



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E300 OF 2019

**THE REGISTERED TRUSTEES OF THE MANAGEMENT UNIVERSITY OF
AFRICA TRUST.....PLAINTIFF**

-VERSUS-

SOLYANA COMPANY LIMITED.....1ST DEFENDANT

SAMUEL MBIRIRI NDERITU.....2ND DEFENDANT

JUDGMENT

1. The plaintiff herein, **the Registered Trustees of the Management University of Africa Trust**, sued the defendants through the Originating Summons (OS) dated 18th September 2019 seeking the following orders:

- a. A declaration that the Arbitral Proceedings between the plaintiff and the 1st defendant, on-going before the 2nd defendant, are premature for non-compliance with Clause 18(1) of the Project Development and Transfer Agreement dated 15th November, 2016, thus null and void.**
- b. An order to set aside the 2nd defendant's preliminary ruling delivered on 20th August, 2019 titled "Order for Directions No. 2" made pursuant to the plaintiff's Letters of Protest.**
- c. An order directing the plaintiff and 1st defendant to exhaustively implore their best efforts to settle amicably any dispute arising between them before proceeding to arbitration.**
- d. The defendants to bear the costs of this application and the arbitral proceedings before the arbitrator.**
- e. Any other orders or directives that the Honourable court may deem just to grant in the circumstances to uphold the scales of justice between parties.**

2. The Originating Summons is supported by the affidavit of the Plaintiff's Acting Vice- Chancellor **Dr. Washington Okeyo**.

3. A summary of the case is that by an agreement dated that 15th November 2016, the plaintiff and the 1st defendant entered into a Project Development & Transfer Agreement for development work which was to be carried out by the 1st defendant on the plaintiff's property. Clause 18 of the said Agreement stipulated that any dispute arising between the parties would be referred to arbitration.

4. The 1st defendant claims that it completed the construction work as agreed but that the plaintiff did not comply with its payment obligations despite numerous reminders. This prompted the 1st defendants to pursue the remedies provided for in their agreement which entailed the appointment of an arbitrator (the 2nd defendant) after all efforts to reach an amicable settlement had failed.

5. On 31st July 2019, the parties appeared before the arbitrator/2nd defendant for a Preliminary Meeting when their representatives confirmed the 2nd defendant's jurisdiction. One and a half months after the Preliminary Meeting, wherein directions for exchanging of pleadings and pre- hearing review date were issued, the plaintiff filed the instant Originating Summons seeking the stay of the arbitral proceedings.

6. The plaintiff highlighted the questions for determination in the Originating Summons to be as follows: -

1. Was the Arbitrator, the 2nd defendant herein, correct in stating or finding in his ruling, titled “Order for Directions No. 2”, delivered on 20th August, 2019 on the Plaintiff’s Letters of Protest, that Clause 18(1) of the Project Development and Transfer Agreement dated 15th November, 2016 had been exhausted thus justifying the present arbitral proceedings.

2. Was the Arbitrator, the 2nd defendant herein, correct in finding through his ruling, titled “Order for Directions No. 2” delivered on 20th August, 2019, that the plaintiff and the 1st defendant had implored their “best efforts” to settle amicably any dispute arising between them as per the strict letter of Clause 18(1) of the Project Development and Transfer Agreement dated 15th November, 2016, thereby clothing the arbitrator with the requisite jurisdiction to entertain the dispute.

3. Was the Arbitrator, the 2nd defendant herein, correct and within his jurisdiction in finding that the 1st defendant herein had failed to demonstrate sufficiently its “best efforts” to settle amicably any dispute arising between the plaintiff and the 1st defendant to warrant the arbitral proceedings hereof without considering the role of the defendant in pursuing an amicable settlement of the arising dispute.

4. Whether the attendance of the plaintiff herein during the First Arbitral preliminary meeting of parties was a waiver by the plaintiff of the right to pursue an amicable settlement as required under Clause 18(1) of the Project Development and Transfer Agreement dated 15th November, 2016.

5. Was the Arbitrator, the 2nd respondent herein, within his jurisdiction to find otherwise than to terminate the Arbitral proceedings in accordance with the mandatory provisions of Clause 18(1) and 18(2) of the Project Development and Transfer Agreement dated 15th November, 2016.

6. Which party should bear the costs of these proceedings?

7. Through an application dated 16th October 2019, the plaintiff sought orders, inter alia, to stay the arbitral proceedings before the 2nd defendant pending the hearing and determination of the Originating Summons. The said application was however withdrawn through the plaintiff’s Notice of Withdrawal of Application filed in February 2020.

8. The 1st defendant opposed the Originating Summons through the replying affidavit of its Managing Director **Eskindir Habte Debessay** who confirms that the 1st defendant and the plaintiff entered into the Project Development and Transfer Agreement. He further confirms that a dispute arose between the parties that necessitated the invocation of the arbitration clause in their Agreement.

9. He states that the plaintiff did not respond to the 1st defendant’s request for the appointment of a mutually agreeable arbitrator thereby leaving the 1st defendant with no option but to request the chairman of the Chartered Institute of Arbitrators, Kenya Branch, to appoint an arbitrator, in accordance with the dispute resolution mechanism in the Agreement.

