



**Pillar Palace Limited v Sichuan Huashi Enterprises Corporation
E.A Limited & another (Miscellaneous Civil Suit E714 of 2021)
[2022] KEHC 12927 (KLR) (Civ) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
MISCELLANEOUS CIVIL SUIT E714 OF 2021
A MABEYA, J
AUGUST 31, 2022**

BETWEEN

PILLAR PALACE LIMITED PLAINTIFF

AND

**SICHUAN HUASHI ENTERPRISES CORPORATION E.A LIMITED 1ST
DEFENDANT**

SYLVIA MUENI KASANGA 2ND DEFENDANT

RULING

1. Before court is the plaintiff's application dated 24/9/2021. The same was brought under sections 1A, 1B, 3A of the *Civil Procedure Act*; Order 51 Rule 1 of the *Civil Procedure Rules*; section 6(1) (a) & (b), and section 7(1) of the *Arbitration Act*.
2. The plaintiff sought to restrain the defendants from proceeding with the arbitration between the plaintiff and the 1st defendant pending the determination of this suit.
3. The grounds thereof were that the plaintiff and 1st defendant entered into an Agreement for the construction of a commercial development. The plaintiff experienced challenges in financing the project leading to a delay in the 1st defendant's payments and a dispute arose between the parties under the agreement.
4. On 5/5/2021, the 1st defendant issued a notification of dispute and request for submission to Arbitration to the plaintiff's advocates under the agreement. The plaintiff contended that under the agreement, arbitral proceedings were to commence after 90 days had lapsed from when the dispute



arose and that the 1st defendant was in breach of this requirement when it appointed the 2nd defendant as an arbitrator to handle the dispute on 17/5/2021.

5. In opposition, the 1st defendant lodged a preliminary objection dated 7/10/2021 and a replying affidavit sworn 10/11/2021.
6. In the objection, the 1st defendant contended that this court lacks jurisdiction to hear the suit; that the application and suit do not meet the threshold for the court's intervention under section 7 of the *Arbitration Act*; that the issues raised in the application and the suit are preserved for the determination of the arbitral tribunal under section 17 of the Act.
7. Lastly, the 1st defendant argued that the plaintiff had waived its right to objection under section 5 of the *Arbitration Act*.
8. In its replying affidavit, sworn by its director, the 1st defendant reiterated the contents of the preliminary objection as aforesaid and stated that, under clause 45 of the agreement any dispute between the parties would be referred to arbitration.
9. That pursuant to the said clause 45, the 1st defendant issued a notification of dispute on 2/3/2021 with a proposal on the appointment of an arbitrator. Upon the expiry of 30 days, having not received feedback from the plaintiff, the 1st defendant wrote to the Chairman of the Architectural Association of Kenya requesting for the appointment of an arbitrator.
10. That the Architectural Association of Kenya appointed the 2nd respondent as the sole arbitrator. Having issued the requisite notification of dispute after the parties had failed to reach a settlement, there was no requirement for arbitration proceedings not to commence before the expiry of 90 days as alleged by the plaintiff.
11. That in any event, the plaintiff had voluntarily participated in the arbitral proceedings and is therefore estopped from attacking the same.
12. The court has considered the pleadings, submissions and the affidavits on record.
13. The first issue for determination is whether the court has the jurisdiction to hear and determine the matter.
14. The interpretation of the agreement between the parties seems to have the answers needed. It is annexed as 'RL1' in the 1st defendant's replying affidavit. Paragraph 45 therein is titled 'Settlement of Issues'.

Clause 45.1 thereof states: -

“In case of a dispute or difference between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice ... Failing agreement to concur in the appointment of Arbitrator, the Arbitrator shall be appointed by the chairman or vice chairman of The Architectural Association of Kenya, on the request of the applying party.”

15. Clause 45.3 states:

“Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.”



Clause 45.4: -

“Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such a dispute or difference amicably with or without the assistance of third parties.”

Clause 45.5:

“In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.”

16. From the foregoing, the intention of the parties was clear. In the event of a dispute, the aggrieved party was to notify the offending party by notice, of the dispute and request that arbitration be commenced.
17. There were two pre-conditions that were to follow the notification of a dispute. Firstly, the parties were to attempt to settle the matter amicably before any arbitral proceedings could be commenced. Secondly, if there was no settlement, then the parties were to proceed to arbitration. That arbitration however, should only commence after 90 days after the service of the notice of a dispute or difference.
18. The 1st defendant argued that since it had entered into a choice of forum agreement with the plaintiff, this Court has no jurisdiction in this matter and must down its tools.
19. The plaintiff on its part argued that the arbitration proceedings were instituted unlawfully as the arbitration was only to begin 90 days after service of the notice of a dispute, which time had not yet lapsed.
20. The record shows that, on 2/3/2021 the 1st defendant’s advocates sent a letter to the plaintiff notifying it of a dispute and requesting for submission to arbitration. The letter is annexed as ‘RL 2’ in the 1st defendant’s replying affidavit.
21. On 29/4/2021, the 1st defendant wrote to the chairperson of the Architectural Association of Kenya requesting for the appointment of an arbitrator. Pursuant thereto, on 17/5/2021, the Architectural Association of Kenya appointed the 2nd defendant as the sole arbitrator.
22. The arbitrator issued Order for Directions number 3 whereby she gave orders as consented to by both the plaintiff and 1st defendant. The orders emanated from the preliminary meeting held on 15/7/2021 in which both parties attended.
23. Among the orders issued by the arbitrator was that both the parties had no objection to the arbitrator’s appointment and jurisdiction over the matter. During the preliminary meeting of 15/7/2021, the parties agreed on a schedule for exchange of documents and further agreed to have a mention before the arbitrator on 19/8/2021 to confirm compliance and to take a hearing date.
24. It appears therefore that the plaintiff had participated in the arbitration and more importantly had acceded to the arbitrator’s jurisdiction to hear the matter.
25. Section 5 of the *Arbitration Act* provides inter alia that, any party who knows that any provision of the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to the non-compliance without undue delay is deemed to have waived the right to object.



26. Guided by section 5 of the *Arbitration Act* aforesaid, the Court finds that the plaintiff is estopped from attacking the arbitral proceedings that it has already participated in. The plaintiff's advocate attended the preliminary meeting with the arbitrator and agreed to her having jurisdiction over the matter.
27. The plaintiff cannot now turn around and seek to impugn those proceedings. That wont do. It matters not that the pre-conditions for the commencement of the arbitral proceedings had not been met. The moment the plaintiff participated in those proceedings and never raised any objection, its right to this Court was shut.
28. Accordingly, under section 10 of the *Arbitration Act*, this Court finds that it lacks jurisdiction to entertain this matter.
29. Accordingly, the application and suit are hereby struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

