



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 300 OF 2016

THOMAS & PIRON GRANDS LACS LIMITEDPLAINTIFF

VERSUS

LIGHTHOUSE PROPERTY COMPANY LIMITEDDEFENDANT

AND

CHASEBANK KENYA LIMITED (IN RECEIVERSHIP).....1ST INTERESTED PARTY

SBM BANK (KENYA) LIMITED2ND INTEREST PARTY

RULING

1. The dispute herein revolves around a Joint Building Council (JBC) agreement entered between Thomas and Piron Grands Lacs Limited (**T&P**) and Lighthouse Property Company Limited (**Lighthouse**). Sucked into this matter as interested parties are Chase Bank Kenya Limited (In Receivership) (**Chase Bank**) and SBM Bank (Kenya) Limited (**SBM Bank**).

2. In an Amended Notice of Motion dated 21st February 2019, T&P seeks an early end to the matter and prays for the following multiple orders;-

4. That pending the hearing and determination of the suit, the court do issue a conservatory order by way of an injunction restraining the Defendant and the Interested parties, either by themselves, their agents, administrators, servants, assignees, and/or anybody acting on their instructions and/or their authority from interfering with the Plaintiff's physical possession of the property known as L.R. No. 3734/1409 Jacaranda Avenue, Lavington Nairobi and from howsoever dealing with alienating, selling, transferring, charging, leasing, disposing of and/or assigning the property known as L.R. No. 3734/1409 Jacaranda Avenue, Lavington Nairobi;

5. That the Honourable court do enter summary judgment and/or judgment on admission in favour of the Plaintiff and against the Defendant for:-

a) The sum certified through interim payment certificate number 8 (Serial No. 98980) dated 21st March 2016 for the sum of Kshs. 23,270,270.60;

b) Interest on delayed payments as at 31st October 2018 in the sum of Kshs. 10,654,173.00;

c) Contractual claims under the JBC agreement in the sum of Kshs. 55,702,204.27 as at 31st October 2018;

d) Interest on (a) and (c) above at court rates of 12% per annum from the date of filing suit until payment in full;

e) Costs of the suit.

6) The judgment amount referred to in clause (5) above be settled forthwith by the Defendant failure to which the property known as

L.R. No. 3734/1409 Jacanranda Avenue, Lavington Nairobi be attached for sale forthwith to satisfy the said judgment sum;

7) That pending the hearing and determination of the main suit or until further orders of the court, an inhibition do issue inhibiting the registration of any dealing whatsoever with the property known as L.R. No. 3734/1409 Jacanranda Avenue, Lavington Nairobi;

8) That a declaration do issue that the Plaintiff has and is lawfully exercising its possessory lien over the property known as L.R. No. 3734/1409 Jacanranda Avenue, Lavington Nairobi;

9) That the Honourable court issues any further direction or order as it may deem fit in the circumstances of the case;

10) That the costs of the application be awarded to the Plaintiff/Applicant.

3. On or about the 25th day of March 2015, T&P entered into a JBC Agreement for the construction of town houses (the **project**) on the 3734/1409 (the **suit property**) at a contract price of Kshs. 115,418,530.75. The architect for the project was Morphosis Limited (**Morphosis**) while the Quantity surveyor was Northwind Consulting Limited (**Northwind**). It was a term of the JBC Agreement (clause 34) that payment would be follow the process set out below :-

a. The Plaintiff as contractor would at agreed intervals (each calendar month) would submit to the Quantity surveyor an application for payment giving sufficient details of the work done and the materials on site and the amounts which the contractor considers himself entitled to;

b. After verifying the amounts claimed, the Quantity surveyor would prepare an interim valuation for work done and materials on site during the relevant period and forward the same to the Architect;

c. On the basis of the interim valuation of work done, the Architect would prepare and issue an interim payment certificate within seven days; and

d. The contractor shall on presentation of any interim payment certificate to the Employer (the Defendant), be entitled to payment thereof within fourteen (14) days.