10. He avers that the 2nd defendant was appointed as an arbitrator in line with the mechanism for such an appointment under the Agreement. He confirms that on 31st July 2019, the parties herein appeared before the 2nd defendant for a Preliminary Meeting whereupon their representatives agreed that the arbitrator had the jurisdiction to determine the dispute. He attached the 2nd defendant order for Directions No. 1 as annexure ESD -15 to the replying affidavit.

11. He adds that it is only after the Preliminary Meeting had taken place and directions for exchange of pleadings and pre-hearing review date agreed upon that the plaintiff came up with the suggestion that parties had not exhausted their amicable settlement talks under the contract. He states that the Agreement does not define what amount to “**best efforts**” to settle the dispute and that the only definite aspect of the settlement, according to the Agreement, is that the same was to be concluded within 30 days.

12. He further states that the 1st defendant engaged the plaintiff in talks geared towards a settlement for a period of six (6) months, from the time the dispute was declared, to the request for the appointment of an arbitrator, without any success.

13. It is the 1st defendant’s case that the plaintiff wants to engage the 1st defendant in dialogue perpetually while the dispute continues to fester and that nothing stops the parties from settling the dispute at any point even during the arbitral proceedings. The 1st defendant’s deponent points out that the plaintiff has never come up with a serious offer of settlement despite the long lapse of time since the dispute was declared.

14. The 1st defendant states that since the arbitrator has been duly appointed in accordance with the dispute resolution mechanism, pleadings filed, witness statements and documents placed before the Tribunal, the dispute is ripe for hearing as the hearing dates have been agreed upon.

15. The 2nd respondent also filed a replying affidavit dated 5th November 2019 in response to the Originating Summons wherein he states that he was duly appointed by the chairman of the Chartered Institute of Arbitrators as the sole arbitrator in this matter. He avers that following his appointment, he called the parties for a Preliminary Meeting where several issues, including his jurisdiction, were agreed upon and directions taken regarding the filing of pleadings. He cited Section 16(B) of the Arbitration Act which provides that an arbitrator shall not be liable for anything done or omitted to be done in good faith in the discharge of his functions as an arbitrator.

16. Parties canvassed the Originating Summons by way of written submissions which I have considered. The main issue for determination is whether the plaintiff has made out a case for the granting of the orders sought in the Originating Summons.

17. As I have already stated in this judgment, the plaintiff sought orders for a declaration that the Arbitral proceedings are premature, the setting aside of the 2nd defendant's preliminary ruling and orders to direct the parties herein to pursue amicable settlement of the dispute.

18. The following issues were not disputed: -

- a. That the plaintiff and the 1st defendant entered into a Project Development Agreement to be completed at the plaintiff's premises.
- b. That a disagreement arose between the parties regarding the payments due to the defendant thus prompting the 1st defendant to declare an event of default under Clause 10(iii) of the Agreement which stipulates as follows:

“If the default is not cured to the reasonable satisfaction of the party issuing the notice within the cure period, the party issuing the notice may without further prior notice, declare in writing an event of default under this Agreement effective on the date of such declaration.”

- c. That through a letter dated 12th March 2019, the 1st defendant's advocate requested the plaintiff for its concurrence on appointment of an arbitrator.
- d. That the parties did not agree on the said appointment thereby prompting the 1st defendant to request the chairman of the Chartered Institute of Arbitrators, Kenya Branch, to appoint an arbitrator, the 2nd defendant herein.
- e. That on 31st July 2019, the parties appeared before the 2nd defendant for a preliminary meeting wherein they, by consent, confirmed the Arbitrator's jurisdiction to hear and determine the dispute.
- f. That at the said preliminary meeting, the Arbitrator issued directions regarding the exchange of pleadings and a pre-hearing review date agreed upon by the parties.
- g. That this Originating Summons was filed on 19th September 2019 after the said preliminary meeting.

19. The plaintiff's case was that the arbitral proceedings are premature for non-compliance with Clause 18(1) of the Agreement which stipulates as follows: -

“(1) Amicable settlement

The parties shall use their best efforts to settle amicably any dispute arising from or in connection with this Agreement or the interpretation thereof.”

20. Clause 18(2) of the Agreement, on the other hand, stipulates as follows: -

“(2) Arbitration

If the dispute has not been settled pursuant to amicable settlement under Clause 18.1 above within thirty(30) days (or such longer period as may be agreed upon between the parties) from when the settlement discussions were instituted, any party may elect to commence arbitration, such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration.

- i. Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.**
- ii. To the extent permissible by law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.**
- iii. Pending final settlement or determination of a dispute, the parties shall continue to perform their subsisting obligations hereunder.”**

21. This court is alive to the fact that Arbitral proceedings are special avenues for dispute resolution that are voluntary in nature as the parties to the agreement opt to refer their dispute to an arbitrator for resolution mainly for purposes of speedy resolution of the dispute and in order to overcome the procedural bottlenecks and delays that are associated with court proceedings.

