



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 307 OF 2018

CEMENTERS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

1. MULTICHOICE KENYA LIMITED.....DEFENDANT/1ST APPLICANT

2. STEPHEN ISABOKE.....DEFENDANT/RESPONDENT

3. ALBERT VAN ROOYEN.....DEFENDANT/RESPONDENT

4. FELLICINE NYAKSARIA ORIRI.....DEFENDANT/ RESPONDENT

5. LUCKY LAVENDAR WAINDI.....DEFENDANT/RESPONDENT

6. CONAPEX CONSULTING

ENGINEERS LTD.....DEFENDANT/RESPONDENT

7. WILSON MUNYU KARABA.....DEFENDANT/RESPONDENT

8. INTERCONSULT ENGINEERS LTD.....DEFENDANT/RESPONDENT

9. KARIUKI MUCHEMI.....DEFENDANT/RESPONDENT

10. S.K.ARCHPLANS.....DEFENDANT/RESPONDENT

11. STANLEY KEBATHI.....DEFENDANT/RESPONDENT

12. TITUS KYENDE.....DEFENDANT/RESPONDENT

13. CHRISTOPHER KAMANDU.....DEFENDANT/RESPONDENT

14 ERIC ODIPO.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to a notice of motion application dated 17th September 2018, brought under the provisions of Order 51, Rule 1 and 3 of the Civil Procedure Rules, 2010, and Sections 1A, 1B and 3A of the Civil Procedure Act, (Cap 210 of the Laws of Kenya. It is filed by the 1st and 14th Defendants (herein “the 1st and 14th Applicants” respectively) seeking for orders as follows:-

(a) *The suit be struck out in its entirety;*

(b) *In the alternative to (a) above, the suit be stayed pending determination of the substantive dispute by arbitration;*

(c) *All orders granted in this matter to the Plaintiff/Respondent be vacated or set aside; and*

