



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 228 OF 2016

MJOMBA AGENCIES LIMITEDPLAINTIFF/RESPONDENT

VERSUS

MVULE INVESTMENT COMPANY LTD.....DEFENDANT/APPLICANT

RULING

The defendant's/Applicant's application dated 21st September, 2016 has been brought pursuant to Article 159 (2) (c) of the Constitution Sections 1A, 1B and 3A of the Civil Procedure Act and Section 6 of the Arbitration Act No. 4 of 1995 and Rule 2 of the Arbitration Rules 1997. It has sought the following orders:-

1. THAT this Honourable Court be pleased to stay the proceedings for reference of the dispute to arbitration in accordance with the Sub earthwork and ancillary construction contract entered into between the Plaintiff and the Defendant on the 28th day of January, 2016.
2. THAT the costs of this application be borne by the Respondent.

It is supported by the Affidavit of Allan Hu and it's premised on the grounds set out therein.

It is averred that sometimes on or about the 28th day of January, 2016 the plaintiff and the defendant entered into a subgrade earthwork and ancillary construction contract in respect of Section No. 4 of the standard Gauge Railway Project subject to the terms and conditions stipulated thereon.

That the defendant is aware that the plaintiff's tenous charge against the defendants is that, allegedly in breach of the contract, the defendant has failed to settle the sum of Kshs.20,281,856.00/- due to the plaintiff. On the other hand, the defendant believes that any of the allegations of breach of contract attributed to it have no foundation whatsoever.

The defendant avers that it flatly disputes the alleged unilateral measurement of the quantity of work conducted by the plaintiff, assessing the purported volume of work done at Kshs.133,405.44 cts. The defendant asserts that the said quantity is not based on the agreed project quantity.

The defendants maintains that the plaintiff has in breach of the express terms of the contract, in relation to measurement and payment thereof, blatantly refused, in spite of repeated requests, to conduct a joint inspection to assess the quantity of the works allegedly done by the plaintiff.

That in the light of the matters hereinabove, the defendant believes that a valid dispute contemplated pursuant to the agreement has otherwise arisen between the parties. That pursuant to the agreement

between the parties they agreed that in the event that any dispute is not resolved amicably, the parties shall refer the dispute to arbitration by a single arbitrator.

The plaintiff has opposed the application vide a replying affidavit sworn by Urbanus Muli Maingi on 30th September, 2016. It is averred that the defendant's application mainly seeks stay of proceedings allegedly on account of a subgrade earthwork and ancillary construction contract dated 28th January, 2016 but the plaintiff's claim against the defendant is specifically based on a construction contract agreement dated 18th January, 2016 duly signed by the plaintiff and the defendant which agreement, the plaintiff has based its cause of action herein and not the one dated 28th January, 2016. The latter agreement does not contain an arbitration clause and there is therefore no basis whatsoever for the defendant to apply for stay of proceedings on the basis of a non-existent clause.

That the plaintiff is a total stranger to the subgrade earthwork and ancillary construction contract dated 28th January, 2016 and the same does not relate to the work agreed between the plaintiff and the defendant for example, it does not have the quantity or volume of work agreed to be carried out and the contract price for the work.

That, it is not true that the measurement of quantity of work done by the plaintiff was unilateral and that the Plaintiff refused a joint inspection of quantity of work. That on the contrary, the defendant was at all times represented by his technical person who directed and supervised the plaintiff's workers and that even the balance of Kshs.20,281,856.60 cts the plaintiff is claiming was inspected and certified by the defendant's representative known as Apolo Ramogi Owiti.

That the defendant's application has no basis and ought to be dismissed as there is no provision for arbitration in the contract and even if there was, which is denied, the applicant would still fail because failure by the defendant to pay for work done is not a dispute and no interpretation is therefore required.

The defendant filed a supplementary affidavit on 1st December, 2016 sworn by Alan Hu in response to the replying affidavit sworn by Urbanus Muli Maingi. He avers that the agreement alluded to by the plaintiff dated 18th January, 2016 was a preliminary contract agreement containing a vague outline of the terms by which the parties immediately bound themselves whilst intending to execute a more formal contract containing by consent of both parties additional terms. That with the co-operation of both parties, on the 28th January, 2015, the parties signed the more formal, detailed and precise agreement which is the authentic expression of the common intention of the parties and it's the sole basis of the parties rights and liabilities in the execution of the project.