22. In *Goodison Sixty-One School Limited v Symbion Kenya Limited* [2017] eKLR it was held as follows:

“.....the primeval and enduring fundamental principles of arbitration, accepted and practiced worldwide over numerous centuries, hold that non mandatory arbitration is, firstly, an inherently complete mechanism of dispute resolution alternative to the state court litigation system; therefore, secondly, that intervention by courts in the arbitral process is extremely limited except where parties agree or the law so stipulates; thirdly, that its essence involves party autonomy, namely, that parties in appropriate cases can choose or ask someone to choose an independent third person or persons to arbitrate or adjudicate over their dispute using a process they mutually agree to; fourthly, that the parties agree that the decision of the third person(s) is binding on them; and finally, that the arbitrator is not bound by complex court litigation procedures and processes or the strict laws of evidence.” [Emphasis added]

23. The contextual framework of arbitration in Kenya was stated by the Court of Appeal in *Kenya Shell Limited v Kobil Petroleum Limited* Civil Appeal (Nairobi) No 57 of 2006 where the court said:

“Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No. 4 1995 (the Act) would apply and the courts take a back seat.”

24. As opposed to proceedings before a court, proceedings before an arbitrator are governed and regulated by the Arbitration Act and Rules. Section 5 and 17(2) of the Arbitration Act stipulate as follows: -

Section 5.

A party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

Section 17(2)

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.”

25. In the present case, I note that the plaintiff duly registered its objection to the jurisdiction of the tribunal in the statement of defence wherein it cited non-compliance with the terms of the arbitration agreement requiring the parties to first exhaust amicable settlement of the dispute before referring it to arbitration.

26. My finding is that even though the spirit of the Agreement was that the parties would use their best efforts to amicably settle any dispute arising out of the agreement, Clause 18(2) clearly stipulates that the process of an amicable settlement was to run take last for a limited period of 30 days, (or such longer period as may be agreed upon between the parties) after which parties would be free to go to arbitration. From the facts of the case, it is clear that even though the parties herein attempted to amicably resolve their dispute, such attempts did not bear any fruits thus resulting in recourse to the arbitration option.

27. My finding is that in the circumstances of this case, the arbitration process cannot be said to be premature more so considering that it was initiated in April 2019 more than 9 months after the issuance of the Notice of Default. My take is that the plaintiff had and still has ample time to pursue an amicable settlement of the dispute the existence of the arbitral proceedings notwithstanding. The parties are however still bound by the terms of their agreement that provided for arbitration in the event the parties fail to reach a settlement. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd and Another (2002) EA 503* the court held that a court of law cannot 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 and proved.

28. I find that the Arbitral proceedings were initiated in compliance with the terms of the Agreement, and that the plaintiff voluntarily participated at the preliminary meeting wherein the jurisdiction of the Arbitrator was agreed upon. I further find that the moment the 1st defendant called upon the plaintiff to request for its concurrence for the appointment of the arbitrator, it should have been clear to the plaintiff that the 1st defendant had lost hope on the prospects of an amicable resolution of the dispute. I am therefore not persuaded that the plaintiff has established that the arbitral process is premature or that the arbitrator lacks the jurisdiction to hear and determine the dispute.

29. Turning to the prayer to set aside the preliminary ruling delivered on 20th August 2019, I note that the plaintiff challenged the 2nd defendant's jurisdiction on the basis that Clause 18(1) of the Agreement had not been complied with. The plaintiff therefore took issue with the finding by the Arbitrator, that he had the requisite jurisdiction to proceed with the Arbitration. The plaintiff's contention before the Arbitrator, just as in the present Originating Summons, is that the parties had not exhausted the dispute resolution mechanism provided for in Clause 18(1) of the Agreement.

30. This court has already pronounced itself on the issue of the exhaustion of amicable settlement of the dispute by the parties. It is my finding that this court cannot compel the parties to negotiate if there is unwillingness, on their part or on the part of one of the parties to pursue such negotiations.

31. My humble view is that the Clause 18(1) of the Agreement must be read together with Clause 18(2) thereof as the latter grants the parties the option to pursue Arbitration should negotiations between the parties fail.

32. In the present case, the plaintiff has at paragraph 16 of the affidavit in support of the Originating Summons stated that the parties held a

meeting to discuss the dispute wherein the plaintiff raised various concerns regarding the alleged completed construction work but that the 1st defendant refused and/or failed to engage in further negotiations.

33. Having regard to the above foregoing averments by the plaintiff, I find that this is a case where negotiations between the parties collapsed thus necessitating the 1st defendant's decision to subject the dispute to arbitration. I am therefore not satisfied that the plaintiff has made out a case for the setting aside of the preliminary ruling of 20th August 2019.

34. For the reasons that I have stated in this judgment, I find that the instant Originating Summons is not merited and I therefore dismiss it with costs to the defendants.

Dated, signed and delivered via Microsoft Teams at Nairobi this 24th day of September 2020 in view of the declaration of measures restricting court operations due to Covid -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:

Miss Kamau for plaintiff

Mr. Darr for defendant

Court Assistant: Sylvia