4. T&P avers that it commenced works on the project in accordance with the terms of the JBC Agreement but Lighthouse is in breach of the payment of interim payment certificate number 8 (Section No.989809) dated 21st March 2016. It contends that having failed to make the payments within the time stipulated in the JBC Agreement, T&P stopped the works as provided under the terms of the JBC Agreement and issued a notice of suspension of works.

5. T&P claims that some of the interest accrued on late payment and other contractual claims were tabulated as follows:-

(a) Interest on delayed payments as at 31st October 2018 in the sum of Kshs.10,654,173.00

(b) Contractual Claims under the JBC Agreement in the sum of Kshs.55,702,204.27 as at 31st October 2018.

6. T&P states that it is still on site and continues to incur routine monthly charges relating to securing the works and site. This would include purchase of water, payment of electricity and provision of security. T&P contends that it is asserting a proprietary lien over the property to secure payment due to it.

7. How so are the interested parties in such a dispute? Chase Bank is a limited liability company carrying on banking business under the Banking Act (Cap 488) and is currently under Receivership. It holds a charge over the suit property. As to SBM Bank, it is said that by virtue of an agreement executed between it and the Central Bank of Kenya, it acquired certain assets and assumed certain deposits with respect to Chase Bank. The argument by T&P is that its proprietary lien takes precedence over the interest created by the charge in favour of Chase bank. No doubt a controversial proposition.

8. Even before setting out the responses by Lighthouse and Chase Bank, it is imperative that the Court walks the short history of the pleadings and proceedings herein as it partly informs the stance taken by Lighthouse and Chase Bank.

9. T&P presented this suit via a plaint dated 22nd July 2016 and filed on 26th July 2016. After outlining its claim against Lighthouse, it sought an order of injunction restraining Lighthouse from transferring the suit property pending referral of the dispute herein to Arbitration. Simultaneously with presentation of the suit, T&P sought interim orders of protection under the provisions of Section 7 of the Arbitration Act. At this point, the interested parties had not been impleaded.

10. On 30th November 2016, Lighthouse filed grounds of opposition in which it stated that the dispute could not fall within the provisions of Clause 45 of the JBC Agreement as it involved Chase Bank. Lighthouse took the position that the matters raised could not be effectively and completely settled without the participation of Chase Bank.

11. On the same date (30th November 2016), and since pleadings had not closed, T&P amended its pleadings to enjoin Chase Bank, citing the charge.

12. Further amendments were to be made to the plaint and this was pursuant to leave granted on the 14th February 2019. This was by way of consent of Counsels for T&P, Lighthouse and Chase Bank. The further amended plaint dated 21st February 2019 and filed on even date is the present pleading by T&P. In it, Chase Bank is removed as co-defendant to Lighthouse and made the 1st Interested party. SBM Bank is then enjoined as the 2nd Interested party. Of some significance as well is that T&P no longer invokes the Arbitral agreement and seeks this Court's intervention for final hearing and determination of the dispute.

13. In response to the current application, Lighthouse and SBM Bank take up a preliminary objection seeking the striking out not only of the application but the entire suit on the basis that the suit is subject to the Arbitral Clause and this court lacks jurisdiction.

14. Chase Bank raises three main issues. First, that a contractor's lien cannot supersede its right as a chargee. Second, that it is under receivership and it cannot be sued without the sanction of Court required under Section 56(2) of the Kenya Deposit Insurance Act No. 10 of 2012 (KDI Act). Lastly, T&P seeks substantive orders against it while the supporting affidavit claims that there is no cause of action against it as a third party.

15. An appropriate place to start the discussion and determination of the issues raised in this matter is the question whether the sanction of this court was required under Section 56(2) of the KDI Act before proceedings were commenced against Chasebank.