(d) *The costs of the application be provided for.*

2. The application is premised on the grounds on the face of it and supported by an affidavit dated 17th September 2018, sworn by Eric Odipo, the 1st applicant's managing director. He deposed that, the Plaintiff (herein "the Respondent") and the 1st Applicant entered into a building contract dated 18th March 2015, (herein "the JBC contract"), for construction of an office block on plot No. 3734/421, Oloitoktok Road, Lavington, Nairobi (herein "the suit premises").
3. That due to the numerous breaches of the contract by the Respondent, the 1st Applicant, through a letter dated 21st June 2017, issued the Respondent with a termination notice terminating the contract. Subsequently on 30th November 2017, a notice of dispute was issued.
4. The Applicant averred that, clause 45.1 of the JBC contract stipulates that, if a dispute arises between the parties thereto, a party shall notify the other of the same and refer the matter to arbitration. Therefore since the parties are yet to exercise their rights under the JBC contract, the court has no jurisdiction to hear the matter and/or grant the prayers sought for in the plaint and the application dated 30th July 2018.
5. Further, the court had no jurisdiction to grant the orders issued, including the orders to enter into the Applicants' and their agents premises in order to seize materials; documents, machinery and information relating to the JBC contract, as they are in the nature of interim measures of protection, pending reference of the dispute to arbitration as contemplated under section 7 of the Arbitration Act (herein "the Act") but rather they seek to definitely determine the dispute between the parties to the JBC contract.
6. The Applicant argued that due to lack of jurisdiction by the court, they have not entered appearance or taken any substantive step to deal with the suit.
7. However the Respondent filed a Replying affidavit dated 29th November 2018, sworn by Ramesh Vishram, its managing director, who deposed that, it is clear from the outset that, the Applicants have conflated the yet to be undertaken arbitration with the question of fraud claim against them. The Respondent distinguished between the dispute in the anticipated arbitration and in the suit, by arguing that, the dispute in the intended arbitration is a purely contractual one relating primarily to a determination of the question: as to who as between, the Plaintiff; the contractor and Conapex; the previous engineer engaged on the project and by extension, Multi choice limited; the developer is to blame for the sagging beams.
8. Whereas, the dispute in the suit herein is a civil dispute involving tortious liability for manipulation of evidence and ultimately through consequential processes, and it also has quasi-judicial and criminal consequences. It is not the subject of the arbitration agreement.
9. That the suit and the accompanying application, was filed so as to search for and preserve all evidence, documents, information and items relating to the construction dispute between it and the 1st Applicant. The intention was to forestall the 1st Applicant intended use of falsified, manipulated and fraudulent evidence in imminent arbitral proceedings contemplated by the parties, in order to give it an unlawful and unfair advantage in the arbitration.
10. The Respondent also filed grounds of opposition dated 3rd October 2018 and argued that, there is no factual basis laid to support the allegations that the Anton Piller orders issued on 2nd August 2018, were improperly obtained, which grossly embarrasses and undermines the dignity of the Honourable court, the authority of the Honourable Mr. Justice Aaron Makau, as a Judge. Therefore on this ground alone, the Honourable court ought to deny the subject application *ex debito justitiae*.
11. Further the Application is based on contested allegations of fact, rather than on points of pure law. The contested facts cannot be a proper or sufficient basis for an effective challenge to the jurisdiction of the Honourable court, accordingly, the Application fails the requisite legal test and there is absolutely no basis for the striking out of the suit.
12. The Respondent averred that, the co-existence of a prayer for striking out of the suit on the ground of lack of jurisdiction together with an alternative prayer, for stay of the suit is a contradictory in terms. That, as Mr. Eric Odipo has deposed that, the parties to JBC contract are yet to exercise their rights under Clause 45.1 thereof it deprives the Honourable court of any jurisdiction to entertain the suit herein. Thus the Honourable court has jurisdiction or does not have jurisdiction and the Applicants cannot approbate and reprobate the alleged lack of jurisdiction by making an alternative prayer for stay of the suit.
13. The Respondent argued that, the alternative prayer is, ipso facto an acknowledgement of the Honourable court's jurisdiction, for if the court has no jurisdiction, it could only strike out, but not stay, the suit, as a stay necessarily presupposes the jurisdiction to make further or subsequent orders.
14. Further, the Applicants have submitted to the jurisdiction of the Honourable court by filing the notice of motion on 8th August 2018 and obtaining preliminary orders thereon, including time lines for the hearing of the application for Anton Piller orders, therefore they are not candid when they depose that no substantive step has been taken herein to deal with the substantive suit, prior to the making of this application.
15. It was averred that, in any event the Applicants have not demonstrated how the Anton Piller orders and an injunction restraining them from advertising or offering the suit property for sale and preserving the property in its current state amount to the dispute itself, and not to interim measures of protection.
16. That an Arbitrator has not been appointed yet to resolve the dispute between the parties concerned, therefore, the interim measures of protection cannot be granted by the Tribunal, which negates the very essence of Anton Piller orders. At any rate, even when an Arbitrator is

finally appointed the Arbitrator will have jurisdiction to hear and dispose of the matters pleaded in the suit as the suit involves thirteen (13) other Defendants who are not privy to the JBC contract that contains the Arbitration clause.

17. The 1st Respondent further averred that, the Applicants are guilty of material non-disclosure of the fact, apparent on the face of the pleadings, to the effect that, they were part of an actionable breach, namely, a conspiracy to commit acts of fraud against the Respondent by blaming it and ultimately making it liable for payment for the defects in the works sagging beams, which were caused by the under-design of the reinforcement by the 6th and 7th Defendants as the initial structural and civil engineers.

18. Finally the Respondent argued that the 14th Applicant is himself not a party to the intended Arbitration and so lacks the necessary locus standi or capacity to swear the Affidavit in support of the motion on his own behalf as the 14th Defendant/Applicant.

19. However, the 4th Defendant/Respondent supported the Application by submitting that, parties to an arbitration agreement or clause are bound by law to refer disputes arising out of the subject agreement to Arbitration. That the suit herein is a dispute on termination of contract between the parties therein and in view of the arbitration clause in the JBC contract, which is yet to be invoked, the Honourable court must decline jurisdiction and refer the dispute to Arbitration.

20. That she is not a party to any such agreements and was wrongly enjoined and/or orders wrongly sought against her. Therefore she is entitled to indemnification in terms of the Plaintiff's undertaking in its application for Anton Piller orders.

