



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 232 OF 2018**

**WORLD VISION INTERNATIONAL.....PLAINTIFF**

**-VERSUS-**

**SYNTHESIS LIMITED .....1<sup>ST</sup> DEFENDANT**

**MAVJI CONSTRUCTION COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

World Vision International, the Plaintiff, is a foreign Company registered under the provisions of the Companies Act. It has its East African regional office in Nairobi.

1. The 1<sup>st</sup> Defendant, Synthesis Limited, and the 2<sup>nd</sup> Defendants, Mavji Construction Company Limited are both Limited Liability Companies registered under the companies Act.

2. The Plaintiff intending to have its Regional office, within Karen area of Nairobi county, entered into two separate agreements with the two Defendants. These related to the construction of that office. The 1<sup>st</sup> Defendant was the project architecture while the 2<sup>nd</sup> Defendant was the project contractor. It was a term of the two contracts that disputes and differences between the Plaintiff and the two Defendants would be referred to Arbitration.

3. It is the Plaintiff's case that on being advised by the two Defendants that the building was complete the Plaintiff relocated its office into that building. The Plaintiff alleges that it noted several defects soon after taking occupation of the building.

4. By its Plaint before Court the Plaintiff has alleged the Defendants failed in the discharge of their legal duty of care and were negligent in the performance of their duties which resulted in structural failure of the building. The Plaintiff further pleaded that the Defendants negligently misrepresented to the Plaintiff that the works were in accordance with the contracts, drawings, the contract bills, specification and condition of contract. The Plaintiff claims damages.

5. The Plaintiff set out the particulars of the 1<sup>st</sup> Defendant's breach of contract and of duty of care, thus:

***“PARTICULARS OF THE 1<sup>ST</sup> DEFENDANT'S BREACH OF CONTRACT AND BREACH OF DUTY OF CARE***

- i. Failure to undertake a geotechnical survey/site analysis prior to commencing the works despite full consultancy fees being paid.
- ii. Failure to oversee and coordinating the input of the consultants commissioned by it.
- iii. Failing to inspect and monitor the progress and quality of the construction work and ensure adherence to specifications.
- iv. Failing to properly oversee the implementation of the terms of the building contract during construction until final completion.
- v. Failing to effectively supervise the work done by other consultants and ensuring that it meets the Plaintiff's requirements

and approval as regards quality.

vi. Assuming the wrong soil bearing pressure and designing small foundation bases on account of the failure to undertake a geotechnical survey with the result that the foundations which were constructed were not founded on a firm were material (rock).

vii. Approving construction of undersized foundation by constructing bases which were smaller than the bases which had been designed.

viii. Improper design of columns which in turn led to inadequate/insufficient reinforcement on beams.

ix. Approving construction of the wrong Ribs on the ground and first floor.

x. Failing to construct all the beams and columns provided in the drawings particularly on 2<sup>nd</sup> floor.

xi. Improper design and construction of slab on the 2<sup>nd</sup> floor.

xii. Failing to ensure that the works were reasonably fit for the purpose for which it was required.

xiii. Failing and/or refusing to remedy the defects.

xiv. Failing to exercise due care, skill and diligence in the performance of its duties under the contract.

xv. Misrepresenting to the Plaintiff that the works were in accordance with the contract drawings, the contract bills, specifications and conditions of contract.”

6. The Plaintiff pleaded the following particulars of the 2<sup>nd</sup> Defendants breach.

**“PARTICULARS OF THE 2<sup>ND</sup> DEFENDANT’S BREACH OF CONTRACT AND BREACH OF DUTY OF CARE**

i. Failing to carry out/request for a geotechnical survey of the site prior to commencing the works.

ii. Failing to familiarize itself with the site and the soils therein.

iii. Using substandard material to construct the building other than what was described in the contract bills, the drawings and the specifications.

iv. Deviating from the contract specifications and drawings.

v. Failing and/or refusing to remedy the defects.

vi. Failing to exercise due care, skill and diligence in the performance of its duties under the contract.

vii. Misrepresenting to the Plaintiff that the works were in accordance with the contract drawings, the contract bills, specifications and conditions of contract.”

7. The Plaintiff also seeks for special damages in relation to the remedial works it under took and in that regards seeks against both Defendants jointly and severally for Kshs.268,783,496.90.