16. It is common ground that as at the date of the application, Chase Bank was under receivership. Although none of the parties produced the instrument appointing the receivership, it is Gazette Notice No. 2320 (a matter this court can take judicial notice) and I reproduce it:-

GAZETTE NOTICE NO. 2320

THE KENYA DEPOSIT INSURANCE ACT

(NO. 10 OF 2012)

IN THE MATTER OF CHASE BANK LIMITED

(IN RECEIVERSHIP)

APPOINTMENT OF RECEIVER

PURSUANT to section 43 (1), 43 (2) and section 53 (1) of the Kenya Deposit Insurance Act, 2012, the Central Bank of Kenya appoints the Kenya Deposit Insurance Corporation as the receiver for Chase Bank Limited, for a period of twelve months with effect from the 7th April, 2016.

Any claims and matters relating to Chase Bank Limited shall be directed to the receivers at CBK Pension House, 3rd Floor, Harambee Avenue; P. O. Box 45983-00100, Nairobi, Tel. 020-2863841; Email kdiccommunications@depositinsurance.go.ke

Dated the 7th April, 2016.

PATRICK NJOROGE,

Governor, Central Bank of Kenya

17. Section 56(2) of the KDI Act which is invoked by Chase Bank provides as follows:-

“56. (2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.”

18. Cited to this court by Mr. Chege appearing for Chase Bank is the decision of Kasango J in Milimani Commercial & Tax Division Petition No. 2 of 2019 Donald Smith Earle vs Central Bank of Kenya & Another, Imperial Bank Limited (Interested party) [2019]eKLR, in which the Judge held that the provisions of Section 56(2) of the Act applied to an institution placed under receivership pursuant to the provisions of Section 43. In this league are the decisions in Andrew Gikuni Muchai vs Chase Bank & Another and Charity Wangio Ngumu vs Chase Bank Limited (In Receivership) & Antique Actions Agencies (2018) eKLR. To be noted is that these two latter cases involve Chase Bank.

19. Mr. Nyaribo for T&P stated that Section 56(2) of the Act applies to institutions under liquidation and not receivership and cites the decision of P.J. Otieno J in Ashok L. Doshi & Another vs Central Bank of Kenya & Another (2016) eKLR.

20. On this matter I side with the position taken by P.J. Otieno J in Ashok L. Doshi (supra) where he rendered himself as follows:-

6. On section 56 of the Kenya Deposit Insurance Act, I note that the Section cited and relied upon is to be found at part VI of the Act headed *RECEIVERSHIP LIQUIDATION AND WINDING UP*". A reading of the Act reveals that Sections 43 to 53 govern and deal with receivership while section 54-59 concern themselves with liquidation. The documents filed in the file and the pleadings are unanimous that the 2nd defendant was on the 13.10.2015 placed under the receivership by the Kenya Deposit Insurance Corporation (KDIC) for a period not exceeding 12 months.

8. It is apparent to me that the preliminary objection was conceived and prosecuted on the understanding that the said defendant has been placed under liquidation. Were that to be the case it would be an open and shut case to invoke the provisions of section 56(2) and the decisions in **Bisai & Another Vs Kenya Commercial Bank Limited & Others [2002] 2 EA 346, Kwanza Estaes Limited VS Dubai Bank Of Kenya Limited[2015]eKLR and Ruth Wanjiku Kagiri Vs Reliance Bank Limited [2012] EKLR**. For this matter, the second defendant being merely under receivership, those decisions were all cited out of context as much as the same concerned liquidation positions and not receivership.

9. A casual reading of the statute would reveal that it is only Section 46 of the Act which legislate some limited right to sue but the limitation is only to protect the corporation or the appointed receiver from being restrained from assumption of control of the institution and no more. In-fact the provision expressly allows any person who suffers any losses from actions of the corporation or the appointed person to institute an action for damages for the losses suffered by that person. I find and hold that nothing in the statutes relied on before me suggest that the appointment of a receiver divests the institution of its corporate stature and capacities in as much as there is nothing in those provisions that insulate it from being sued. If I was wrong on the findings then the provisions of section 45(5) is of good guidance. It provides:

"(5) Where the corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall-

(a) be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, business and affairs, including disposal of assets; and

(b) not, by reason of having assumed control of the institution o any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account. "

21. The concept of Receivership and Liquidation as contemplated by the KDI Act are different. The circumstances under which Central Bank can place a Bank under receivership are set out in Section 43(2) of the KDI Act and include when assets of an institution are less than its obligations to its creditors or the institution has engaged in malpractices or activities contrary to provisions of any Kenyan Law or other applicable law.