That contrary to the suggestion by the plaintiff, pertinent terms of the contract including the agreed price of Kshs.380 per m³ with full particulars of the project has been aptly incorporated in the formal contract. That both parties having notably discharged their respective obligations on the foundation of the formal contract, the plaintiff is estopped from denying knowledge of the existence and the contents of the said contract.

In its submissions, the defendant submitted that the preliminary agreement was merely a provisional agreement containing provisional terms for the execution of the project. That the vague terms of the preliminary agreement make it impossible to negate the parties' intention to sign a formal, detailed and precise contract. It submitted that the onerous suggestion by the Respondent that the formal agreement does not relate to the project is an unyielding attempt by the Respondent to mislead the court. That the project is without a doubt the subject of both the formal contract and the preliminary contract. In support of that contention, the court was referred to the case of **Printing and Numerical Registering Company and Sampson Equity Cases Vol. XIX (1874-75)** where the court held in the relevant part:-

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and

voluntarily shall be held sacred and shall be enforced by courts of justice.”

On whether the preliminary agreement is admissible, the defendant relied on the case of **John Onyancha Zurwe Vs Oreti Atinde Civil Appeal NO. 217/2003** where the following passage from Halsbury’s Laws of England 4th edition Vol. 12 was adopted;

“Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document.”

Similarly in the case of **George Musindi & 2 others Vs Small Enterprises Finance Co. Ltd HCCC No. 1861/1995**, Hon Nyamu J adopted the following excerpt from Chitty on Contract 29th Edition Vol. 12.

“It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given..... so as to add or subtract from, or in any manner to vary or qualify the written agreement..... The rule is usually known as “parol evidence” rule. Its operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation.

On whether a dispute has arisen between the parties, it was submitted that it has. This is based on the fact that the applicant flatly disputes the alleged unilateral measurement of the quantity of work conducted by the Respondent, and has assessed the purported volume of work done at Kshs.133,405.44cts. The applicant asserts that the said quantity is not based on the agreed project quantity. This is a demonstration that a dispute and/or a difference exists as there are two opposed positions and/or views. It cited the case of **William Oluande Va American Life Insurance Company (K) Limited Misc. Application No. 721/2004 (O.S)**.

On the principles governing the exercise of the court’s discretion under the provisions of Section 6 of the Arbitration Act, the defendant/applicant cited the case of **Emailji Vs Mistry Shamji Lalji & Co. (1984) KLR 150** as follows:-

“Under Section 6 it lies within the discretion of the court whether a stay of proceedings will be ordered. The following principles can be stated in the Felicitous language of Mr. Justice Erandon which I have called from his judgment in “the Eleft Heria” 1969 1 Loyd’s Law Rept 237 at page 242:

“The principles, established by authorities can, I think be summarized as follows:

- 1. The court is not bound to grant a stay but has a discretion whether or not to do so.***
- 2. The discretion should be exercised by granting a stay unless cause for not doing so is shown.***
- 3. he burden of proving such strong cause is on the plaintiffs.***
- 4. In exercising its discretion the court should take into account all the circumstances of the particular case.”***

Hon. Justice Law added his voice on the burden of proof holding that the onus is on the party moving for a stay to show that the dispute is within a valid and subsisting arbitration clause. It is only when that has been achieved that the burden of showing cause why effect should not be given to the agreement to submit it upon the party opposing the application for stay.

It was further submitted that where a dispute between the parties is by agreement to be referred to the decision of an arbitral tribunal, the court should direct the parties to refer the dispute to arbitration.

Reliance was placed on the case of **SHAMJI v TREASURY REGISTRAR, MINISTRY OF FINANCE (2002) 1 EA 269** where the court held:-

“As a matter of general principle, it has been stated that where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the court directs that the parties should go before the specified tribunal and should not resort to the courts. The parties herein very clearly chose arbitration to be the modality of settling their disputes but the petitioners want to resile from what was previously agreed upon in the pretext that there was fraud or misrepresentation.”

In summing up its submissions, the defendant quoted the case of **Harbour/Assurance Co. Ltd vs Konza General International Alliance Co. Ltd (1993) 3 all ER** in which Hoffman L.J made the following statement;

“.....it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. There are first , the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one-stop adjudication, or in other words, the inconvenience of having one issue resolved by the court and then, contingently on the outcome of that decision, further issues decided by the arbitrator.”

