



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO.365 OF 2017**

**EPCO BUILDERS LIMITED ..... PLAINTIFF/RESP**

**VERSUS**

**LEMNA INTERNATIONAL INC ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL HOUSING CORPORATION ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This is a ruling on two applications. Application dated 9<sup>th</sup> January 2018 was filed by the 2<sup>nd</sup> Defendant (now struck out of the suit) seeking orders to review or vary the ruling of the Court delivered on 19<sup>th</sup> December 2018. The Defendant (former 1<sup>st</sup> Defendant) filed application dated 10<sup>th</sup> April 2018 seeking to stay proceeding herein and parties referred to arbitration.

Grounds on the Court allowed the 2<sup>nd</sup> Defendants Preliminary Objection striking the 2<sup>nd</sup> Defendant from the suit.

The 2<sup>nd</sup> Defendant contend that there is an error on the ruling in that it failed to make determination on costs. That it is in the interest of justice for the Plaintiff to be ordered to pay costs to the 2<sup>nd</sup> Defendant.

The application is supported by Affidavit sworn by William K. B. Keitany the Legal Officer of the 2<sup>nd</sup> Defendant. He restated grounds on the face of the application. In paragraph, 5 of the Affidavit he averred that under Section 27 of the Civil Procedure Act, costs should follow event and the 2<sup>nd</sup> Defendants Preliminary Objection having been allowed the 2<sup>nd</sup> Defendant should have been awarded costs of defending the suit.

Grounds on the 1<sup>st</sup> Defendants application are that the 1<sup>st</sup> Defendant was awarded contract by the second Defendant to erect and complete 230 housing units in Langata, Nairobi County and that it subcontracted the contract to the Plaintiff by contract dated 1<sup>st</sup> April 2011 for a sum of Kshs. 796,794,890.

That the Plaintiff further varied the contract sum from Kshs.796,794,890 to Kshs. 862,566,522.00 and the said subcontract contained an arbitration clause at clause 34.0

The Defendant contends that it was the intention of the parties to the subcontract to submit disputes in respect of the agreement to arbitration.

The application is supported by the Affidavit sworn on 6<sup>th</sup> April 2018 by Brien Johnson the Chief Financial Officer of the Defendant. He restated grounds on the face of the application.

In response, the Plaintiff filed Replying Affidavit sworn on 22<sup>nd</sup> May 2018 by Ramji Devji Varsani the Plaintiff's Managing Director.

He averred that there is no contractual dispute between the Plaintiff and the Defendant since the Plaintiff has performed all its contractual obligations under the contract; that what remain is for the Defendant to pay the sums due to the Plaintiff

Plaintiff further averred that the arbitration clause indicate that the venue for arbitration is London and in the event that arbitration take place in London, the Plaintiff stand to suffer grave injustice and will be denied access to justice as envisaged under Article 18 and 159(2) of the Constitution.

That the arbitration clause in agreement dated 1<sup>st</sup> April 2011 is incapable of being performed without undue delay, monolithic costs and

injustice for the Plaintiff.

In respect of the 2<sup>nd</sup> Defendants application, it is true I did not make determination on costs in the ruling on the Preliminary Objection. In the said ruling, I found that there is no cause of action by the Plaintiff against the 2<sup>nd</sup> Defendant and struck out the claim against the 2<sup>nd</sup> Defendant. I note from the ruling that I did make a determination on costs in respect of claim between Plaintiff and 2<sup>nd</sup> Defendant.

It is not disputed that the 2<sup>nd</sup> Defendant filed defence and response to application filed. I agree with Counsels for the Plaintiff's argument that award of costs is discretionary. While exercising the discretion, it would however be unfair to deny a party who should not have enjoined in a suit costs expended in defending it. It was not my intention to deny the 2<sup>nd</sup> Defendant costs; failure to make a determination on costs was an inadvertent omission on my part.

From the foregoing, I find that the 2<sup>nd</sup> Defendant is entitled to costs incurred in defending this suit. I therefore correct the error on the ruling by ordering the Plaintiff to pay 2<sup>nd</sup> Defendant's costs.

As concern Defendants (1<sup>st</sup> Defendant's) application, I note that parties have not denied executing the agreement dated 1<sup>st</sup> April 2011. It is not also disputed that the agreement has arbitration clause under clause 34.0.

The Plaintiff is opposed to referral to arbitration on ground that the venue as per contract is London and the dispute will not be determined without undue delay and that it will be costly.

Arbitration Act gives parties who have agreed to submit to arbitration, autonomy to decide the venue of Arbitration, law applicable and appointment of arbitrators. Parties are expected to voluntarily consent to refer dispute to arbitration for settlement. By so doing they oust the jurisdiction of the Court.

A party having agreed to submit to arbitration is bound by the agreement. Allowing a party to change terms of the contract will amount to the Court rewriting contract for the parties.

Parties herein must have known the implication of choosing London as a venue for arbitration proceedings. There is no indication that any of the parties was coerced to enter into the contract or any existence of fraud on any of the parties.

Once parties have agreed to have arbitration as their dispute resolution mechanism, the Court has no business interfering with terms of the agreement by entertaining the matter. By including arbitration clause in their agreement, parties are taken to have voluntarily chosen to submit their disputes to that mechanism of dispute resolution.

From the foregoing, I find that 2<sup>nd</sup> Defendant's application dated 10<sup>th</sup> April, 2018 is merited and do allow it. Costs of the application in the cause.

**FINAL ORDERS**

1. 2<sup>nd</sup> Defendants application dated 9<sup>th</sup> January 2018 is hereby allowed; Plaintiff to pay 2<sup>nd</sup> Defendants cost for defending suit.
2. The Defendant's (formerly 1<sup>st</sup> Defendant) application dated 10<sup>th</sup> April 2018 is allowed.
3. This matter is referred to arbitration.
4. Costs in the cause.

**Ruling dated, signed, and delivered at Nairobi this 18<sup>th</sup> day of October, 2018.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

**CATHERINE: COURT ASSISTANT**

**NJENGA: FOR PLAINTIFF/RESPONDENT**

**MS. ABOBO: COUNSEL FOR 2<sup>ND</sup>DEFENDANT/APPLICANT**

**NO APPEARANCE FOR FOR 1<sup>ST</sup>DEFENDANT**