22. The intention of statute is that receivership is a short term measure not exceeding twelve (12) months and if extended, for a further six (6) months (Section 53 of the KDI Act). The objective of receivership is to bring back the institution into conformity with the capitalization levels and/or other statutory or regulatory requirements set out in the Banking Act or the Microfinance Act, depending on the statute under which the institution is registered. The aim of receivership is, in the first instance, to put back the institution on track but failing which KDIC can recommend to Central Bank that the institution be liquidated. In that event, Central Bank appoints the corporation as a liquidator (Section 53(2)] of the KDI Act). Liquidation may lead to the winding up of the institution.

23. While it is true that an institution placed under receivership may require some temporary protection from aggressive creditors so that the receiver is not detracted from its effort to revive the institution, it has to be remembered that an institution can be placed under receivership because of whole range of reasons. Just to appreciate the length of the list, I reproduce Section 43(2):-

S.43 (2) The Central Bank shall appoint the Corporation as sole receiver of any institution if the Central Bank determines that—

(a) the institution's assets are less than the institution's obligations to its creditors;

(b) an unsafe or unsound condition to transact business exists or other cause that warrants the exercise of the relevant power in the interests of the institution, its depositors, or other creditors;

(c) there is a willful violation of a regulatory or supervisory order;

(d) there is a concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the Central Bank or the Corporation;

(e) the institution is likely to fail to meet any financial obligation or meet its depositors' demands in the normal course of business;

(f) the institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized without assistance;

(g) there is violation of any law or regulation, or an unsafe or unsound practice or condition that is likely to cause insolvency or substantial dissipation of assets or earnings, weakening the institution's condition or otherwise seriously prejudice the interests of the institution's depositors or the Fund;

(h) the institution is undercapitalized or significantly undercapitalized and fails to comply with requirements imposed by the Central Bank or the Corporation under section 45 or otherwise has substantially insufficient capital;

(i) the institution has engaged in malpractices or activities contrary to the provisions of any Kenyan law or other applicable law.

24. It is evident that financial distress is not the only reason why an institution may suffer receivership. An institution whose only problem is a willful violation of a regulatory or supervisory order need not be wary of creditors, financial obligations or depositor demands. So whether or not an institution placed under receivership deserves protection depends on the nature of challenge that bedevils it.

25. If the challenge is one of solvency, liquidity or capitalization (I use these words in their loose meaning), then an institution under receivership may require some protection. That protection is, in my view, available by means of a moratorium on the payment to depositors and other creditors. On declaration of a moratorium, Section 50(2) of the KDI Act reads:-

S. 50 (2) For the purposes of discharging its responsibilities as receiver, the Corporation shall have power to declare a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium shall-

(a) be applied equally and without discrimination to all classes of creditors:

Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution;

(b) limit the maximum rate of interest which shall accrue on deposits and other debts payable by the institution during the period of the moratorium to the minimum rate determined by the Central Bank under the provisions of section 39 of the Central Bank of Kenya Act or such other rate as may be prescribed by the Central Bank for the purposes of this section:

provided that the provisions of this paragraph shall not be construed so to impose an obligation on the institution to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case;

(c) suspend the running of time for the purposes of any law of limitation in respect of any claim by any depositor or creditor of the institution; or

(d) cease to apply upon the termination of the Corporation's appointment whereupon the rights and obligations of the institution, its depositors and creditors shall, save to the extent provided in paragraphs (b) and (c), be the same as if there had been no declaration under the provisions of this subsection.

