



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY AND TAX DIVISION

CIVIL SUIT NO 213 OF 2016.

MACHIRA LIMITED.....PLAINTIFF

VERSUS

CHINA WU YI LIMITED.....DEFENDANT

AND

KENYA NATIONAL HIGHWAY AUTHORITY.....THIRD PARTY

RULING

1. This ruling is in relation to a preliminary objection dated 18th April, 2018, filed by the 3rd Party (herein “the Applicant”), following the hearing and determination of a Chamber Summons Application dated 30th January 2017, whereby the Court granted the Defendant leave to issue the Third Party notice, against it.

2. The Applicant argues that, the Court lacks jurisdiction to hear and determine any matters relating to it and that, any action against it is fatally defective as it does not comply with the mandatory provisions of the law.

3. The Applicant averred that it is established under Section 3 of Kenya Roads Act No.2 of 2007, (herein “the Act”) and that, under Section 4 (2) thereof, it’s functions are *inter alia*, constructing, upgrading, rehabilitating and maintaining national and reserve roads under its control and access to roadside developments. It also ensures that the quality of road works is in accordance with such standards as may be prescribed by the Minister.

4. That on 26th July 2012, the Applicant and the Defendant herein entered into a contract, whereupon the Defendant was to rehabilitate and upgrade the Nairobi-Thika Road Lot 1: Nairobi Arterial Connections. The Defendant carried out the works and submitted the final accounts to the Project Engineer, who verified, certified and signed the same. The accounts were then forwarded to the Applicant to settle.

5. The Applicant avers that, however during the preparation and submission of its final statement, the Defendant excluded the Plaintiff’s final statement of accounts for works done under a sub-contract agreement to which, it is not privy. Subsequently, the Plaintiff sued the Defendant herein and the Defendant applied for leave to issue the Third Party notice, against it, allegedly as being the Employer and the Procuring Entity of the project which is of the suit. The Notice was allowed and on 7th April, 2017, the Applicant was served with the Notice together with pleadings filed.

6. The Applicant argues that, the Applicant had not been notified of the dispute between the Plaintiff and the Defendant and only became aware of the dispute upon being served with the pleadings herein. In particular, the Defendant failed to adhere to the mandatory provisions of Section 67 (a) of the Act, by enjoining it to the proceedings without serving the Director General of the Applicant, with a one month’s notice outlining its grievances for redress as outlined there-under. That the essence of the notice being to give the Authority is to accord it an opportunity to deal with the issues raised and resolve them in an amicable and appropriate manner.

7. It was argued that the provisions of Section 67(a) of the Act are coached in mandatory terms. Reference was made to the cases of; *Sumac Development Company Limited vs George Munyi Kigathi & 2 others [2017] eKLR* and *Michael Otieno Nyaguti & 5 Others vs Kenya National Highways Authority & 5 Others [2015] eKLR*. Further reference was made to the case of; *Everrose Chemtai Obwaka Vs Kenya Railways Corporation [2008] eKLR* wherein, the Applicant allegedly, failed to issue a notice to the Managing Director, of Kenya Railways Corporation pursuant to Section 87 of the Kenya Railways Corporation Act, which is a replica of Section 67 (a) of the Roads Act, and the Court held that failure to issue the notice was in breach of the law an upheld the preliminary objection.

8. The Applicant further argued that, Plaintiff’s suit against the Defendant is premature for failure to exhaust all available Dispute Resolution

Mechanisms. That, upon examination of the pleadings, it was revealed that, Clause 24 and 25 of the sub-contract dated 25th July, 2011, referred to herein, provides that, a dispute between the parties shall be referred to the Adjudicator within 14 days of notification of the Project Manager's decision, while clause 25.1 thereof, states that, the Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute. Further 25.2 states that, either party may refer the dispute of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to Arbitration within 28 days, the Adjudicator's decision will be final and binding.