21. The parties agreed to dispose the Application through written submissions. The Applicants filed submissions dated 12th October 2018 and argued that, jurisdiction is everything, without it, a court has no power to make one more step and must down its tools in respect of the matter before it. The case of; Owners of Motor Vessel Lilian "S" vs Caltex Oil Kenya Ltd 1989 KLR 1, was cited. That, the court is granted jurisdiction by the constitution and statute and cannot arrogate unto itself jurisdiction where it has none.

22. The Applicants submitted that, the issue of jurisdiction herein arises in respect of three issues, namely whether the issues in dispute herein can be determined under Section 7A of the Arbitration Act, 1995; whether the prayers in the application dated 30th July 2018, are interim in nature and whether the court can hear the applications under Section 7 of the Arbitration Act against individuals not parties to the JBC contract.

23. It was submitted that scope of court's intervention as invoked by Section 7 of the Act, is to preserve the subject matter of the suit to prevent it from being dissipated or wasted pending the referral of the dispute to Arbitration. It is not the intention of Section 7 of the Act to open the door for a party to commence litigation of the issues that ought to be determined in Arbitration.

24. That if the court were to intervene in the Arbitral process, then it can only intervene in accordance with the provisions of the Arbitration Act or as previously agreed in advance by the parties. Reference was made to the case of; Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR.

25. It was argued that the court is functus officio, with respect to addressing the orders sought in the application and if the Honourable court were to proceed to address the substantive issues relating to the dispute, it would amount to a contravention of Section 10 of the Arbitration Act and any ruling on substantive issues in dispute would be a nullity. Reference was made to the case of; Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others (2010) eKLR.

26. The Applicant further submitted that Section 6(2) of the Act does not permit parallel proceedings to be handled simultaneously. The case of; Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya (2001) Eklr, was relied on.

27. It was submitted that the deliberate joining of thirteen (13) other parties, including the Applicants, who were merely as employees and sub-contractors of the 1st Applicant and inclusion of grounds that were not within the scope of the contract, has only served to convolute the issues relating to the dispute between the parties to the JBC contract. Thus, if the contract, which is the subject of the Arbitration proceedings, is taken away from the equation, the other parties would be superfluous. That even then no prayers have been sought specifically as against the other parties in their individual capacities, in view of the prayer for general damages for breach of contract.

28. Finally, the Applicants submitted that, Alternative Dispute Resolution processes are complementary to the judicial process and by virtue of Article 159(2) of the Constitution of Kenya, 2010, as such the court is obligated to promote these modes of alternative dispute resolution. The case of; Adrec Limited vs Nation Media Group Limited (2017) eKLR, was relied on.

29. However, the Respondent filed response submissions and argued the court has jurisdiction conferred upon it, inter alia, by Article 165(3) (a) of the Constitution of Kenya, 2010, (which gives the High Court unlimited original jurisdiction in criminal and civil matters), Sections 7(1) of the Arbitration Act, 1(2), 1A, 3A and 5, of the Civil Procedure Act, as read with Order 40 of the Civil Procedure Rules. That under Section 3A of the Civil Procedure Act, the court is empowered to make such orders as may be necessary for the ends of justice.

30. The Respondent submitted that the other orders, other than those relating to arbitration, sought herein have a constitutional underpinning under Article 50(1) of the Constitution which provides that "every person has the right to have any dispute that can be resolved by the application of law decided in a fair...hearing before a court or, if appropriate, another independent and impartial tribunal or body."

31. It was submitted that a court can only fail to hear disputes where there is an arbitration clause as a tool of convenience, but not because it lacks jurisdiction, as held in the case of; Tononoka Steels Limited vs Eastern and Southern Africa Trade and Development Bank (1999) eKLR.

32. Further the court has jurisdiction to make orders under Section 7 of the Act against third parties to the Arbitration, as held in the appeal from the High court in the Safaricom's case (supra) where the Court of Appeal granted an injunction against three (3) Respondents pursuant to Section 7 of the Act, although only the 1st Respondent and the Applicant had an Arbitration agreement.

33. That similarly, the Safaricom case is inapplicable as the measures in this case do not encroach on the Tribunal's decision making power, given that the evidence has already been seized and *stricto sensu* the process of Arbitration can therefore commence. The Safaricom Case also does not lay any broad proposition with regard the period of the interim measures, and there is no express requirement in the Act itself as to the period a measure will be given.