26. Indeed, in the matter at hand, KDI declared a moratorium in respect to payment to all depositors and creditors of Chasebank. The following is the declaration:-

GAZETTE NOTICE NO. 2321

THE KENYA DEPOSIT INSURANCE ACT

(NO. 10 OF 2012)

IN THE MATTER OF CHASE BANK LIMITED

(IN RECEIVERSHIP)

DECLARATION OF A MORATORIUM

IN EXERCISE of the powers conferred by section 50 (2) of the Kenya Deposit Insurance Act, 2012, the Kenya Deposit Insurance Corporation, the receiver for Chase Bank Limited declares that with effect from the 7th April, 2016, and until such time as normal operations of Chase Bank Limited shall have resumed, a moratorium shall apply equally and without discrimination to the liabilities of Chase Bank Limited.

Accordingly—

(a) no deposits on any types of accounts operated by Chase Bank Limited (in receivership) shall be paid nor shall any claims by any other class of creditors be met;

(b) the maximum rate of interest which shall accrue on deposits and other debts payable by Chase Bank Limited (in receivership) during the period of the moratorium shall be limited to the minimum rate determined by the Central Bank of Kenya, provided that there shall be no obligation on Chase Bank to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case; and

(c) the running of time for the purposes of the law of limitation in respect of a claim by any depositor or creditor of Chase Bank Limited is suspended for the duration that the moratorium shall remain in effect.

Dated the 7th April, 2016.

MOHAMUD A. MOHAMUD,

Ag. Chief Executive Officer,

Kenya Deposit Insurance Corporation

27. From the language of Section 50(2), a moratorium is applied equally and without discrimination to all classes of creditors. So, secured or unsecured creditors, creditors with vested or contingent interest are all treated equally. This can be on a very effective way of protecting an institution under receivership. I would think that having appreciated that institutions can be placed under receivership for different reasons and that the device of a moratorium adequately insulates those that require some respite, the legislature did not think it necessary to extend provisions of stay of proceedings under Section 56 to receivership.

28. Perhaps I need to add that while proceedings against an institution under receivership can be commenced or continued without the necessity of court sanction, a decree holder will not be able to reach the assets of the institution if it is shielded by a moratorium under the provisions of Section 50(2).

29. I have to come to the conclusion that the provisions of Section 56 of the KDI Act do not apply to institutions placed under receivership and the preliminary objection is misplaced.

30. That said, this Court has doubt that the suit as pleaded discloses any cause of action against the two Banks. It is common cause that a charge was registered in favour of Chasebank over the suit property on 30th March 2016. However, T&P asserts that it has a proprietary or contractor lien over the property which takes priority over the charge. T&P attempts to find strength in Section 101(2) of the Land Act. Section 101 reads:-

Application of proceeds of sale of charged land.

101. The purchase money received by a chargee who has exercised the power of sale shall be applied in the following order of priority—

- (a) first, in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the charged land;
- (b) second, in discharge of any prior charge or other encumbrance subject to which the sale was made;
- (c) third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
- (d) fourth, in discharge of the sum advanced under the charge or so much of it as remains outstanding, interests, costs and all other money due under the charge, including any money advanced to a receiver in respect of the charged land under section 92; and
- (e) fifth, in payment of any subsequent charges in order of their priority, and the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the charge.

31. This argument was the subject of judicial discussion in **Spentech Engineering Limited vs Methode Limited & 2 Others** (2017) eKLR. I am content to identify with the reasoning of Hon. Onguto J when he held:-

41. Spentech's alternate argument was that by dint of a contractor's lien and pursuant to the provisions of s.101(a) of the Land Act, any sale proceeds realized by Chase Bank was first to be utilized in settling the debt owed to Spentech before being appropriated by either Chase Bank or Methode. According to Chase Bank however its legal rights to appropriate the sale proceeds as provided under statute could not be subordinated to Spentech's or Methode's. Chase Bank also placed reliance on the provisions of s.101 of the Land Act.

42. Section 101 of the said Act provides as follows:

101. The purchase money received by a chargee who has exercised the power of sale shall be applied in the following order of priority-

- a) First, in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the charged land;
- b) Second, in discharge of any prior charge or other encumbrance subject to which the sale was made;
- c) Third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
- d) Fourth, in discharge of the sum advanced under the charge or so much of it as remains outstanding, interests, costs and all other money due under the charge, including any money advanced to a receiver in respect of the charged land under Section 92; and
- e) Fifth, in payment of any subsequent charges in order of their priority, and the residue, if any, of the money so received

shall be paid to the person who, immediately before the sale, was entitled to discharge the charge.

