



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**CIVIL SUIT NO. 16 OF 2020**

**SHIV CONSTRUCTION COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**RIVATEX EAST AFRICA LIMITED.....DEFENDANT**

**RULING**

1. Vide a plaint dated 6/05/2020, the plaintiff moved this Court seeking for orders inter-alia for:-

- a. An order compelling the defendant to pay the plaintiff the retention amount and pending certificates in the sum of Nine million, eight hundred and sixty six thousand two hundred shillings (Kshs 9,866,200.00) and interest thereon as per paragraph 14 (a) and (b).
- b. An order directing the defendant to remit to the Kenya Revenue amount totaling Kshs. 2,508,739.80/= for VAT and Kshs 1,254,320.20/= for withholding Tax in respect to contract No. REAL/39/2015–2016 and Kshs 2,182.974.70/= for VAT and Kshs 1,091,487.30/= for withholding Tax in respect to contract No. REAL/41/2016 – 2017.
- c. An order declaring the contract agreement dated 15<sup>th</sup> June 2016 and that of 22<sup>nd</sup> September 2016 between the plaintiff and the defendant as the bona fide tender Nos. REAL 39/2015 and tender No. REAL 41/2016 -2017 respectively to perform construction works for the construction of a warehouse and proposed additional works for assembly building at the defendant's factory.
- d. Damages for breach of contract and exemplary damages.
- e. Interest on (a) above at the current market rates and costs.

2. In response the defendant filed a notice of preliminary objection on the following grounds:

- a. That the Honourable Court lacks the jurisdiction to hear and/ or dispose off this matter arising out of purported breach of construction works contract.
- b. The contract for building works stipulates a settlement of Dispute mechanism clause (Arbitration).
- c. Clause 37 (37.1) of the contract for construction works provides internal Dispute Resolution Mechanism hereinafter referred to as arbitration.
- d. The suit is incurably defective for failure to enjoin necessary parties.
- e. The orders/prayers being sought in the plaint are directed to the project manager from Ministry of Public Works who are not parties.
- f. The suit before this Court is incompetent, bad in law, vexatious, frivolous in itself and an abuse of the process of this Honourable Court hence should be dismissed/struck out with costs to the Defendant.

3. It was agreed that the preliminary objection be canvassed by way of written submissions. The plaintiff submitted that the High Court as provided for under Article 165(3) of the constitution has unlimited original jurisdiction in criminal and civil matters.

4. The plaintiff heavily relied on the provisions of section 6(1) of the Arbitration Act together with Order 1 Rule 9 of the Civil procedure

rules and subsequently prayed that the suit be allowed.

5. The Defendant submitted that it is not in dispute that the plaintiff and the defendant both entered into a contractual agreement vide Tender Nos. REAL/39/2015-2016 and REAL/41/2016-2017 to perform building works and/or construction works of a warehouse.

6. The parties in the making of the contract, intended that the terms and conditions in every clause of the contract was legally binding.

7. Issues raised by the plaintiff relates to the breach of performance by the parties under the contract of which the same contract has provided a mechanism for resolving such disputes.

8. That the mechanism for resolving such disputes are provided for under clause 45.1 and 37.1 (settlement of disputes) of the contract respectively otherwise known as the Arbitral Clauses.

9. Further, that Section 10 of the Arbitration Act limits Courts intervention in arbitral process and specifically states that **“except as provided in this Act, no Court shall intervene in matters governed by this Act.”**

10. The plaintiff did not consider taking the matter to Arbitration nor did it notify the defendant of exploring the same as provided for in the relevant clauses of their agreement.

11. The clauses do not specify as to which dispute should be resolved by arbitration but rather states clearly that any dispute that arises between the defendant and the plaintiff should be referred to arbitration.

12. The plaintiff has therefore breached the specific clauses in the contract and has wrongly moved this Court to determine a matter that is well to be determined by an Arbitrator. That the Court should therefore honor the party’s contractual intention and refer the matter to Arbitration.

13. The defendant raises the issue of jurisdiction in reference to the existence of an Arbitral Clause which required the parties to amicably resolve their issues by Arbitration and the arbitrator to issue a final decision on the same.

14. The defendant relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors* where the Court held:-

**“.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings which if argued as a preliminary point may dispose off the suit example are an objection to jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

15. Further that section 6(1) of the Arbitration Act states that:-

**“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 stay of proceedings is sought, stay the proceedings and refer the parties to arbitration.”**

16. Lastly, that the Court should down its tools and refer the present matter to arbitration as fully intended by the parties in their contractual agreement. The present suit is therefore not rightfully before this Court.

#### **Issues for determination:**

The main issue for determination is whether the matter should be referred to arbitration.

17. **Section 3 of Arbitration Act** defines an arbitration agreement as:-

**“an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not.”**

18. In a contract, parties may decide on their own the forum to determine disputes arising out of the said contract . In *Nyutu Agrovat Limited Vs. Airtel Networks Limited (2015) eKLR* the Court of Appeal held:

**“Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here.”**

19. By entering into an arbitration agreement, parties express their intention that all disputes between them be referred to and settled by arbitration. This choice of forum manifests the parties’ intended dispute resolution mechanism. With respect to the parties’ agreement, Court proceedings cannot be instituted where the dispute is governed by the Arbitration clause.

20. Section 10 of the Arbitration Act limits Court’s intervention on matters that concern arbitration unless where provided for in the Act, as was reiterated in *Kenyatta International Convention Centre (KICC) V Greenstar systems Limited (2018) eKLR* Court held:

**“indeed, section 10 of the Arbitration Act, No. 4 of 1995 expressly stipulates that: “ Except as provided in this Act, no Court shall intervene in matters governed by this Act.”**

21. In the case of , *Prof. Lawrence Gumbo & Another Vs. Honourable Mwai Kibaki & others, High Court Miscellaneous No.1025 of 2004, Nyamu, J.* held that:

**“our section 10 is based on the United Nations Model Law on arbitration and all Countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented....”**

22. The parties herein under clause 37.1 of the contract for construction works chose arbitration as the internal dispute resolution mechanism. The plaintiff/Applicant by coming to Court breached the said provision. This Court therefore lacks jurisdiction to entertain the matter. The preliminary objection has merit and is allowed. The application is accordingly dismissed with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 22<sup>ND</sup> DAY OF MARCH, 2021.**

In the presence of:-

Mr. Too for the plaintiff (absent)

Mr. Kibichiy for the defendant.

Gladys - Court Assistant