



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL SUIT NO. 2 OF 2017

GANUNI CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF GARISSA.....1ST DEFENDANT

GARISSA COUNTY SECRETARY.....2ND DEFENDANT

RULING

Introduction:

1. Coming up for determination is the defendants Notice of Preliminary Objection dated 21st May, 2019 and filed on even date seeking to have this suit struck out with costs or in the alternative to have the same stayed pending Arbitration on the following grounds that:

1) The Honourable Court lacks jurisdiction to hear and determine the matter herein by virtue of the express provisions of Condition 67.3 of conditions of Contract for Works of Civil Engineering Construction, fourth Edition 1987, reprinted in 1992 with further amendments, prepared by Federation International de Ingenieurscounseils (FIDIC) for reason that no reasonable effort has been taken to settle the dispute herein as provided in the said FIDIC Conditions

2) The aforesaid FIDIC Conditions of work were incorporated under Part 1 of Section VI of the subject tender document being Tender No. CGG/T/67/2014-2015.

3) The present suit is therefore brought prematurely and is therefore an abuse of the process of this Honourable Court for the foregoing reasons

2. Both parties filed their respective submissions in regard to the Preliminary Objection. The defendants' submissions are dated 28th June, 2019 and filed on 1st July, 2019, whereas the Plaintiff Submissions are dated 1st July, 2019 and filed on even date.

Background

Defendant's case:

3. The defendants in support of their Preliminary Objection have submitted that the Plaintiff instant suit is based on a breach of contract as evidenced by document CGC/T/67/2014-2015. The contract was for re-carpeting of Garissa University College road. It is their position that the Contract entered into with the plaintiff incorporated FIDIC Contract conditions for works of Civil Engineering and that clause 67.1, 67.2 and 67.3 of the contract provides for an elaborate scheme for dispute resolution.

4. They submitted that the first step when a dispute arises as per the set conditions is to refer the dispute to an Engineer, if not satisfied a party can refer the dispute to amicable Resolution and failure of which the same would be referred to an Arbitrator. It is the defendant position that the plaintiff has failed to adhere to the above provisions which requires them to try alternative means of dispute resolution including Arbitration before filing a suit in Court.

5. The defendant in buttressing their position have relied on Article 159(2)(c) of the Constitution which provides that the courts in exercising the Judicial Authority shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. In addition, they relied on section 59C of the Civil Procedure Act and Order 46 Rule 20 of the Civil Procedure Rules, 2010 which provisions enable the courts to *suo moto* or on application of party refer a matter for resolution vide alternative forms of

dispute resolution.

6. Further, the plaintiff has submitted that the instant matter raises technical issues and that the most appropriate mode of resolution is through arbitration. They urged the court to give effect to the party's agreement and not allow a party to breach the same. In this regard they relied in the case of *True North Construction Limited vs Kenha (2014) eKLR*.

7. Furthermore, the defendants argues that section 6 of the Arbitration Act does not prohibit this court from referring the instant suit to Arbitration, alleging that referring this matter to Arbitration would be just. Moreover, they submitted that in any event the plaintiff would not suffer any prejudice. In sum they urged the court to find that the Preliminary Objection is meritorious and stay the instant proceedings.

Plaintiff Response:

8. The Plaintiff in their submissions addressed only one issue, whether the court has the jurisdiction to hear the instant suit. In this regard they rely in the case of *Owners of Motor Vessel 'S' vs Caltex Oil (Kenya) LTD(1989)KLR 1* and *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others[2012] e KLR* where the court held that jurisdiction flows from the constitution or legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which has been conferred upon it by law. In this respect they submitted that a court should never be hoodwinked into delaying a matter just because a party has raised an issue on jurisdiction.

9. In this instant case the plaintiff has submitted that the Defendant vide their defence filed on 4th June, 2018 at paragraph 10 admitted the Jurisdiction of this court, arguing that the Preliminary Jurisdiction is a waste of precious judicial time and should be condemned.

10. Further, the plaintiff submitted that section 6 (1) of the Arbitration Act No. 4 of 1995 which provides that a party who seeks to challenge proceedings in court where there is a valid Arbitration clause must do so not later than the time when a party enters appearance or otherwise acknowledges the claim. They argue that a party seeking to stay proceedings as sought by the defendant must do so immediately after entering appearance and latest before filing a defence.

11. In this case they submitted that the defendant lost their right of stay and reference of the matter to Arbitration when they filed their defence. In this regard they rely on the following authorities, *Fairlane Supermarket Ltd vs Barclays Bank Ltd. HCC No. 12 of 2011*, *Blassovilla Holding Kenya Ltd vs Foton East Africa Ltd Nakuru HCC No. 28 of 2014* and *Corporate Insurance Co. vs Wachira (1995-1998) I EA 20* where it was held that a party seeking to rely on an arbitration clause must do so immediately after entering an appearance and before filing a defence.

12. In sum the Plaintiff argues that the defendants Preliminary Objection is an abuse of the Court process and a waste of precious judicial time and the same ought to be dismissed with costs.

Issues and Analysis:

13. The Instant Preliminary Objection by the defendant in my view raises only one issue, which is as to whether this Court has the Jurisdiction to hear this suit in view of the party's arbitration clause contained as part of their contract.

14. In this regard Section 6 of the Arbitration Act provides 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.”

15. Consequently, it is apparent from the above Section 6(1) of the Arbitration Act that the time for filing an application to stay a matter and refer it Arbitration where a valid Arbitration clause exists should not be later than the time when that party enters appearance or files any pleadings, or takes any other step in the proceedings.

16. In *Lofty vs Bedouin Enterprises Ltd [2005] 2 EA*, the Court of Appeal addressed the issue of section 6(1) of the Arbitration Act. Thus:-

“We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings.

17. Further, in the case of the *Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd [2014] eKLR*, Gikonyo J. stated thus:-

"I should add that, the requirement in section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration. Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law. By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the Arbitration Act forfeits his right to

apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court....."

18. The defendant herein did not pursue the Alternative methods of resolving the instant dispute including arbitration as provided in their Contract. After entering their appearance, they went ahead and filed their defence admitting the Jurisdiction of this court, and as if that is not enough they participated in the plaintiff case, and after the close of the plaintiff case they seemed to have woken from slumber and remembered that there existed an Arbitration warranting some action.

19. The defendants therefore subjected themselves to the proceedings herein and failed to promptly file their application seeking to refer the matter to Arbitration. They have done so mid-way being after the close of the plaintiff case, and thus in my view the same cannot stand. . As a result thereof, this Court is therefore inclined to find that it has jurisdiction to hear this suit. In the circumstances, the instant preliminary objection is incompetent and ought to be dismissed with costs.

CONCLUSION

The end result in my finding is that the Notice of Preliminary Objection has no merit and thus court makes the following orders;

i. The Notice of Preliminary Objection herein is dismissed.

ii. Costs awarded to the plaintiff/respondent.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT GARISSA THIS 25TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE