



IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

HCC OS NO.490 OF 2017

IN THE MATTER OF A CHARGE CREATED OF AN INFORMAL

CAMILLA PELIZOLLI.....1ST PLAINTIFF

SIMONE PELIZOLE.....2ND PLAINTIFF

FRANCESCA PELIZOLLI.....3RD PLAINTIFF

VERSUS

VISARO CONSTRUCTION COMPANY LTD.....1ST DEFENDANT

TOM ONYANGO OKETCH.....2ND DEFENDANT

J U D G M E N T

By Originating Summons dated 14th December 2017 Applicants/Plaintiffs sought to strike out statement of claim dated 17th July 2017 and filed on 20th July 2017 between the 1st Defendant, the Plaintiff and two others.

The application is supported by the Affidavit sworn by 1st Plaintiff.

He averred that the statement of claim is fatally defective as it contravene mandatory provisions of the law.

The Plaintiffs contend that there is no contract signed between the Plaintiffs and the Defendants herein to submit to arbitration on any dispute that may arise between the parties hererin; that there is no dispute between the Applicants and 1st Respondent to refer to arbitration.

He averred that the Applicants filed an application before the 2nd Respondent to have the claim struck out but the application was dismissed on 23rd November 2017 for being *resjudicata*.

He averred that the Plaintiffs herein were not able to file an application-disputing jurisdiction of the Court by 23rd March 2017 as required because they had not been served with statement of claim.

The Applicants submitted that the statement of claim is an abuse of the Court process and should be struck out.

In response, the 1st Defendant/Respondent filed Replying Affidavit sworn by its Director Vishram Ramji.

He averred that the suit herein is bad in law, fatally, incurably defective and should be struck out; that the suit has been filed in bad faith and is designed to delay expeditiously disposal of the dispute.

He further averred that the 1st Plaintiff through her Architect and on behalf of the 2nd and 3rd Plaintiffs instructed the 1st Defendant as the main contractor for construction of new residents and ancillary buildings and that the letter referred to terms of contract stipulated in the Bill of Quantities authored by the Plaintiff's quantity surveyor and Architect.

That the Bill of Quantities provided that the Joint Building Council of Kenya Agreement and Conditions of Contract for Building Works of 1999 would also form part of the contract between the parties.

The 1st Defendant aver that it commenced work in September 2010 but upon completing and handing over works, the Plaintiff failed to make payments of interim certificates as and when they fell due. The 1st Defendant invoked Clause 45 of the Agreement and Conditions of Contract for Building Works of 1999 on dispute resolution and referred the matter to arbitration for final determination.

The 1st Defendant refutes the Applicants claim that there is no contract signed between parties and there is no dispute.

The 1st Defendant further avers that oral objection on the Tribunals Jurisdiction was raised before the Tribunal on ground of non-existence of contract between parties and that the parties were directed to file formal application. That the Plaintiffs failed or neglected to file the formal application as directed.

That on 15th June 2017 the 2nd Defendant proceeded to deliver a ruling dismissing the objection on jurisdiction. 1st Defendant aver that instead of the Applicants applying for the ruling to be set aside, they applied for the claim to be struck out.

That the Applicants should be seeking to set aside the Arbitrator's ruling and not making the same application before this Court.

I have considered rival submissions by parties herein.

Section 17(1) of Arbitration Act gives the Arbitral Tribunal powers to rule on its own jurisdiction including ruling on any objections with respect to existence or validity of the arbitration agreement.

The plea challenging arbitrate tribunals jurisdiction shall be raised not later than submission of statement of defence.

Under subsection 5, the Arbitral Tribunal may rule on objection either as a preliminary question or in arbitral award on the merits.

A party aggrieved with the ruling may apply to the High Court to decide on the matter.

From the proceedings herein, I note that the Applicant herein never filed formal application to challenge jurisdiction as directed by the arbitrator. If the application had been filed as directed, the parties would have had an opportunity to argue the grounds for challenging jurisdiction before the Arbitrator and a decision would have been reached on merit. The Arbitral Tribunal was not therefore given an opportunity to decide own its jurisdiction as provided in section 17 of Arbitration Act.

Under Section 17 (1) a challenge on jurisdiction is not a bar to arbitral proceedings. The Arbitral Tribunal may either determine jurisdiction as preliminary question or in arbitral award on merit.

If decided in Arbitral Award the Applicant has an option of either seeking refusal of recognition of award or to set aside the award.

The Applicant had an option of seeking to set aside the ruling delivered Arbitrator on 15th June 2017 and seek to be heard on merit. This was not done.

Section 17 (1) also gives powers to the Arbitral Tribunal to make determination on validity of the arbitration agreement. This process has not been exhausted.

My view is that, this suit is aimed at delaying determination of the dispute between the parties herein. I find this suit is not merited and an attempt to delay settlement of the dispute herein.

FINAL ORDERS

Suit dismissed with costs to the Respondents/Defendants.

Judgment dated, signed, and delivered at Nairobi this 18th day of October, 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

CATHERINE: **COURT ASSISTANT**

ODUOR H/B FOR MS MISERE: **COUNSEL FOR RESPONDENTS**

MS. KARANJA: **FOR APPLICANTS.**