Hon Justice Ojwang applied those legal principles in the matter between **William Oluande Vs American Life Assurance Company (K) Limited** in making an order compelling the parties to refer the dispute to the decision of arbitral tribunal in accordance with the arbitration clause. The learned judge said, “the significance of the above passage, to my mind is that it underscores the sanctify of contract and states that it behoves the court to give effect, so far as possible to the purpose and intent of the parties; to the essence of the agreement between the parties”.

On the part of the plaintiff/respondent it was submitted that, parties herein executed an agreement dated the 18th January 2016 which was for the construction of earth-works on standard gauge railway at section 4 of the Sultan Hamud area. That by the time the respondent completed the works in May 2016, there was an approved measurement certificate for Kshs.20,281,856.60 cts due and owing to it. It was submitted that in the contract,” the sub grade earth works and ancillary construction contract there are several defects namely; that it is not executed by the Plaintiff and it has two different dates showing it was signed by the defendant in 2016 while the Plaintiff signed in 2015. That the document is not known to the Plaintiff and is inadmissible. The Plaintiff avers that the contract was performed pursuant to the construction agreement dated the 18th January, 2016 which was freely signed by the parties and it has no arbitration clause whatsoever. The said contract of 18th January, 2016 is the basis of the parties’ rights and obligations and it is the contract upon which the Plaintiff’s claim is based and/or founded.

That if the “*so called subgrade earthwork and ancillary construction contract*” is admitted, it will contradict and confuse the parties’ intention. That a party who wishes to vary or modify a contract does not do so by preparing another contract; he does so by doing a variation agreement which must state whether or not the new agreement replaces or supersedes the earlier agreements. We cannot have two contracts with conflicting terms.

On whether there is an arbitral dispute, the Plaintiff relied on the case of **J. H. Bullington Ltd (1899) AC 79 Halsbury** where it was stated: -

“A condition precedent to the invocation of the arbitrator on whatever ground is that a difference between the parties should have arisen and I think that must be a different option before is filed either by plaint or by will.....”

“Any contention that the parties could have when they are sued for the price of the services raised for the first time, the question whether or not the charges were reasonable and that, therefore, they had a right to go an arbitrator seems to me absolutely untenable.”

The same position was held by Hon. Justice Mutungi in **UAP Provincial Company Ltd Vs Michael John Beklelt**, HCC No. 1310 of 2001 where the learned Judge said: -

“I decline to stay the proceedings herein as there is nothing to be referred to arbitration, there is no dispute between the parties all there is, is the Plaintiff’s right to be paid as per agreement and that has nothing to do with the policy.”

That a claim by the Plaintiff to be paid the balance of the work already completed cannot by any stretch amount to an arbitration dispute, all there is, is the Plaintiff’s right to be paid the balance of the contract price. There is no difference of opinion on any matter or a point of law or interpretation of a clause in the contract. That the Defendant clearly seeks to delay the expeditious determination of the matter. The case of **Timam Construction Group (Africa) Vs Attorney General, HCCC No. 236 of 2001** has been cited to support that contention where Justice Mbaluto found that the Attorney General was engaging in delaying tactics and refused to refer the matter for arbitration. That failure to pay for services rendered pursuant to an agreement is not a dispute, it is a right that can be remedied by an action in court.

This court has carefully considered the application and the submissions by the parties. I have been asked to stay the proceedings herein for reference of the dispute to arbitration in accordance with the sub earthwork and ancillary construction contract entered between the parties on the 28th January, 2016. The applicant has brought the application under Section 6 of the Arbitration Act among other provisions. The said section provides: -

”6(1)(a) 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 otherwise acknowledges the claim against which the stay of proceedings is sought, 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.”

It is clear from this provision that the court is required to undertake an enquiry under Section 6(1) (b) of the Arbitration Act to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to the matters agreed to be referred to arbitration. If as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the right forum for resolution of the dispute is the court.

As the Court of Appeal held in the case of **UAP Provincial Insurance Company Ltd Vs Michael John Beckelt**, Civil Appeal No. 26 of 2007: -

“the inquiry by the court with regard to the question whether there is a dispute for reference to arbitration extends, by reason of Section 6(1) (b), to the question whether there is in fact, a dispute. In our view it is within the province of the court when dealing with an application for stay of proceedings under Section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute.”