34. In the same vein, the Sanvageau case (supra), dealt with the issue of the grant interim measures of protection as against non-parties to an arbitration agreement, and in fact, interim measures of protection before or during Arbitral proceedings are often intended to deal with situations which involve third parties, in order to cure the mischief where a party to an Arbitration could frustrate the arbitration through the use of third parties, without recourse to the aggrieved party.

35. Finally the Respondent submitted that as held in the Canadian case of *Nader Munir Farah & Another vs Sanvageau Holdings Inc., (2011) ONSC 1819 (CanLii)* (the Sanvageau Case), the law is settled that Anton Piller Orders and Mareva injunctions may be granted as an interim measure of protection in anticipated or pending arbitral proceedings.

36. At the conclusion of the arguments by the respective parties herein, I have considered the subject application and the arguments and/or the submissions tendered and I find that the following issues that have arisen for determination:-

- a) Whether the 14th Applicant has locus standi to prosecute and raise the issues of jurisdiction;
- b) Whether there two distinct disputes in the matter herein
- c) Whether, the Respondent intends to determine the substantive issues in the dispute under section 7 of the Arbitration Act;
- d) Whether the prayers in the application dated 30th July 2018, are interim in nature; and
- e) Whether the court can grant the orders sought for in the subject application against non parties to the JBC contract?

37. However, in my considered opinion, the main issue herein is whether the court has the jurisdiction to hear and determine this matter or whether it should be referred to Arbitration. The Applicant invited the court to consider the issue of jurisdiction in respect to three aspects;

- a) whether the issues in dispute herein can be determined under Section 7A of the Arbitration Act, 1995;
- b) whether the prayers in the application dated 30th July 2018, are interim in nature; and
- c) whether the court can hear the applications under Section 7 of the Arbitration Act against individuals not parties to the JBC contract.

38. However, it suffices to note that, it is a trite principle of law that, the issue of jurisdiction is a pure point of law, though as evidenced from the averments herein, the parties in this matter have deposed to several factual matters which are not pure points of law and which do not go to the root of the issue of jurisdiction. Indeed, the Respondent was live to the same when it submitted that, the notice of motion is based on contested facts, rather than points of pure of law. That facts cannot be a proper or sufficient basis to challenge jurisdiction of the court.

39. Be that as it may, it is trite law that, jurisdiction is everything. The locus classicus on jurisdiction; is the celebrated case of; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal (as he then was) held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

40. The holding in this case is supported by the works of; John Beecroft Saunders in a treatise entitled: *Words and Phrases Legally defined – Volume 3: I – N* at page 113, as the follows:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before

judgment is given.

41. Be that as it may, the issue of jurisdiction may be raised, inter alia on the ground that; a particular court or tribunal lacks the power hear the case, and the same may be in regard to either territory (the court chosen by the plaintiff has no authority to try a case in the place where the cause of action arose) or pecuniary (the court chosen by the claimant/plaintiff does not have the authority to try the case because the value of the case in monetary terms is higher than the upper limit that can be tried by the Court).

42. To revert back to the issues herein, the first issue is whether the 14th Applicant has the locus standi to challenge the jurisdiction of the court to hear and determine this matter and/or to swear an affidavit in support of the motion in his capacity as a 14th Applicant. I have considered the evidence adduced and/or arguments advance and I find that, there is no dispute that the only parties to the JBC contract herein, are the Plaintiff and the 1st Defendant. The 14th Defendant/Applicant is not. The doctrine of privity of contract clearly states that only parties to a contract can sue or be sued in it. I therefore find that the 14th Applicant has no locus standi to raise the issue of jurisdiction in his capacity as such.

43. The next issue to consider is whether the court has jurisdiction to hear this matter as it relates to the main parties to the JBC contract. In that regard, I find from the copy of the JBC Contract dated 18th March 2015 that clause 45.1 stipulates that-

“In case any dispute or difference shall arise between the Employer of 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 Architectural Association of Kenya, on the request of the applying party.”

44. Further as evidenced by a letter dated 29th November 2017, the Applicant declared a dispute and stated as follow:-

“In accordance with clause 45 of the JBC Contract, we hereby declare a dispute.

We request that the dispute be submitted to arbitration and that we agree on the appointment of an Arbitrator within thirty (3) days of this dispute notice in accordance with clause 45.1 of the JBC Contract.