9. In addition Clause 67 of the FIDIC Conditions of Contract executed between the Defendant and the Third Party provides, an elaborate Dispute Resolution Mechanism whereby, disputes between the Employer and the Contractor are to be referred to the Engineer, in the first instance after the dispute arise. A Party dissatisfied with the decision thereof, is required to refer the matter for Amicable Settlement. The party that is not satisfied with that decision is, then required to refer the matter to Arbitration being the last Dispute Resolution Mechanism provided for therein.

10. The Applicant referred to Article 159 (2) (c) of the Constitution of Kenya, 2010, which require the Courts to promote Alternative Dispute Resolution mechanisms including reconciliation, mediation and arbitration. Further reference was made to the case of; True North Construction Limited Vs Kenya National Highways Authority [2014] eKLR, where the Court held that, parties are bound by their contractual terms and dispute resolution forum agreed on.

11. The Applicant further submitted that, the Defendant tendered the final statement of accounts on 21st April, 2015 and it approved the same on 30th June, 2015. By dint of clause 60.14 of the FIDIC General Conditions, the Defendant is estopped from claiming against the Applicant anything after presentation of its final statement. That the said Clause 60.14 provides that:-

“The employer shall not be liable for any matter or a thing arising out of or in connection with the contract or execution of works unless the Contractor shall have included a claim in respect thereof in the final accounts”

12. Finally, the Applicant submitted that the Defendant's claim against, it is statute barred by virtue of Section 67 (b) of the Roads Act, 2007, which provide that, an action against the Applicant has to be instituted within twelve months next after the act, neglect, default complained of or, in the case of continuing injury or damage within six months next after the cessation thereof.

13. Yet, in the instant case the Plaintiff alleges that, the sum due and claimed was certified by the Engineer, as at 18th June, 2014, whereas the Defendant prepared and submitted a final statement of accounts on 21st April, 2015. The same was approved by the Third Party on 30th June, 2015. Therefore, the Engineer having certified the amount due on 18th June, 2014, and the Defendant having presented the Final Statement on 21st April, 2015, then the Plaintiff should have filed a suit twelve (12) months thereafter.

14. However, the Defendant opposed the preliminary objection arguing that, Article 48 provides for the Constitutional right of access to justice and therefore, that right shall not be infringed upon on account of a procedural technicality. Further that, Article 159(2)(d) of the Constitution of Kenya, 2010, is very clear in as far as it obligates the judicial system to dispense justice to all without undue regard to procedural technicalities.

15. The Defendant submitted that Section 67 (a) of the Roads Act is a procedural provision that was created in order to ensure that, the Director General of Kenya, of the Kenya National Highway Authority (the authority) is notified of likely claims as against the Authority and to determine which matters ought to be considered for an out of Court settlement as well as which matters were to be subjected to Court litigation. Reference was made to the case of; Michael Otieno Nyaguti & 5 Others vs Kenya National Highways Authority & 5 Others [2015] eKLR.

16. The Defendant further argued that, the said provision cannot and ought not be interpreted to the effect that it locks out helpless litigants who seek redress from the judicial system, as that will be against the spirit of the Constitution as well as the provision of Section 1A of the Civil Procedure Act if the Court were to dismiss its legitimate claim against the Authority on account of failing to issue a notice pursuant to Section 67(a).

17. That this matter has been referred to Court annexed mediation, therefore the parties are undoubtedly pursuing an out of Court settlement in accordance with the spirit of the Constitution and the purpose of serving the Director General with a notice as per Section 67(a) has not been defeated.

18. It was argued that, as far as Section 67(a) is concerned, a clear distinction can be drawn in this case, as the section only contemplates that “a Plaintiff or his agent” shall issue the subject notice to the Director General of the Authority. Thus it is important for the Court to note that, the Defendant cannot be held accountable for an action that has already been instituted by the Plaintiff, as the Defendant herein was not able to control the proceedings of the main suit and all that was in his control was to follow the provisions of Order 1 Rule 15 of the Civil Procedure Rules, in as far as enjoining the Applicant is concerned and therefore the present case does not fall under the purview of Section 67(a) of the Roads Act, on account of being third party proceedings.

