lastly, arbitration. That Clause 20.1 to 20.8, provides that an aggrieved party is required to first issue a notice detailing the extent of breach for rectification and/or remedy within the prescribed timelines. Where



there is no rectification and/or remedy provided, the aggrieved party is required under sub-clause 20.4 to refer the matter to the Dispute Board. Where either party is dissatisfied with the decision of the Dispute Board, each party may within 28 days issue a notice of dissatisfaction indicating the extent of dissatisfaction and intention to commence arbitration. That even where a notice of dissatisfaction has been given under Sub-clause 20.4 above, both parties are required to attempt to settle the dispute amicably before commencement of arbitration and consequently, where there is no amicable settlement between the Parties and the Dispute Board's resolution has not become final and binding, the matter shall be referred and finally settled through Arbitration as per clause 20.6.

11. The defendant argues that the plaintiff in this suit has not exhausted the mandatory dispute resolution mechanisms preceding litigation. That with respect to referral number 5, the defendant issued a notice of dissatisfaction on November 26, 2020 hence the dispute remains active and subject to determination by the Dispute Board as envisaged under sub-clause 20.4 and that upon determination by the Dispute Board, parties have leeway to prefer an amicable settlement and in the event of failure refer the matter to arbitration for final settlement. As regards referral number 6, where there is a Dispute Board decision, the plaintiff's notice of dissatisfaction dated September 9, 2021 automatically provides other avenues for settlement of the disputes as highlighted under above. With respect to Referral Number 7, whereas there is a decision by the Dispute Board, Sub-clause 20.7 of the Contract requires the aggrieved party to refer the matter to arbitration including for enforcement. Lastly, with regard to referral number 8, whereas there is a decision by the Dispute Board alleging non-compliance with the decision of the Dispute Board on the part of the Defendant, sub-clause 20.7 of the Contract requires the aggrieved party to refer the matter to arbitration including for enforcement.
12. The Defendant therefore contends that since the Plaintiff's application is pegged on allegation that the Defendant has failed to comply with the decisions of the Dispute Board and mischaracterization of the three-tier dispute process under FIDIC Pink Book, the suit and application are not ripe for determination. Further, that where a party alleges non-compliance with a Dispute Board's decision such a party must refer such a failure to arbitration.
13. The defendant contends that it has raised substantial questions of fact and law which it would otherwise present before the arbitral tribunal. That whether or not the matter is referred to arbitration, the defendant ought to be granted leave to defend the suit on the basis that the decision of the Dispute Board was non-contractual, unlawful, and illegal and that all the claims were settled following termination of the Contract. It further contends that the Plaintiff terminated the Contract in a manner that was not envisaged as it had already been compensated for the delay in payment and had been awarded profits.

The Defendant's Application for stay pending reference to arbitration

14. The grounds in support of the defendant's application seeking stay of the proceedings pending reference to arbitration mirror those it has advanced in its response to the plaintiff's motion for summary judgment. It prays that the court to stay these proceedings and refer the dispute between the parties to arbitration as contemplated in the Contract and as envisaged by section 6 of the [*Arbitration Act*](#).
15. The defendant urges that disputes between the parties must go through the three-pronged dispute resolution mechanism provided for by the contract and the FIDIC Pink Book including notice of rectification to the employer in the first instance, through referral to the Dispute Board resolution and amicable settlement and subsequently arbitration if the first two forums are not effective pursuant to the express terms of the Contract.