8. The Plaintiff has presented a Notice of Motion application dated 5<sup>th</sup> June 2018. By it the Plaintiff seeks the orders:

a. That the Arbitral proceedings in the matter of an Arbitration international and synthesis limited and in the matter of Arbitration between World Vision International and Marji Construction Company Ltd be consolidated and heard together and a single award published.

b. That this honorable Court be pleased to appoint a suitable arbitrator (s) to adjudicate over the consolidated proceedings.

c. That this honourable Court be pleased to make any such orders and to issue such directions as shall be necessary to facilitate:

i. The harmonized expeditious, efficient, proportionate and economical disposal of the dispute amongst the parties hereto.

ii. The attainment of the overriding objective envisaged under Section 1A and 1B of the Civil Procedure Act 2010.

9. Those prayers are based on the grounds that there are two separate and parallel Arbitral proceedings which have been commenced by the

Plaintiff against the Defendants; that the two Arbitral agreements are silent regarding consolidation and there is no agreement for consolidation; that the Plaintiff's claim against the Defendants are intertwined and incapable of separation; that if the dispute is arbitrated separately there is the risk the arbitrators will render inconsistent awards; and that whereas the Plaintiff will suffer prejudice if there is no consolidation of the Arbitral proceedings, the Defendants will Suffer no prejudice.

10. The application is opposed by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant by its replying affidavit stated that it entered into an agreement with the Plaintiff on 9<sup>th</sup> March 2010. Accordingly there is privity of contract only between Plaintiff and itself. That the said agreement is clear distinct and different from the agreement between the Plaintiff and 2<sup>nd</sup> Defendants in its contractual responsibility and obligation.

11. One example the 1<sup>st</sup> Defendant gave of its agreement being different to that one between the Plaintiff and 2<sup>nd</sup> Defendant was the method of appointing arbitrator. In the case of the 1<sup>st</sup> Defendant's agreement, the appointing authority is the Chartered Institute of Arbitrators. In the case of the 2<sup>nd</sup> Defendant the appointing authority is the Architectural Association of Kenya. That for the Court to appoint an arbitrator would be to take away the 1<sup>st</sup> Defendants participation in appointing an arbitrator. The 1<sup>st</sup> Defendant also stated since Arbitration is a consensual and voluntary method of dispute resolution, and because consolidation had not been contemplated in its agreement, it amounts to interference with the parties autonomy and/or re-writing the parties contract if the Court was to intervene as sought by the Plaintiff.

12. The 1<sup>st</sup> Defendant stated that consolidation would prejudice its rights, that it would lead to long and expensive Arbitration process.

13. In similar vein the 2<sup>nd</sup> Defendant objected to the application it stated that it was express term of its agreement, under Clause 45.1, that in case of any dispute or difference, between it and the Plaintiff, the same was to be referred to Arbitration for final resolution. That after parties were unable to agree on the appointment of an arbitrator, as provided in the agreement, an arbitrator, Stanley Kebathi, was appoint by the chairman of Architectural Association of Kenya. That arbitrator was consented to by the parties. That the parties having consented to that appointment the Arbitral proceedings, as provided under Section 22 of the Arbitration Act, commenced from there on.

14. The 2<sup>nd</sup> Defendant was of the view that consolidation ought not to be ordered because, the nature and scope of the work undertaken by the 1<sup>st</sup> Defendant was unrelated to that undertaken by the 2<sup>nd</sup> Defendant; that the Arbitral Clause of the two agreements was different; and the nature of the Plaintiff's claim against the two Defendants was different because they played different roles.

#### **ANAYSIS OF THE SUBMISSIONS**

15. The parties, in their submissions raised various issues. Before considering them, I shall proceed first by setting out the Arbitration Clause in the two agreements.

16. The Arbitration Clause between the Plaintiff and the 1<sup>st</sup> Defendant provides:

**“if any dispute or difference of any kind whatsoever arises between the parties in connection with , or arising out of, the this agreement, the aggrieved party shall promptly notify the other party of its intention to invoke the dispute resolution procedure by convening a meeting of the representatives of the parties to this agreement. Upon receipt of such notice the representatives of the parties shall meet at the named location or any other mutually acceptable location to resolve the dispute within ten (10) business days after receipt of such notice. If the representatives are unable to resolve the dispute within five (5) business days, or such other time as both may mutually agree after the meeting, either party may require that the dispute be referred to Arbitration.**