In addition, in accordance with clause 45.t of the JBC Contract, we confirm out readiness to attempt to settle the dispute with you amicably, with or without the assistance of third parties. We request that we initiate this process by meeting on 18th December 2017 at 10.00am at our offices, in order to set the parameters of attempting to settle the dispute in terms of clause 45.4.”

45. I therefore find that, indeed, there is a dispute between the Plaintiff and the 1st Defendant. I have also considered the prayers in the Plaintiff and I find that under prayer (i) the plaintiff is seeking that, an order be issued to allow it to search and preserve all documents and information relating to the dispute between it and the 1st Defendant. This acknowledges that, there is a dispute between parties to the JBC contract. Therefore the parties having agreed under clause 45.1, thereof that Arbitration is the dispute resolution mechanism; the court has no jurisdiction to entertain the dispute herein.

46. Moreover almost all the other prayers in the plaintiff relate to the JBC contract. Prayers (iii) and (iv) makes reference to the suit property; LR No. 3734/421. Prayer (v) seeks for an order that, the Honourable court appoint an independent forensic engineer (or engineers) to inspect the suit property and obtain full information or evidence with a view to ascertaining the cause of sagging beams and, for that purpose, to take such samples, make such observations and try such experiments as may be necessary for such ascertainment. This prayer relates to the order sought relates to the contractual works which are a subject of the JBC Contract governed by clause 45.1 of the agreement.

47. Further, prayer (vi) seeks for general damages for breach of contract. The Respondents conceded that this prayer is a subject of the main contract and should not have been included in the Plaintiff. It is therefore a matter of arbitration. Prayer (vii) seeks for general damages for fraud. The Respondent alleges that this prayer is a tortious action that can be determined herein.

48. Prayer (viii) seeks for special damages for the foreseeable economic loss (being loss of revenue, business reputation and loss of goodwill) occasioned by the negative publicity arising against the Plaintiff (to be computed and ascertained) and prayer (ix) seeks for exemplary damages. It is alleged to be available to be determined herein.

49. It is therefore clear from these prayers that, some are a subject of the contract between the Plaintiff and the 1st Defendant which provide for arbitration as the mode of dispute resolution while others are not. The question still remains as to whether the court can hear and determine the matter herein.

50. It suffices to note that, the provisions of Article 159 (1) of the Constitution of Kenya, clearly stipulates that, Judicial authority is derived from the people and vested in, and shall be exercised by the courts and tribunals established by or under the Constitution. That, in exercising the judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism.

51. Further, the statutory provisions of; **Section 10** of the Arbitration Act No. 4 of 1995, limits the court's intervention in arbitral process and states as follows:

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

Thus the court can only intervene in Arbitral matters before commencement of proceedings under Section 6 and 7 of the Arbitration Act.

52. In the instant matter, the Applicants are seeking for orders that, the suit be stayed pending the referral of the dispute to Arbitration. However, the Applicant did not invoke the provisions of Section 6 (1) of the Act, which deals with the same. These provisions 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 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”.

53. In this regard, the Respondent argues that the Applicants prayer for stay of proceedings is ipso factor acknowledgement of jurisdiction. But it suffices to note that, the key factors under the provisions of Section 6 are that, an Applicant seeking to stay proceeding and referral thereof to arbitration should make an application for the same, at the time of entering appearance or before acknowledging the claim in question.

54. The question is; what constitutes an acknowledgement of a claim. In the case of; *Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR*, the court held that, the filing of a defence constitutes acknowledgment of a claim, within the meaning of the provisions of section 6(1) of the Arbitration Act. In that matter, the 1st, 2nd and 3rd Respondents had already filed and even amended their statements of Defences while the 4th and 5th Respondent had entered appearance and filed their statements of defences. The Court held that, the Defendants had already submitted to the jurisdiction of the court and the matter could not be referred to arbitration.

55. The 1st Defendant/Applicant has not filed a defence to the claim herein. Therefore, it is within the ambit of the law to seek for orders of stay of proceedings within the provisions of Section 6 of the Arbitration Act as they have not submitted to the to the jurisdiction of the court.

56. The other issue raised by the Applicant is that, the other 13 Defendants are not parties to the JBC contract and cannot be subjected to the arbitral proceedings. It is noteworthy that, it is trite principle of law that, Arbitration proceeding are dependent on the existence of an agreement between the disputant parties. This is a reflection of the role of consent as the basis of arbitration.