16. The Plaintiff attacks the competence of the defendant's application by stating that it offends section 6(1) of the [Arbitration Act](#) since the same was filed 13 days after the defendant filed its memorandum of appearance. It further avers that there is in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration.
17. The plaintiff takes a different view of the dispute resolution clause. That under sub-clause 20.4 of the General Conditions, a decision of the dispute board "shall be Binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or arbitral award." That if either party is dissatisfied with a decision of the Dispute Board, either party may, within 28 days after receiving the decision, issue a Notice of Dissatisfaction indicating its dissatisfaction and intention to commence arbitration and no party shall be entitled to commence arbitration of a dispute unless a Notice of Dissatisfaction is issued in accordance with sub-clause 20.4 of the General Conditions. That where no Notice of Dissatisfaction is given in compliance with sub-clause 20.4 of the General Conditions, the Dispute Board's decision shall be Final and Binding on the parties where Final and Binding means that the said determination shall have the same preclusive effect for all purposes as if such determinations had been embodied in a final judgment, no longer subject to appeal, under the Contract.
18. According to the plaintiff sub-clause 20.4 above implements the "pay now, argue later" principle which underpins the dispute board regime in the FIDIC Pink Book and that as per sub-clause 20.7 of the General Conditions, in the event that a party fails to comply with a Final and Binding Dispute Board decision, "the other party may, without prejudice to any other rights it may have", refer the failure itself to arbitration. That such "other rights it may have" are clearly intended to capture the rights to enforce a binding Dispute Board decision which under sub-clause 20.4, both parties must "promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award". Therefore, the plaintiff argues that a party is not limited to a referral to arbitration and that such right to referral to arbitration does not make the Dispute Board's decision any less binding or any less immediately payable.
19. The Plaintiff also avers that the fact that a party has filed a notice of dissatisfaction does not relieve its burden as it has an opportunity to contest the decision but through arbitration under clause 20.6 of the General Conditions. It restates that it seeks payment of the monies as per the decisions of the Dispute Board, in line with the provisions of the Contract and as the defendant is contractually obligated to immediately honour the decisions of the Dispute Board, there is no dispute to refer to arbitration.

Analysis and Determination

20. The main issues for the court's determination are whether this suit ought to be stayed and the dispute referred to arbitration and whether the Plaintiff is entitled to summary judgment. Both applications are interrelated since the determination that there is in fact no dispute within section 6(1)(b) of the [Arbitration Act](#) *ipso facto* implies that the Defendant does not have any *bona fide* triable issue to present in its defence.
21. Section 6(1) of the [Arbitration Act](#) provides as follows:

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- (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.

22. 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.

23. 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.

24. In this case, it is common ground that the contract as read with the FIDIC Pink Book and the General Conditions provides for the manner in which the parties deal with their claims and disputes at clause 20 under which a claim originates from a notice by the aggrieved party explaining the nature and circumstances of the claim and calling for a response from the other party within the stipulated timeframe. If the notice is not responded to within this timeframe, the claim is then referred to the Dispute Board in accordance with clause 20.4 and the Dispute Board is required to give a decision within 84 days after receiving the reference or within such periods as may be proposed by the Dispute Board and approved by both parties. The Clause further states that this decision “.....shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award” and if the Dispute Board has given its decision “... and no Notice



of Dissatisfaction has been given by either party within 28 days after it received the [Dispute Board] decision, then the decision shall become final and binding upon both Parties.”

25. It is because of the aforementioned clauses that the Defendant has argued that the Plaintiff has not exhausted all the mechanisms provided for including arbitration and that its suit is premature before the court. The interpretation of the aforementioned clause and the general provisions of the FIDIC Conditions of Contract are not novel and have been the subject of consideration in our courts and in other jurisdictions.
26. In *SBI International Holdings (Kenya) v Kenya National Highway Authority* ML HCCC No. E075 of 2020 [2020] eKLR this court held as follows:

(28) The courts in South Africa have taken a firm view that the DB decision is binding unless and until it is set aside and it must be accordingly enforced. In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd (Supra)* the court interpreting the Clause 20.4 stated as follows:

(8) The effect of these provisions is that the decision shall be binding unless and until it has been revised as provided. There can be no doubt that the binding effect of the decision endures, at least, until it has been so revised. It is clear from the wording of clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The moment the decision is made the parties are required to “promptly” give effect to it. Given that a dissatisfied party has 28 days within which to give his notice of dissatisfaction it follows that the requirement to give prompt effect will precede any notice of dissatisfaction.

