



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 62 OF 2019

MONACO ENGINEERING LIMITED.....PLAINTIFF

VERSUS

MUNYWE INVESTMENT LIMITED.....DEFENDANT

AND

HFC LIMITED.....PROPOSED INTERESTED PARTY

RULING

The plaintiff filed this suit against the defendant claiming a sum of Kshs. 29,964,789.60 as at 31st August, 2017 plus interest in the sum of Kshs. 4,326,438.04 as at 22nd November, 2018 plus further interest as set out in the prayers to the plaint. Alongside the plaint, the plaintiff filed an application by way of Notice of Motion for injunction orders to restrain the defendant from dealing with LR No. Sigona/422 Kikuyu to the detriment of the plaintiff and an inhibition order against registration of any dealing whatsoever with the said property.

In addition, the plaintiff sought entry of summary judgment or judgment on admission of the sums set out in the plaint, and that any judgment entered be settled forthwith by the defendant, failure to which the property known as Maisonettes in Sigona Munywe Investment Limited be attached and sold to satisfy the judgment.

On 31st July, 2019 the defendant filed its defence and also a Notice of Preliminary Objection on a point of law to resist the plaintiff's application aforesaid. It is important to set out in full the two grounds set out in the said notice of preliminary objection. These are;

“1. The Standard Agreement and Conditions of Contract for Building Works prepared by the Joint Building Council (JBC) entered into by the parties contains at clause 45 provisions for settlement of disputes between the parties, by an Arbitrator to be agreed upon or appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya.

2. This honourable court does not therefore have jurisdiction to entertain this dispute and any interference must be within the confines of Section 10 of the Arbitration Act.”

In the process HFC Limited joined these proceedings as an interested party. Counsel agreed to file submissions to address the plaintiff's application aforesaid, but the interested party elected not to do so. Some authorities have also been filed.

It is true that clause 45 divests the court of jurisdiction to deal with matters where the parties have elected to refer the same to arbitration in the event of any dispute. This is a subject that has been addressed by the courts and several decisions have been cited in that regard.

Section 6 of the Arbitration Act provides as follows,

“6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applied not later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the matter 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.”

The preliminary objection by the defendant was lodged 105 days after entering appearance. The spirit of the law cited above is that such a step should be taken without unnecessary delay. I note that the objection was also filed after the defence had been lodged. The plaintiff has observed, and I think rightly so, that the defendant may have lost the right of stay and reference to the matter to arbitration because of that delay.

The thrust of Section 6 (1) (b) is that the court should interrogate whether or not there is a dispute between the parties. Above that finding, if at all, the court should also interrogate whether or not that dispute is related to matters agreed to be subjected to arbitration. The court therefore, in my view, has to look at the pleadings for guidance.

Under the agreement executed by the parties the plaintiff was entitled to payment upon completion of the project and handing over the certificate of completion. The certificate of completion, going by the pleadings and documents presented, shows that the same was issued and presented to the defendant on 31st August, 2017. Following that certificate, the plaintiff raised appropriate invoices after which the defendant failed to settle, leading to the calculation of the final account which amounted to the figures claimed in the plaint. The defendant, it is pleaded, has not denied its indebtedness to the plaintiff.

On the contrary, the defendant made a plea to the plaintiff that payment will be made after buyers had been secured but no funds were available then for settlement.

The above summary of the pleadings leads to the question whether or not there is in fact any dispute between the parties to require reference to arbitration. In **Civil Appeal No. 26 of 2007 UAP Insurance Company Limited vs. Michael John Becket** the court found that if the plaintiff's claim was to enforce a settlement agreed upon by the parties, then there is no dispute whatsoever. Put the another way, the right to payment is not a dispute between the parties. It will be noted that in a reply filed on 30th April, 2019 the defendant in a replying affidavit sworn by James Wainanina Munywe stated as follows,

“That there was no contract price as there did not exist a construction agreement as between the parties and further the bill of quantities allegedly relied upon by the parties and marked “EPM 2” in the plaintiff/applicant’s bundle of documents is not executed by either party to this suit nor are its origins clearly indicated.”

The denial of any contract is equally repeated in paragraphs 5, 6 and 12 of that affidavit. Ironically however, the defendant in the preliminary objection relies upon the same contract and in particular section 45 to raise this objection. It will not be lost to the court that the defendant is intent on delaying the determination of this matter to the prejudice of the plaintiff.

Upon consideration of all the material presented, I find that there is no dispute capable of being referred to arbitration and therefore the notice of preliminary objection is dismissed with costs to the plaintiff. The parties shall now take a date for the hearing of the application lodged by the plaintiff and dated 4th March, 2019.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE