



Rosslyn Suites Limited v Britam General Insurance Company (K) Ltd & another (Commercial Case E503 of 2022) [2023] KEHC 27273 (KLR) (Commercial and Tax) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 27273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E503 OF 2022
NW SIFUNA, J
OCTOBER 31, 2023**

BETWEEN

ROSSLYN SUITES LIMITED PLAINTIFF

AND

BRITAM GENERAL INSURANCE COMPANY (K) LTD 1ST DEFENDANT

ROKOH (K) CONSTRUCTION LTD 2ND DEFENDANT

RULING

1. This Ruling is on the 2nd Defendant's Chamber Summons dated October 6, 2023. Which has sought the following orders:
 - (a) (Spent).
 - (b) A stay of the orders this Court issued on October 2, 2023 directing the 2nd Defendant herein to file and serve its statement of defence and all pre-trial documents on or before 6th October 2023.
 - (c) A stay the proceedings against the 2nd defendant.
 - (d) An order referring to arbitration, the dispute between the Plaintiff and the 2nd Defendant.
2. The Application is supported by the Supporting Affidavit of Mark Walter Koehler the Chairman of the 2nd Defendant's Board of Directors sworn on October 6, 2023. The Application which is purportedly filed under the provisions of Section 6 of the *Arbitration Act* (Act No. 4 of 1995), is based on the following grounds stated therein:
 - (a) That on October 2, 2023 the court directed the 2nd defendant to file its statement of defence and all pretrial document on or before the October 6, 2023.



- (b) That the suit arises from a construction agreement between the Plaintiff and the 2nd Defendant wherein arbitration is provided as the form of dispute resolution; and the 2nd Defendant is desirous of having the suit claim resolved through arbitration.
3. The Application was opposed by the Plaintiff and was argued orally with the parties first filing their rival skeleton arguments. I have considered the Application and its Supporting Affidavit, the Plaintiff's Response, as well as the oral submissions by the parties' advocates.
4. The suit was filed sometime in the year 2022, and from the Affidavit of Service, summons and the pleadings were served in January 2023. Despite service on both defendants, only the 1st Defendant entered appearance and filed defence. Thereafter only the 1st Defendant entered appearance and filed a defence to the suit. The 2nd Defendant for its part, went into a long slumber and woke up only after the Plaintiff had filed against it, a Request for Judgment and the file listed before the Deputy Registrar for entry of the requested judgment. The Request for Judgment is dated April 4, 2023.
5. By its Plaint dated November 17, 2022, the Plaintiff is in this suit seeking the following reliefs:
- (a) A declaration that the 2nd Defendant's purported objection to the payment by the 1st defendant of sum of Ksh 167,266,450/40 being the amount guaranteed by the 1st Defendant pursuant to an on-demand guarantee issued by the 1st Defendant in respect of proposed development known as Enaki Residential Apartments situated on LR No. [particulars withheld] & LR No. [particulars withheld] Redhill Road Nairobi phase 1 Contract 2, is unlawful, irregular and invalid.
- (b) A mandatory order directing the 1st Defendant to pay the Plaintiff the sum of Ksh 167,266,450/40 being the amount guaranteed by the 1st Defendant pursuant to an on-demand guarantee issued by the 1st Defendant in respect to proposed development known as Enaki Residential Apartments situated on LR No. [particulars withheld] & LR No. [particulars withheld] Redhill Road Nairobi phase 1 Contract 2.
- (c) Interest on the sum of Ksh 167,266,450/40 at court rates from July 8, 2021 until payment in full.
- (d) Costs of this suit.
6. The body and prayers in the Plaint, the Plaintiff's suit is seeking to enforce against the 1st Defendant, a Performance security guarantee guaranteed by the 1st Defendant, hence is not a contractual dispute between the Plaintiff as developer and the 2nd Defendant as contractor. I even wonder why the Plaintiff joined the 2nd Defendant in this suit.
7. The Plaintiff's claim against in this suit, is stricto sensu not a dispute between it and the 2nd Defendant-hence not a claim that the subject contract contemplated for arbitration. Indeed only disputes as are expressly or impliedly contemplated in the agreement are to be referred to arbitration.
8. The subject Contract/Agreement is clear and speaks for itself. The work of a court in a written contract is only to interpret it hence that cannot add, subtract anything from it or vary it. The text and substance of a written agreement or written contract should not be modified, varied or schewed by the craft of interpretation as is being attempted and urged by the 2nd Defendant in this Application.
9. This suit is principally against the 1st Defendant who is not a party to the Construction Contract between the Plaintiff and the 2nd Defendant. Hence the 1st Defendant cannot be dragged to arbitration when he is not a party to an arbitration clause providing for arbitration.



10. I find that this application by the 2nd defendant is an after-thought after it discovered that there was a request for judgment and it could therefore not file any defence. This Application is mischievous and intended to delay this suit, hence is an abuse of the court process. It was also filed belatedly after the suit set down for hearing.
11. It is as intrusive as it is disruptive of these proceedings, and cannot be entertained at this advanced stage of the suit, and belatedly coming more than a year after service of the Summons. This suit having a hearing date, shall proceed without delay or excuse or scapegoat as is being attempted by the 2nd Defendant. This Application and all the recent efforts by the 2nd Defendant are in bad faith, and clearly attempts at winding the clock backwards to accommodate its long slumber and also scuttle the hearing of this matter.
12. I hereby accordingly hereby dismiss this Application with costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2023.

PROF (DR) NIXON SIFUNA

JUDGE