**Each party shall appoint one arbitrator within two weeks of the Arbitration Notice, which may be issued by either party. The two arbitrators shall jointly appoint the third arbitrator who shall be a member of the Chartered Institute of Arbitrators, Kenya Chapter. Such third arbitrator shall be the chairman of the tribunal.**

**The party to the dispute, which claims relief, shall deliver a statement of claim to the arbitrators and the opposing party within 1 week of the appointment of the 3<sup>rd</sup> arbitrator.”**

17. The Arbitration Clause in the agreement of the Plaintiff and the 2<sup>nd</sup> Defendant is in the following terms:

**“45.1 In case any dispute or difference shall arise 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. The dispute shall be referred to the Arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an arbitrator, the arbitrator shall be appointed by the Chairman or Vice chairman of the architecture association of Kenya on the request of the applying party.”**

18. It is not denied that the two Arbitral processes have commenced, save that the Plaintiff has not filed its statement of claims in both processes.

19. The Plaintiff submitted that the two Arbitral processes are one indivisible claim. That it is impractical and impossible to proceed with those processes separately because they raise common issue of fact that is the defects that arose from the combined work of the Defendants. It therefore argues that if the Arbitrations are not heard together there is the danger of there being inconsistent and contradictory determinations.

20. The Plaintiff further argued that even if the Arbitration Act has no provision for consolidation that does not prohibit consolidation. In this regard the Plaintiff placed reliance on the case, in the Court of appeal, being **KENYA BUREAU OF STANDARDS –V- GEO-CHEM MIDDLE EAST CIVIL APPL. NO. 132 OF 2017 (2018) eKLR** where the Court considering an application for leave to appeal from High Court’s order, of adoption of Arbitral Award, found that even though Section 32 and 35 of the Arbitration Act do not provide for an appeal to that Court it would proceed to allow leave to appeal. This is what the Court of Appeal stated:

**“Although unlike Section 39, Section 35 does not specifically provide that an appeal to this Court will lie from a decision of the High Court setting aside an Arbitral award, we reiterate that it does not, in the same breath, expressly bar a party aggrieved by the setting aside to come to this Court for redress. If the intention was to circumvent the right to appeal nothing stopped the legislature from expressly saying so.”**

21. In response to this submission the Defendants submitted that this Court lacked jurisdiction to order consolidation. The Defendants argued that Section 10 of the Arbitration Act prohibits the Court’s intervention in the matters governed by the Act. The 2<sup>nd</sup> Defendant relied on the case **NYUTU AGROVET LIMITED – V- AIRTEL NETWORK LIMITED (2015) eKLR** viz:

**“The rationale behind the limited intervention of Court in Arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through Arbitration, intervention by the Courts in the dispute is the exception rather than the rule. In KENYA OIL CO LTD & ANOTHER V. KENYA PIPELINE CO. LTD., CA No 102 of 2012, this Court expressed itself as follows on the principle:**

**“The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). In addition to improving, simplifying and harmonizing practices in international commercial Arbitration, the Act recognizes the principle of party autonomy and limits the role of the Courts in commercial Arbitration. The principle of party autonomy underpinning Arbitration is premised on the platform that provided it does not offend strictures imposed by law, parties in a relationship have the right to choose their known means of resolving disputes without recourse to the Courts or by limiting the circumstances under which recourse to the Courts may be had.”**

22. The Defendants also argued, contrary to what the Plaintiff submitted that consolidation will prejudice them because there will be more likelihood of delays, with the hearing of the Arbitrations together.

23. The Defendants also submitted that the proposed Court’s intervention would not only be contrary to the doctrine of privity of contract but would be tantamount to the Court re-writing the parties contracts. The 2<sup>nd</sup> Defendant cited the case **NATIONAL BANK OF KENYA LIMITED – V- PIPEPLASTIC SAMKOLIT & ANOTHER (2001) eKLR** where the Act stated:

**“A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”**

24. I have considered the parties submissions and affidavit evidence. I wish to begin by considering the case of Court of Appeal **KENYA BUREAU OF STANDARDS (Supra)**. The Plaintiff, by citing the above case argued that, because consolidation of Arbitral proceedings is not specifically barred by the Arbitration Act, the Court in exercising its inherent power and by invoking constitutional provisions, such as Article 50, 159 and 165 (6) should grant the prayer sought, to enable the Plaintiff litigate its bonafide claim through a process that will deliver it justice.