19. It was argued that the Applicant was given due notice regarding this case vide the Third Party Notice and was informed of the impending legal proceedings, which Notice served the purpose of the notice as contemplated under Section 67(a) of the Roads Act. Further that, Section 4(1) of the Act, outlines the functions of the Authority. In this matter, the Plaintiff has instituted proceedings against the Defendant for failing to pay money that has been withheld by the Authority pursuant to a Contract for works, hence in essence, this is a civil debt recovery case. Therefore the Defendant was and is not obligated to issue a notice to the Authority in accordance with Section 67(a).

20. That the argument that, by dint of Section 67(b) of the Roads Act, the Defendant's claim against them is statute barred is flawed, in that, the Defendant's claim as against the Authority only arose after they were served with the Plaint and Summons to enter appearance by the

Plaintiff and that is when the cause of action arose and the 12 months time begun to run. That the summons to enter appearance was served upon the Defendant on 8th June 2016, and the Defendant filed the Third-party proceedings to enjoin the Authority on 3^{0th} January 2017, less than 7 months from the date the cause of action arose, thus, the claim was brought within the statutory period and is therefore not time-barred.

21. Finally it was submitted and reiterated that this matter has been referred to Court Annexed Mediation under Nairobi Mediation 56 of 2016, therefore the argument that the entire suit is premature for failure to adhere to an Alternative Dispute Resolution Mechanism, is flawed and cannot therefore be a viable ground for their Preliminary objection.

22. I have considered the arguments advanced by the respective parties, alongside the submissions filed and I find that the following issues have arisen for consideration:-

- a. whether the Defendants complied with the provisions of Section 67(a) of the Roads Act 2007 and/or whether the notice served under Order 1 Rule 15 of the Civil Procedure Rules is sufficient
- b. whether the Defendant's claim against the Applicant is statute barred; and
- c. whether that claim is premature."

23. The provisions of Section 67(a) of the Roads Act, 2007 provides as follows:-

“where any action or other legal proceedings lies against the Authority for any act done in pursuance of execution, or intended execution of an order made pursuant to this act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect;

- a. the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director General by the Plaintiff or his agent; and
- b. such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage within six months next after the cessation thereof.”(emphasis mine).

24. It follows from these provisions that, it is a mandatory statutory requirement that the Authority ((herein “the Applicant”) should be served with a one month written notice before the commencement of the legal proceedings against it. However, it suffices to note that, these provisions make reference to “a Plaintiff or his agent”.

25. In the instant case, the Applicant has been enjoined into these proceedings, by the Defendant and not the Plaintiff and/or his agent. In my considered opinion, if the Plaintiff herein had sued the Applicant, then the Plaintiff was obligated to comply with the provisions of Section 67(a) of the Roads Act, 2007.

26. However, the Applicant in this matter, has been brought into these proceedings under a Third party notice issued in accordance with the provisions of Order 1 Rule 15 of the Civil Procedure Rules. Although it therefore follows that the Applicant becomes a Defendant in defence in relation to the claim levelled against it by the Defendant herein who in the given circumstances acquires the status of the Plaintiff for the purpose of its claim.

27. The question that arises is whether in the given circumstances, the Defendant is under a duty to comply with the said provisions of, Section 67(a) of the Roads Act 2007. To answer this question, one must have regard to two things; namely, the purpose for which a notice is given under the said Section 67(a) and whether the notice given under Order 1 Rule 15 of the Civil Procedure Rules is sufficient in the circumstances. It is a fact that the purpose of a notice under Section 67(a), is to bring to the attention of the Applicant, the fact that there is an intention to bring legal proceedings against it and to accord it an opportunity to consider the alternative and available avenue for resolution of the same. Similarly the Third party notice issued under Order 1 Rule 15 of the Civil Procedure Rules, requires that, the notice shall state the nature and the ground of the claim and be served alongside a copy of the pleadings, Plaintiff and the statement of defence filed.