After reviewing the other provisions, the court concluded as follows:

(14) The scheme of these provisions is as follows: the parties must give prompt effect to a decision. If a party is dissatisfied he must nonetheless live with it but must deliver his notice of dissatisfaction within 28 days failing which it will become final and binding. If he has given his notice of dissatisfaction he can have the decision reviewed in arbitration. If he is successful, the decision will be set aside. But until that has happened the decision stands and he has to comply with it.

(29) The decision in *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd (Supra)* involved enforcement of the decision of the DB issued under clause 20.4 of the FIDIC Conditions of Contract. The employer refused to make payment in terms of the DB decision arguing that it had given a notice of dissatisfaction. The learned Judge considered the intention and context of the dispute resolution court holding that

(12) [T]he DAB process ensures that the quid pro quo for continued performance of the contractor’s obligations even if dissatisfied with the DAB decision which it is required to give effect to is the employer’s obligation to make payment in terms of a DAB decision and that there will be a final reconciliation should either party be dissatisfied with the DAB decision...

The court then concluded as follows:



- (13) In order to give effect to the DAB provisions of the contract the respondent cannot withhold payment of the amount determined by the adjudicator, and in my view is precluded by the terms of the provisions of clause 20 (and in particular clauses 20.4 and 20.6 from doing so pending the outcome of the arbitration. In my view it was precisely to avoid this situation that the clauses were worded in this fashion.
- (14) I have considered a number local and foreign cases that were dealt with in argument. In my view this is a straight forward case based on the reading of the contract and the underlying rationale for requiring the immediate implementation of the DAB decision.
- (15) This court is required to give effect to the terms of the decision made by the adjudicator. The DAB decision was not altered and accordingly it is that decision which this court enforces.
- 30 In both cases cited the contractor had applied for summary enforcement of the DB decisions. The courts found that any issues raised by the employer would be dealt with by amicable settlement or arbitration once the Notice of Dissatisfaction is filed. Although the present case deals with stay of the suit pending reference to arbitration in accordance with section 6(1) of the *Arbitration Act*, the same principles apply regarding the obligation to give effect to the DB decision. Under the Contract, a DB decision that is “binding on the parties” imposes on the parties an obligation to give it effect promptly. It however remains provisional or interim if the parties avail themselves of the amicable settlement process or arbitration if they file a Notice of Dissatisfaction. The filing of Notice of Dissatisfaction does not in any way discharge the party from its obligation to promptly give effect to the decision. The words, “unless and until” underpin the duty of the employer in this case to comply with its obligation. It is this obligation to give prompt effect to the DB decision that the Plaintiff now seeks to enforce. I find that under Clause 20. 4, the obligation imposed by the DB decision is binding on the parties and the successful party is entitled to enforce the decision unless it is set aside by amicable settlement or by arbitration. The right to enforce the DB either by arbitration or through a court action is preserved by the Clause 20.7 of the Particular Conditions.
- (31) Since the right to enforce the DB decision has accrued and must be given effect promptly, this means there no dispute to be referred to arbitration in view of clear and unequivocal obligation, “to pay now argue later”. The fact that a party has filed a Notice of Dissatisfaction does not relieve its burden as it has an opportunity to contest the DB decision but through arbitration under Clause 20.6. It is at a later stage that any error may be corrected. In *Bouygues UK Ltd v Dahl-Jehnsen UK Ltd* [2000] BLR 49 [TCC], the court addressed this concern as follows:
- (35) Mr Furst submits that, if Dahl-Jensen is permitted to enforce a decision which is plainly erroneous, Bouygues will suffer an injustice, and this will bring the adjudication scheme into disrepute. But as I said in *Macob*, the



purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact. It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.