43. A building contractors' bill is not expressly provided for under the Act. The question, in my view, even at this very interlocutory stage is whether a building contractors bill falls within the particular or general words of s.101(a) of the Land Act. The words "or other sums" owing and required to be paid on the charged land are apparently wide and there may be need to construe the same ejusdem generis.

44. The ejusdem generis rule of statutory construction is basically to the effect that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same character. Of the word "other", Strouds Judicial Dictionary 3rd Ed says the following in relation to the ejusdem generis rule:

"Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated."

45. Effectively, if one can find that things described by particular words have a common characteristic which constitutes them as a genus then you ought to limit the general words which follow them to the things of that genus.

46. In the present case all the items susceptible to payments on the charged land are described by particular words. The words in their natural meanings appear to have the common characteristic of outgoings which concern and touch on land. They do not include any receipts. They do not in my view constitute ordinary debts. They constitute regular burdens on the land in the form of taxation or duties payable regularly, whether monthly, semi-annually or yearly. The general words "other sums owing" in my view, should also only apply to articles and items which possess that characteristic. It should not be such as it is fetched on the person or proprietor as a personal covenant or other debts for that matter.

47. Additionally, the context and intent of s.101 of the Land Act cannot in my view be ignored. When land is used as security and the chargee ultimately exercises its right of recovery of debt through realization of the security, it is intended that it is not only the chargee who benefits but that any purchaser does not inherit any monetary burdens payable on the land. Such other monetary burdens may include regular service charge and management fees as well as any annual repair costs but not non-regular third party claims not regularly chargeable on the land or property.

48. I am not convinced at this stage that a contractors' claim would fall to be 'other sums owing' and required to be paid on charged land unless one adopts a semantic comparison with the particular words of that subsection of the statute. A contractor's claim does not in my judgment appear to fall in the same class or bundle as the traditional outgoings on land.

49. I return an initial interlocutory verdict that, prima facie, a contractor's bill is not part of the charges on land under S.101 (a) of the Land Act.

32. Perhaps realizing this argument may be on quicksand, Mr. Nyaribo for T & P conceded that indeed the charge takes priority over his client's claim and lien but that it would be subject to his client's right to challenge the charge under Section 106 of the Land Act or Section 686 of the Insolvency Act. Counsel asserts that there would be good reason to mount such a challenge because the charge was registered a few weeks before the Bank was placed under receivership. The trouble, however, is that this matter is not pleaded at all in the Further Amended Plaintiff and no substantive orders are sought against the two Banks who are impleaded merely as interested parties.

33. That seals the fate of prayers 4, 6, 7 and 8 of the application as no prima facie case has been made against the Banks.

34. What is left of the application is prayer (5) of the motion which is for summary judgment and/or judgment on admission against Lighthouse.

35. As I turn to discuss this aspect of the claim, I need to observe that in the suit as originally presented, T&P took the position that there was a dispute between it and Lighthouse which required reference to Arbitration under clause 45 of the SBC agreement. T& P had a change of heart and in the Further Amended Plaintiff, takes the position that there is no dispute to be referred. On the other hand, Lighthouse's initial position was that the Arbitral clause could not be invoked because the dispute also involves Chasebank. Just like T & P, Lighthouse changed its position and now argues that this Court lacks jurisdiction to hear and determine this matter and the dispute should be referred to Arbitration pursuant to the Arbitral clause.

36. Lighthouse invokes Section 6 of the Arbitration Act, 1995 which reads:-

S.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 relation to those proceedings.

37. A second observation is that the only evidence before this court is that in the affidavit of Coralie Piron as the Respondents did not file replying affidavits.

38. Clause 45.1 of the JBC Agreement reads as follows:-

[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 Architectural Association of Kenya, on the request of the applying party.