28. In my considered opinion, both notices serve the same purpose. That is why the provisions of Section 67(a) makes reference to a Plaintiff or his agent. Thus the notice under Order 1 Rule 15 serves the same purpose and it sufficient to bring to the knowledge of the Applicant, that a suit has been filed by the Plaintiff against the Defendant therein, and the Defendant has a claim against it. Thus the two notices serve the same purpose, save for the fact that one is provided for under an Act of Parliament and another one under the Rules. In my further considered opinion, if the Defendant were to serve the notice required under Section 67(a) of the Act, as required, it would still have to apply to Court and serve a Third Party Notice under Order 1 Rule 15 of the Rules and would amount to the same thing and duplicity.

29. Even then, the question that arises however is whether the failure (if any) to comply with the provisions of Section 67(a) has caused the Applicant any prejudice? Reference has been made to the case of; *Everrose Chemtai Obwaka (supra)* where the Court held that; failure to serve a statutory notice under Section 87(a) of the Kenya Railways Corporation Act was fatal. However it suffices to note that first and foremost, this case was decided in the year 2008. The Constitution of Kenya was subsequently passed and promulgated in the year 2010 and in the same vein the Civil Procedure Act, was amended to include Section 1A and 1B, whereby the Courts are obligated to uphold substantive justice and decide matters before it in a manner that will facilitate the just, expeditious and affordable resolution of disputes. Similarly, the Constitution provides that, a litigant should not be hindered under Article 48 from approaching the seat of justice and guarantees every person a right to access justice.

30. To answer that question, I find that in the given circumstance, taking into account that the Application is already before the Court, and has been brought in the proceedings not by the Plaintiff but by the Defendant under a Third party notice and that this matter from a pure direct suit filed by the Plaintiff as against the Applicant, I find that to order that the proceedings be stayed for the Defendant to comply with the provisions of Section 67(a) of the Act, will be spinning the wheel of justice backwards. If the purpose of the notice was to enable the Applicant to consider whether to resolve the dispute through the alternative dispute mechanisms as opposed to litigation, the Applicant can still pursue the same at this stage. Thus the Applicant has not suffered any prejudice.

31. The next thing to consider is whether the Defendant's claim is statute barred. The provisions of Section 67(a) further provide that any legal action against the Authority shall be instituted within twelve (12) months after the cause of action arises. I have considered the pleadings herein, the Plaintiff was filed on 2nd June 2016. The Defendants filed a memorandum of appearance on 20th June 2016 and its statement of defence on 6th July 2016. The application seeking for leave to serve a third notice against the Applicant was filed on 31st January 2017 and served upon the Applicants on 10th March 2017. The Applicant in response filed a Preliminary objection dated 18th April 2017. Therefore, if one considers the period between 20th June 2016 to 10th March 2017, which is approximately eight (8) months, then it is still within the twelve (12) months period. The Defendant's claim is thus not statute barred.

32. The final issue raised is whether the Defendant's claim is premature. To answer this question, one must have regard to the contract between the Defendant and the Applicant in that the claim between the Plaintiff and the Defendant is governed by a different contract altogether and the Applicant is not a party thereto, although the Applicant did make reference to clause 24 and 25 of thereof. I will not delve into that.

33. However, I do take cognisance of clause 67 of the FIDIC Conditions of Contract between the Defendant and the Applicant, whereby the dispute between the parties should be referred to Arbitration as the last dispute resolution mechanism. According to the averments herein, this matter has been a subject of Court Annexed Mediation, unfortunately, the Applicant was not involved.

34. Be that as it were, if indeed the Defendant and the Applicant agreed to resolve their dispute through arbitration proceedings, then the parties must use that forum for the dispute resolution. However the Applicant cannot move the Court through a Preliminary objection to stay the proceedings. Their Preliminary objection deals with pure point of law. The Applicant should therefore move the Court appropriately to enable the Court evaluate the contractual document executed by the parties in relation to the dispute mechanism forum.

35. The upshot of the above is that, I find the Preliminary objection dated 18th April 2017, has no merit and I dismiss it. The costs thereof shall abide the outcome of the main suit.

36. Those are the orders of the Court.

Dated, delivered and signed in an open Court this 31st day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Musangi for the Plaintiff

Mr. Mwangi for Mr. Kairu for the Defendant

Mr. Maruti for the Applicant/Third party

Dennis.....Court Assistant