- (32) Counsel for the Defendant submitted that the urgency inherent in Clause 20.4 has since been diminished upon termination of the Agreement. I did not see nor was I referred to any provision in the Contract that affects the DB decisions in that regard given that the DB decisions for all intents and purposes constituted a binding obligation on the parties unless it is set aside. At the end of the day, the contractual provisions which this court is called upon to apply under Clause 20.7 of the Particular Conditions do not make any distinction between a provisional or binding decision in so far as the procedure for enforcement is concerned. Clause 20.7 preserved the right of the aggrieved party to move the court for relief.

Disposition

- (33) Following the conclusion, I have reached on the tenor and purport of Clause 20.4 of the General Conditions as read with the 20.7 of the Particular Conditions of the Contract, I decline to stay the proceedings and refer the matter to arbitration.

27. In *SBI International Holdings (Kenya) v Kenya National Highways Authority* ML HCCC No. E375 of 2020 [2020] eKLR, Mativo J., (as he then was), agreed with the above position by stating that:

Sub-Clause 20.4 creates contractual obligations which are immediate and which must be performed promptly. By dint of the said clause, the fact that a party had engaged the other to attempt amicable settlement or the fact that a party had reserved the right to appeal the decision of the DB to arbitration by giving notice to the other party of its dissatisfaction and intention to commence arbitration does not suspend the duty to perform the obligations determined by the DB, and conversely does not bar a successful party before the DB from enforcing the decision of the DB.

Determinations of the DB being an assessment of rights and obligations of parties under the contract is enforceable, binding and continue to be binding unless upset by amicable settlement of the parties or by an arbitral award.

28. The same issue was dealt with in *SBI International Holdings AG v Kenya National Highways Authority*, ML HCCC No. E968 of 2022 (UR) where Mwita J., agreed with the aforementioned conclusions on the interpretation of Clause 20.4. I do not see any legal or factual basis to depart from what I consider settled principle that the Plaintiff is entitled to enforce the decisions of the Dispute Board as the same have not been upset by either an amicable settlement or arbitration. The



enforcement of these decisions precedes any determination by way of an amicable settlement or arbitral tribunal in line with the parties' commitment to give prompt effect to such decisions. I therefore reject the Defendant argument that these proceedings are premature. The inescapable result is that I must conclude that there is in fact no dispute for resolution hence there is no reason to stay the proceedings as the Plaintiff is entitled to the enforce the Dispute Board's decisions regardless of whether the Defendant seeks to challenge them in arbitration.

29. Having concluded that there is no reason to stay the proceedings, it follows that for the same reasons the Defendant does not, by affidavit or otherwise, raise any issue for trial or determination by the court.

Disposition

30. For the foregoing reasons, I now make the following orders:
- a. The defendant's application dated October 13, 2022 is dismissed.
 - b. The Plaintiff's application dated October 13, 2022 is allowed and judgment be and is hereby entered for the Plaintiff as against the Defendant as prayed in the Plaint as follows:
 - a. The sum of Kes 150,452,027.41, being the outstanding amount due of Kes 191,005,283 awarded to the Plaintiff in the Binding decision of the Dispute Board in Contractor Referral Number 5 of 17.11.2020;
 - b. The sum of Kes 231,931,127.64 as the outstanding amount of the sums awarded to the Plaintiff in the Binding decision of the Dispute Board in Contractor Referral Number 6 of 12.08.2021;
 - c. The sum of Kes 150,814,745.30 as awarded to the Plaintiff in the Final and Binding decision of the Dispute Board in Contractor Referral Number 7 of 14.03.2022;
 - d. The sum of Kes 16,721,426.16 as awarded to the Plaintiff in the Final and Binding decision of the Dispute Board in Contractor Referral Number 8 of 25th May 2022;
 - e. Costs of this suit;
 - f. Interest on item (a) to (e) above at court rates from the date of filing this suit until payment in full.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2023

D. S. MAJANJA

JUDGE

