REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 6 OF 2016

UNION TECHNOLOGY KENYA LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAKURU.....DEFENDANT

RULING

1. The plaintiffs suit against the defendant is based on a project Agreement entered into between the parties on the 20th February 2007 that outlines the parties obligations and duties. **Cause 6.4** thereof states:

> ***"Any dispute between the parties shall be referred to an independent arbitrator agreed by the parties or in default appointed by chairman for the time being of the Institute of Arbitrators. Failing agreement within 60 working days after one party has notified the other in writing that a dispute has risen. His decision shall be binding on the parties and his costs and changes shall be borne whichever of the parties is substantially unsuccessful in the dispute."***

2. A dispute arose in 2013 promoting the plaintiff to file this suit seeking compensation for breach of contract by the defendant.

Upon service of summons, the defendant entered appearance and followed up with a statement of defence and counterclaim. The plaintiff filed a reply to Defence and defence to counterclaim thereafter.

The suit was then fixed for hearing on the 23rd November 2016 on the instance of the plaintiff.

3. On the 14th March 2016, the defendant lodged a preliminary objection and sought dismissal of the suit on the grounds that:

> ***(1) Clause 6.4 of the project agreement has an arbitral clause for resolution of disputes through arbitration.***
>
> ***(2) That the suit is therefore in contravention of the arbitration clause***
>
> ***(3) That parties are bound by Section 6 of the Arbitration Act to resolve the dispute by way of arbitration.***

Both parties argued their respective and rival positions on the 30th November 2016.

4. For the Defendant, Mr. Opondo Advocate argued that the preliminary objection was filed together with the appearance as required under Section 6 of the Act and informed the plaintiff of its intention to raise

the preliminary objection. Further, to comply with the Civil Procedure Rules a defence and counterclaim was also filed. He urged that the dispute be referred to arbitration under Clause 6.4 of the Agreement.

5. The plaintiff on the other hand by its Advocate Mr. Kimondo was of the view that the Arbitration Clause 6.4 does not apply nor does it limit or oust the courts jurisdiction. In particular, it was his submission that the contract and agreement between the parties was terminated and therefore the clause does not apply. It was his submission that Clause 8 thereof is the one applicable.

Clause 8 is to the effect that if a dispute or breach is reported to the other party and it remains unresolved for a period of 120 days, the party giving notice shall be entitled to terminate or cancel the agreement.

Clause 8.2 is of particular interest. It reads:

> ***"In case of breach in total by the Municipal Council of Nakuru before the end of 20 years contract, the Municipal Council shall compensate/pay the operator the total value of the work and materials poles at the time of the breach oaf the contract."***

Clause 8.3 states that:

> ***"No cancellation of this agreement shall effect the provisions of clause which expressly or by implication are intended to survive the termination or cancellation of this agreement."***

I have considered the rival pleadings and arguments on the preliminary objection.

6. The Arbitration Act is a self regulating legislation.

> **Section 6(1)** states
>
> ***"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 files any pleadings or take any other step in the proceedings, 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.***
>
> ***(c) Notwithstanding that an application has been brought under Section (1) and the matter is pending before the court, arbitral proceedings maybe commenced or continued and an arbitral award may be made."***

7. It is not in dispute that the defendant has complied with provisions of Section 6(1) of the Act by filing the Preliminary Objection as any other proceeding at the time of filing its appearance. It is also evident that both parties have taken and filed other pleadings to progress the suit in the court, hence invoking the courts jurisdiction.

However, Section 6(1)(C) allows commencement or continual of arbitral proceeding despite the matter being in court.

8. Parties in an agreement/contract are bound by the mutually agreed and express terms of their agreement. It is not the duty of a court to re write the agreement for the parties.

> See **Clause 6.4** of the agreement is specific of what would constitute a dispute that would be resolved by arbitration. It is **"any dispute between the parties."**

It is the duty of this court to determine whether breach of contract alleged by the plaintiff constitutes a dispute to be referred to arbitration. It is also to determine whether the arbitration is null and void.

9. Reading through the plaint the defence and defence to counter-claim, it is evident that there is a dispute between the parties. That dispute caused the plaintiff to terminate the contract and seek for compensation in monetary terms. The defendant denies owing any money to the plaintiff and infact denies there being any contract with the plaintiff. On the other hand the plaintiff in its counter claim states breach by the defendant by failure to comply with its obligations stated in the agreement. There are triable issues and that being the case, it follows that there is indeed a dispute as envisaged under **Section 6(1) a & b of the Act.** To that end the agreement/contract between the parties cannot be null and void.

10. The parties agreed to refer disputes to an arbitrator in no uncertain terms **Clause 6.4**.

By **Clause 8.3** parties agreed that cancellation of the contract/agreement shall not affect clauses expressly intended to survive the termination.

The plaintiff is of the view that having stated that the contract was cancelled then it is his submission that there is no contract whose breach could be referred to arbitration in terms of Clause 6.4, hence the forum for the resolution should be the court. I think that is a very narrow interpretation of that clause.

11. In the case **Corporate Insurance Co. -vs- Wachira (1995) IEA 20** quoted in the **Safaricom Ltd -vs- Flashcom Ltd (2012) e KLR,** it was held that if the defendant wanted to invoke the arbitration clause, (reference of disputes to arbitration) it ought to have applied for a stay of proceedings after appearance and before delivery any other pleading. This was done by the defendant as stated earlier. At the same time both parties had acceded to the jurisdiction of this court by filing further pleadings under **Order 2 Rule 15(1) of the Civil Procedure Rules.**

12. I have rendered above that **Section 6(2)** does not prohibit a court from referring a dispute to arbitration despite provisions of **Section 6(1) of the Arbitration Act.** In my view the nature of the dispute and the contract subject of the dispute must be taken into account to determine its appropriateness for arbitration or otherwise.

This is in itself quite a complicated dispute in terms of quality and quantities of works done and the method of evaluation of the same. It falls under **"Expert evaluation of the quality and quantity of works performed."**

13. A court of law may not, by all means be able to undertake the task of evaluating the quality and quantities of works done without assistance by the experts in the particular field.

To the contrary an arbitrator, in the relevant field would be the right person(s) to come up with a resolution. No doubt the parties were aware of this aspect when they agreed to refer disputes for arbitration. Both parties also appreciated the need for an out of court settlement. This they have failed to achieve.

Article 159 2(c) of the Constitution encourages disputants to explore alternative forms of dispute resolution including mediation, arbitration and others.

For the above reasons, this court will uphold the preliminary objection and find that the parties hereto are bound by the **Arbitration Clause (Clause 6.4)** and further that **Clause 8.3** is not applicable as the dispute evidenced through the parties pleadings does survive the alleged termination or cancellation of the contract.

14. I shall allow the preliminary objection pursuant to **Clause 6.4** of the project agreement dated the 20th February 2007 and refer the dispute to an independent arbitrator to be agreed upon by both parties within 30 days of this ruling.

If there is no such agreement, the chairman of the Institute of Arbitrators shall appoint a single arbitrator who within 45 days shall arbitrate and file his arbitral award in court whose decision shall be binding on the parties pursuant to **Clause 6.4.** Further the arbitrators costs and charges shall be borne by whichever of the parties shall be substantially unsuccessful in the dispute.

15. Each party shall bear own costs on the preliminary objection.

Dated, Signed and Delivered this 28th Day of February 2017.

J.N. MULWA

JUDGE