39. Both sides recognize the existence of the Arbitration clause and its place in the settlement of disputes that arise between the Employer and the Contractor. The divergence is that T & P asserts that there is in fact no dispute or difference that requires referral.

40. The stance by T & P is an invitation to discuss the proviso under Section 6(b) of the Arbitration Act vis a vis the facts of this case. After setting out the opinions of various English courts, the Court of Appeal in **UAP Provincial Insurance Company Limited vs Michael John Beckett 2013 eKLR** said as follows in respect to the provisions:-

[24] We identify fully with those pronouncements by English courts. The words “*that there is not in fact any dispute between the parties*” appearing in Section 6(1)(b) of the Arbitration Act are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay proceedings. As we have held, under Section 6(1)(b) of the Arbitration Act, 1995, the issue whether the dispute or differences between the parties had any merit was a matter properly before Mutungi J.

41. This Court is enjoined to consider whether there is a genuine dispute before staying the proceedings as urged by Lighthouse.

42. It is not controverted that the procedure relating to payment is in clause 34 of the JBC Agreement which has been summarized by the T&P as follows:-

5. THAT in relation to payment [clause 34], the JBC Agreement provided as follows:

a. The Plaintiff as contractor would, at agreed intervals [each calendar month] would submit to the Quantity Surveyor an application for payment giving sufficient details of the work done and the materials on site and the amounts which the contractor considers himself entitled to.

b. After verifying the amounts claimed, the Quantity Surveyor would prepare an interim valuation for work done and materials on site during the relevant period and forward the same to the Architect.

c. On the basis of the Interim Valuation of Work Done, the Architect would prepare and issue an interim payment certificate within seven days; and

d. The Contractor shall, on presentation of any interim payment certificate to the Employer [the Defendant], be entitled to payment thereof within fourteen [14] days.

43. It is also not in dispute that the Architect to the project issued interim payment certificate No. 8 (Special No. 989804) dated 21st March 2016 for the sum of Kshs. 23,270,270.60. Shown to this Court as well is invoice No. 2016/63/04 raised on 21st March 2016 calling for payment of that certificate.

44. It is not said that T&P has not complied with the payment procedure. T&P alleges that Lighthouse defaulted in payment of the interim payment certificate and again this is not denied.

45. As I understand it, under the terms of the JBC Agreement, the Architect is an appointee of the Employer in this case Lighthouse and therefore an agent of Lighthouse. That said, as a general obligation, the Architect was required to act impartially by the provisions of clause 5.4;

5.4 Where the Architect is required under the contract to exercise his discretion by giving his decision, opinion, consent or approval or by taking any other action which may affect the rights and obligations of the Employer or the Contractor, he shall exercise such

discretion impartially within the terms of the contract.

46. It has not been argued by Lighthouse that the certificate No. 8 raised by the Architect is erroneous or otherwise incorrect. No wrongdoing has been attributed to the Architect. Indeed, Lighthouse has not challenged the quantum of the unpaid certificates.

47. The only issue raised by Counsel Michira, on behalf of Lighthouse, is that T & P is in breach of clause 29 of the Contract which reads:-

29. The Contractor may suspend the carrying out of the works, if

29.1.1 He has not received a payment certificate which he applied for in accordance with Clause 34.0 of these conditions and the default continues for thirty days after expiry of the stated period, or

29.1.2. He has not received payment within the period for honouring certificates provided in clause 34.0 of these conditions and the default continues for thirty days after expiry of the stated period, or

29.1.3 The Contractor notifies the Architect that it has become impossible or impracticable to procure goods and materials for the Works for reasons beyond the Contractor's control and the Architect has not given appropriate instructions in accordance with sub-clause 23.3, or

29.1.4 Delay occurs in the nominations or renomination of a sub-contractor or supplier which delay materially affects the progress of the Works, or

29.1.5. Delay occurs in the appointment of a replacement Architect, Quantity Surveyor or Engineer which delay materially affects the progress of the works.

