



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E007 OF 2018

CHINA CONSTRUCTION ENGINEERING (K) LTD.....PLAINTIFF

-VERSUS-

VERNONIA APARTMENTS LTD.....1ST DEFENDANT/APPLICANT

HUDUMA CONSULTING LTD.....2ND DEFENDANT/APPLICANT

RULING

1. Through the application dated 24th April 2019, the defendants/applicants seek, *inter alia*, orders to set aside the interlocutory judgment entered on 6th July 2018 and to stay the proceedings herein pending arbitration. The applicant also seeks orders to refer the dispute to arbitration.

2. The application is supported by the affidavit of the 1st defendant's Director **Abdullahi A. Shariff** and is premised on the grounds that:

1. The parties hereto on the 21st day of July 2015 entered into an Agreement for building works (hereinafter called "the Agreement") whereby the plaintiff/respondent was contracted by the 1st defendant/applicant to, inter alia, carry out construction works being the proposed construction of apartments on LR No. 209/3154 in Kileleshwa Nairobi for a contract sum of Kshs 380,848,462.90, as per the specifications and conditions contained in the said Agreement.

2. Clause 45.0 of the Agreement stipulated that any dispute or difference arising there from shall be referred to arbitration.

3. This suit has been instituted by the plaintiff/respondent in violation of the Agreement and prematurely without the dispute being referred to arbitration as stipulated by Clause 45.0 thereof.

a. That the defendant stands to suffer irreparable loss if the judgment entered is not aside.

b. That the avenue of resolving this dispute via arbitration, a mechanism provided for in the agreement would be the most desirable in the circumstances herein.

4. By virtue of the Agreement the parties hereto agreed and are bound to proceed to arbitration on matters in dispute arising there from.

5. Section 6 of the Arbitration Act 1995 (hereinafter called "the Act") empowers the court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay the proceedings and refer the parties to arbitration.

6. Section 6(1) of the Act further provides that the court shall grant a stay of legal proceedings subject to the exceptions set out herein. None of those exceptions apply to this suit.

7. The defendants/applicants are ready, willing and able to proceed to Arbitration on any dispute from the parties as stipulated in the Agreement.

8. That this application ought to be granted in the interests of equity and justice.

3. The respondent opposed the application through the replying affidavit of its Managing Director, **Zhao Rhongai**, who avers the applicants did not enter appearance or defend the suit filed by the respondent on 13th April 2018 despite proper service thereby precipitating the filing of a request for judgment on 19th June 2018 and the subsequent entry of judgment on 6th July 2018. He concedes that the respondent was on 12th July 2018 served with an application seeking the referral of the dispute to arbitration filed on 4th July 2018. He however contends that the interlocutory judgment entered on 6th July 2018 was regular.

4. He states that the respondent protested at the manner in which the application dated 4th July 2018 found its way into the court record and requested the Deputy Registrar to open an investigation on the matter whose outcome is yet to be made known to the respondent. It is the respondent's case that the instant amended application is malicious, fraudulent and an abuse of the process of court.

5. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

6. A perusal of the court record reveals the following undisputed facts: -

i. That on 13th April 2018, the respondent sued the applicants seeking the following orders:

a. Principal amount being Kshs 25,034,930;

b. Building and construction equipment hiring charges at Kshs 10.000 per day computed from the day of illegal seizure;

c. An order of specific performance compelling the 1st and 2nd defendant to return the construction equipment to the plaintiff in the same condition in which they were at the time of seizure;

d. Interest in (a) and (b) above at court rates.

ii. That the cause of action arose from an agreement and conditions of contract for building works signed by the parties in July 2015.

iii. That Clause 45.1 - 45.5 of the said Agreement provides for the settlement of disputes arising from the Agreement through arbitration.

iv. That on 4th July 2018, the applicants herein filed an application dated 27th June 2018 seeking the referral of the dispute to arbitration and for stay of all proceedings pending arbitration.

v. That the respondents request for judgment was filed on 19th June 2018 and interlocutory judgment entered on 6th July 2018.

7. From the above stated undisputed facts, it is clear to me that as at the time the interlocutory judgment was entered on 6th July 2018, the applicant's application to stay the proceedings and refer the dispute to arbitration had already been filed. I note that even though the respondent contends that there is more than meets the eye in the manner in which the application dated 27th June 2018 was filed, no material was placed before this court to show that there was anything fishy or untoward in the filing of the said application.

8. My finding is that the interlocutory judgment recorded on 6th July 2018 ought not to have been entered in the face of the existence of an application seeking the stay of proceedings and referral of the dispute to arbitration.

9. Section 6(1) (b) of the Arbitration Act stipulates as follows.

(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—

b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

10. In **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya** [2001] the Court of Appeal held.

“All that an applicant for stay of proceedings under Section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application PROMPTLY. This court will be obliged to consider three things: whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there are any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration.”

11. In the present case, the applicants filed the Memorandum of Appearance upon service with the plaint and Summons to Enter Appearance but did not file a defence. Instead the applicants filed an application for stay of proceedings and referral of the dispute to arbitration. I find that the applicants took the earliest opportunity to bring the existence of the arbitration Clause in their agreement to the attention of the court and are therefore entitled to the orders sought in the application. The scenario would have been different had the applicants filed a defence as was observed in **Corporate Insurance Company v Wachira** [1995-1998] EA where the Court of Appeal held:

“The arbitration clause was in the nature of scott v avery clause, which provides that all disputes shall be referred to arbitration.... a scott v avery can provide a defence to a claim but the party relying on it CANNOT circumvent the statutory requirement to apply for a stay of proceeding. If the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleadings. By filing a defence the appellant had lost the right to rely on the clause....”

12. Section 6 and 10 of the Arbitration Act stipulates as follows:

6. Stay of legal proceedings

(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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

“10. Extent of court intervention

13. In the present case, it was not disputed that the parties had a valid agreement that contained an arbitration clause which this court cannot overlook. Courts have taken the position that they cannot purport to rewrite a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded. (See *National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another* [2001] eKLR).

14. Having regard to the findings I have made in this ruling, I find that the application dated 24th April 2019 is merited and I therefore allow it as prayed with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties.

Court Assistant: Silvia