My understanding of the judgment of the Court of Appeal in the **UAP Provincial Insurance Company Ltd case** (supra) and my reading of Section 6(1) and (b) of the Arbitration Act, is that an order for stay of proceedings prayed for under this Section is not automatic and the Applicant has to satisfy the court that there is a dispute between the parties with regard to the matters agreed to be referred to Arbitration. This, therefore, would mean that the existence of an Arbitration Clause in an agreement does not necessarily give the Applicant a right to apply and obtain orders staying proceedings as of right. I do, therefore agree

with the Court of Appeal that the court is required to make an enquiry as to whether there is a dispute between the parties and whether the dispute is with regard to the matters agreed to be referred to arbitration.

From the foregoing, it is my considered view that the following issues fall for determination.

1. Is the preliminary agreement admissible?
2. Has a dispute arisen between the parties with regard to the matters agreed to be referred to arbitration?
3. And has the Applicant established a sufficient cause to warrant the grant of the orders sought?

On the first issue, the defendant avers that the agreement dated 18th January, 2016 was merely a provisional one containing provisional terms for the execution of the project while the one dated 28th January, 2016 is the comprehensive one containing all the terms and conditions governing the relationship between the parties.

On the other hand, the plaintiff contends that the agreement dated 28th January, 2016 is unknown to it and that the plaintiff did not execute it. It is also averred that the same has two dates namely 28/1/2016 and 28/1/2015 and being titled “ancillary construction” means it is not a primary document.

It is further submitted that the latter contract was performed pursuant to the construction agreement dated 18th January, 2016 which was freely signed by the parties hereto. That the first agreement has no arbitration clause.

The court has perused the two agreements displayed by the parties herein. It is true that the first agreement dated 18/1/2016 does not contain an arbitration clause while the second one dated 28/1/2016 does.

Though the plaintiff has denied having signed the agreement dated the 28th January, 2016, the copy I have in the court record is duly signed by both parties. It shows that one Japheth K. Koech signed the agreement on behalf of the Plaintiff and he is the same person who signed the earlier agreement. A quick perusal of the two agreements reveals that the latter one is more comprehensive and it has incorporated more terms and conditions some of which had not been included in the earlier one, an example being the arbitration clause. The latter agreement has not made any reference to the earlier one, in fact it does not even mention it. My considered view is that if parties intended to incorporate the earlier agreement in the latter one, they would have done so by way of an addendum or by referring to it which has not been done in this case.

In this regard, an excerpt from judgment of Justice Nyamu in the case of **George Musindi & 2 others Vs Small Enterprises Finance Co. Ltd HCCC No. 1861/1995** adopted from Chitty on Contract 29th Edition Vol. 12 may be of some help thus:-

“It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given..... so as to add or subtract from, or in any matter vary or qualify the written contract..... the rule is usually known as the “parol evidence”, its operation is not confined to oral evidence; it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation.”

The learned Judge went on to say:-

“The court has considered all the evidence on record and finds that the pre-contract documents which were not specifically made a part of the subsequent formal agreements such as the local agreement charges or guarantees did not form part of the enforceable contract.”

I therefore find that the preliminary agreement is not admissible.

As to whether a dispute has arisen between the parties with regard to the matters agreed to be referred to arbitration, the Plaintiff in its plaint is claiming a sum of Kshs.20,281,856.60cts after raising a measurement certificate for the works done for the defendant as at 9th May, 2016. On his part, the defendant had disputed the alleged unilateral measurement of the quantity of work conducted by the plaintiff arguing that the said quantity is not based on the agreed project quantity.

In paragraph 4 of the Plaint, it has been admitted that the measurement certificate for the work done shall be raised jointly every month and it's only after that has been done that an invoice for the works is raised and the defendant can then pay for the same.

Though the plaintiff avers that the measurements of quantity of work done by it was not unilateral, annexure "UMM3" which is a copy of the measurement sheet duly signed by both parties clearly shows that the quantities indicated therein are preliminary volumes which were subject to joint measurement by all the parties.

Going by that document, it is not clear to the court whether the joint measurement by all the parties was ever undertaken or not.

The defendant avers that the joint measurement of quantity of the work done was not conducted. That to me, is a dispute in performing the contract and it's among the matters the parties agreed to refer to the arbitration.

In the premises aforesaid, I find and hold that the application dated 21st September, 2016 has merits and it's granted as prayed.

The defendant shall have the costs of the application.

DATED, SIGNED and DELIVERED at Nairobi this 23rd day of March, 2017

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....***for the Plaintiff/Respondent***

.....***for the Defendant/Applicant***