29.2 Where the Contractor intends to suspend the carrying out of the Works, he shall give the Employer a seven days notice in writing to that effect, with a copy to the Architect.

29.3 The Contractor shall not suspend the carrying out of the Works if the matter occasioning the notice is rectified within the period of the notice. Such suspensions shall cease immediately the matter occasioning the notice is rectified.

29.4 During the period of suspension either under Clause 28.0 or herein the Contractor shall properly protect and secure the Works to the reasonable satisfaction of the Architect.

48. It is argued for Lighthouse that T & P did not annex the notice it supposedly issued under the provisions of clause 29.2 to its application. Coralie Piron had averred:

“11. That consequently, the plaintiff due to delayed and/or non-payment of the interim payment certificates stopped works as provided under the terms of the JBC Agreement and issued a notice of suspension of works.”

49. The argument by Lighthouse is somewhat weakened because it did not raise this issue in a formal opposition to the application nor did it file an affidavit denying receipt of the notice. The averment that notice was duly issued was therefore not challenged. On a balance of probability, I would hold that the notice was issued as alleged.

50. In addition, it was not pointed out to this court, where in the JBC Agreement, the giving of notice of suspension of works was a prerequisite to laying a claim for payment once it had fallen due.

51. Given my appreciation of the matters raised, I reach a conclusion that there is no genuine or real dispute or difference between the parties to be referred to Arbitration within the contemplation of clause 48.1 of the JBC Agreement.

52. In the same breath, no defence has been raised at all in respect to the sum certified as due under interim payment certificate No. 8 of 21st March 2016, that is for Kshs. 23,270,270.60 and this Court does not hesitate to enter judgment in that regard.

53. As to the claim in respect on the delayed payments, this is justified under clause 34.6 of the JBC Agreement which provides as follows:-

[34.6] If a certificate remains unpaid beyond the period for honouring certificates stated herein, the Employer shall pay or allow to the Contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial bank lending rate in force during the period of default. The Quantity Surveyor shall assess the amounts to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate.

54. Two observations on interest on an unpaid certificate. First, it is worked out on simple interest on the unpaid amount for the period it remains unpaid at commercial bank lending rates in force during the period of default. Secondly, the Quantity surveyor is mandated to assess the interest due.

55. In the contract under discussion, Northwind were the Quantity surveyors. I do not see their assessment of the interest due. Instead, there is a letter of 31st October 2015 from T & P asking them for review and certification of its final claim which included interest. Further, on the

interest rate calculation worked out by T & P, it uses a rate of 18.0%. There is no proof whatsoever that the rate applied was the commercial bank lending rate in force during the period of default (See clause 34.6 of the JBC agreement).

56. The question of interest antecedent to the filing of a suit is a matter of substantive law and must be not only be pleaded but also proved. While this court notes that Lighthouse did not refute the claim, the Court is not satisfied that the assessment of interest has been sufficiently proved.

57. The same applies to the contractor's claims of Kshs. 55,702,204.27. T & P hinges this claim on clauses 37 and 43 of the JBC Agreement. There was no proof of the alleged direct loss incurred on termination or any of the post termination costs and expenses claimed.

58. Ultimately, the application dated 21st January 2019 succeeds to a very limited extent. The final orders of the court are:-

58.1 Prayers 4, 5, 6, 7, 8 are dismissed with costs to the 1st and 2nd Interested parties;

58.2 Prayer 5(a) is allowed;

58.3 Prayer 5(b) and (c) are disallowed and the claims for interest and contractual claims shall await trial;

58.4 A decision of on prayers 5(d) and (e) awaits the final outcome of this suit;

58.5 The Plaintiff and Defendant to bear their own costs in respect to the entire application.

Dated, Signed and Delivered in Court at Nairobi this 25th Day of October 2019.

F. TUIYOTT

JUDGE

PRESENT:

Cherono for Nyaribo for Plaintiff/Applicant

Akello Holding brief Ratemo for Defendant/2nd Interested Party

Akello Holding brief Chege for 1st Interested Party

Court Assistant: Nixon