57. In the case of; *Eunice Soko Mlagui –vs- Suresh Parmar& 4 others (supra)* the court held that an arbitral clause in the subject contract applied in the event of; disputes between members and the company and between members per se. That it did not apply to disputes with employees like the 4th and 5th Respondents therein, who were external auditors of the company. To that extent therefore, and as contemplated by Section 6 (1)(b) of the Arbitration Act, there was no dispute between the Appellant and the 4th and 5th Respondents, which the parties had agreed to be referred to arbitration. In the same vein the claims against the 2nd to the 14th Defendants cannot be a subject of Arbitration proceedings.

58. However, as already stated the contract herein is between the Plaintiff and the 1st Defendant and therefore any dispute between them in relation to the subject contract cannot be heard in this court.

59. In this regard, the court has two options; to stay the proceedings pending the referral of the same to arbitration or strike out the suit. In my considered opinion, the striking out of the suit will not serve the interest of justice in view of the fact that, the other 13 other Defendants are not a party to the JBC contract. It is therefore in the interest of justice and of the parties to order that the proceedings in relation the Plaintiff and the 1st Defendant be stayed pending referral of the dispute to Arbitration, than strike out the entire suit.

60. The other issue relates to the orders issued herein ex parte on 1st August 2018 on the first appearance by the Respondent. The question is whether these orders were properly granted. The subject application was seeking for a total of 17 prayers. The first 14 prayers were sought for ex parte. Prayers (2) – (13) were granted ex parte. Most of them (if not all) have already been executed and are not available for setting aside and/or vacating. Therefore, an order to set them aside or vacate them will serve no purpose.

61. Indeed the Plaintiff/Respondent has conceded under paragraph 12 of the submissions that, the orders granted by the court were interim in nature and the evidence seized will be crucial for the hearing of the eminent arbitral proceedings proposed by the 1st Defendant. Further, given that, the evidence has already been seized, the process of arbitration can therefore commence.

62. Based on the above facts, it therefore follows that, the parties to the JBC contract are ready to go for Arbitration; the court has no jurisdiction to hear the merits of the substantive issues relating to the dispute arising out of the JBC contract. In the given circumstances, the proceedings herein shall be stayed pending the referral of the dispute to Arbitration. This order is made in favour of the 1st Defendant only. As already stated, the 14th Defendant has no locus standi to enjoy the benefit of this order for reasons stated herein.

63. The last issue to consider is whether the court should strike out the suit as against the other 13 Defendants. First and foremost, the Application was filed by the 1st and 14th Defendants only, and supported by the 4th Defendant. All the other Defendants have not sought for the striking out of the suit. No orders can be in favour or against a party who is/has not sought for the same or opposed the grant thereof. The court having ruled that the 14th Applicant has no locus standi to challenge the jurisdiction of the court to hear this matter, it follows that, there is no basis to make any orders in favour of the 2nd to 14th Defendants.

64. However, the Plaintiff may wish to reconsider its case in view of the fact that, the subject matter of this suit and of the arbitral proceedings is the same and whether it will be in the interest of justice to prosecute the matter in the two different forums. Taking into account the Plaintiff stated that it may file proceedings before the civil and criminal courts and professional bodies, it may have to re-evaluate what will remain in this matter for prosecution.

65. The upshot of this is that, the proceedings herein as they relate to the dispute between the parties to the JBC contract are stayed pending the referral thereof to arbitration. The proceedings shall be so stayed for a period of twenty eight (28) days from the date of this order. All the orders given on interim basis that have not been spent shall stand vacated at the expiry of that period. The costs of the application shall abide the outcome of the arbitration.

66. It is so ordered.

Dated, delivered and signed in an open court this 22nd day of May 2019.

G.L.NZIOKA

JUDGE

In the presence of:

Mr. Nderitu for the Plaintiff/Respondent

Ms. Ndirangu for Mr. Njogu for the 1st and 14th Defendants/Applicants

Ms. Okimaru and Mr. Kilonzo for the 4th Defendant/Respondent

No appearance for 2nd to 3rd Defendants/Respondents

and then 5th to 13th Respondents

Ms. Ochieng for 6th and 7th Defendants/Respondents

the 14th Defendant/Applicant

DennisCourt Assistant