25. The Court of appeal while deciding whether to grant the applicant leave in that case **KENYA BUREAU (Supra)** began by stating that:

**“The Courts are consistent in their decision that every decree may be appealed from unless barred by some law and conversely that an appeal does not automatically lie against every order.”**

26. In my considered view the Justices of the Court of Appeal, in making their finding that leave to appeal, was not being specifically barred by the Arbitration Act, could be said they did not intend their said findings to be of general application in matters touching on the Arbitration. I believe if the Justices of Court so intended they would have stated so. It follows that in my finding, in this matter, I cannot be said to be abusing the doctrine of *stare decisis* because the facts of this case are distinguishable to that case.

27. In this case the Plaintiff entered into two separate agreements with each of the Defendants. Those agreements provided for the settlement of dispute arising thereof to be settled through Arbitration.

28. Those agreements provided distinct process of appointing arbitrator.

29. Even without going to the statutory provision, touching on this matter, I do find that it would not be in the interest of justice for consolidation of the two Arbitral processes. It would indeed, as argued by the Defendant, be to re-write the parties contract. I find support from the decision of **HANIF SHEIKH – V- ALLIANCE NOMINEE LTD & 17 OTHERS (2014) eKLR** as follows:

**“16. It is clear who the parties to the aforeside agreements and what the governing laws, seat and venue of the different Arbitral proceedings were. It would be outside the scope of this Court to purport to add other parties who were not parties to the said agreements an order that their disputes be resolved by way of amicable settlement of dispute or referral to Arbitration. If the Court were to do so, this would amount to it re-writing the said agreement, something it did not have**

**power or jurisdiction to do...”**

30. I also differ with the Plaintiff’s submissions that the Court will be applying technicalities contrary to article 159 if it finds that it does not have power to order consolidation. To the contrary Article 159 (2) ( c) specifically provides that the Courts and tribunals should be guided by the principle of alternative forms of dispute resolution. The constitution supports alternative dispute resolution. Since it does the Courts should support that alternative dispute resolution process, not by unnecessarily meddling in the process but rather supporting it. Again I rely on the case of **HANIF SHEIKH (SUPRA)** when the Court expressed itself thus:

**“Whereas the Court is mandated under article 159 (2) (c) of the constitution of Kenya, 2010 to promote resolution of disputes through alternative dispute resolution, statutory provisions must be strictly adhered to. Parties cannot always invoke provisions to circumvent what had specially been legislated.”**

31. Arbitration is a consensual process. Parties in entering into an agreement for Arbitration, they are essentially saying, ‘save for the law and procedure that we choose the statutory provision and the legality of the process: this line, that is the agreement, demarks where any other party can interfere with the process.’ That would be why the Court of appeal in the case **NYUTU AGROVET LIMITED – V- AIRTEL (SUPRA)** stated:

**“Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely...”**

32. The above proposition is supported by Section 10 of the Arbitration Act which provides:

**“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”**

33. If I was to repeat that Section in my own words I would say; except as provided in this Act, no Court shall intervene in ‘Arbitral process governed by this Act. That is my understanding of that Section. That a Court of law can only intervene in Arbitral proceeding/process as provided in the Arbitral Act and not under any other circumstances.

34. The Plaintiff erred to argue that because consolidation of Arbitral proceedings is not barred under the Arbitration Act the Court can invoke its inherent power to grant orders of consolidation. I respond to that submission by saying inherent jurisdiction can only be invoked where there is no express provision of the Law. See the case of **K.G. PATEL & SONS LTD –V- JOHN KABUKURU GITURO (2016) eKLR**. In this case Section 10 of the Arbitration Act is an express provision which prohibits the Court’s intervention, in Arbitral process, other than what is provided in the Act. It is because of this finding that I am not persuaded by the finding in the case **AGTRACO LIMITED –V- TELKOM KENYA LIMITED (20160 eKLR)**.

**DETERMINATION**

35. **In the end I find and hold that the Notice of Motion dated 5<sup>th</sup> June 2018 must and does fail. It is hereby dismissed and the costs, which shall follow the event, are awarded to the Defendants.**

36. **At the reading of this ruling this Court will give a mention dated for the Plaintiff to inform the Court whether it wishes to proceed with this action which was filed for the purpose of obtaining an Order for consolidation of the Arbitral processes. Now that prayer has failed the Plaintiff will indicate, at the mention date, whether it intends to withdraw this suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of MAY, 2019.

MARY KASANGO

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1<sup>ST</sup> DEFENDANT

..... FOR THE 2<sup>ND</sup> DEFENDANT