



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE. 477 OF 2016

JB PHOENIX CONSTRUCTION LIMITED..... PLAINTIFF

VERSUS

MARGARET WAIRIMU THUO.....DEFENDANT

RULING

(Reasons for Decision)

1. On 20 February 2017, the Defendant filed a Motion and sought orders to stay all the proceedings in this cause. The Defendant also asked the court to issue an order referring the case to arbitration.

2. I heard the parties on the merits of the Motion on 27 July 2017. Immediately upon conclusion of the oral hearing, I issued the following order:

“The application is dismissed. Costs shall be the cause.

Reasons to be given on 31 July 2017”

3. What follows are the reasons for the dismissal.

4. The Defendant’s Motion, as I understood it both from my reading of the grounds stated on the face of the Motion as well as the oral arguments advanced by Mr Francis Wamahiu was that the parties had agreed to refer all their disputes to arbitration and consequently there was need to stall any further prosecution of the suit commenced by the Plaintiff. Reliance was placed by the Defendant wholly on Clause 45 of the Agreement and Conditions of Contract for Building Works (“the JBC Agreement”) as executed between the Defendant and the Plaintiff, under which the Plaintiff was engaged by the Defendant to execute certain civil and building works.

5. The Defendant in these respects insisted that the court lacked the requisite jurisdiction, as the parties had agreed on a specific forum to resolve any disputes emerging from the JBC Agreement and further that the suit was wrongly before the court as the Plaintiff ought to have ignited the arbitral process.

6. The Motion was opposed by the Plaintiff who filed grounds of opposition on the ground largely that the dispute could not be referred to arbitration as the Defendant had not ignited the arbitral clause by giving notice to the Plaintiff as required by Clause 45.3 of the JBC Agreement between the parties.

7. During oral argument, Ms Agwata who appeared for the Plaintiff additionally added that the Motion

had been filed late as s.6 of the Arbitration Act anticipated that a Motion for stay of proceedings be filed not later than the time of filing the Memorandum of Appearance. According to Ms. Agwata, the Motion ought to be simultaneously filed with the Memorandum.

8. Clause 45 is a standard clause which appears in all standard JBC Agreements. This court had the occasion to consider the effect of Clause 45 of the JBC Agreement in the cases of **West Mount Investments Ltd v Tridev Builders Company Ltd [2017]eKLR** and **Kenya Airfreight Handling Limited v Model Builders & Civil Engineers (K) Limited [2017]eKLR**. In both cases the court held that the provisions of Clause 45.3 of the JBC Agreement as to commencement and ignition of the arbitration process had to be strictly construed. Any party wishing that a dispute arising from the JBC Agreement be resolved by arbitration had to notify the other party of the fact of dispute and additionally of the fact that the party would be invoking the arbitral clause if the dispute was not resolved within the stated period. The court further held that where the requisite notice was not given within the prescribed time the arbitral forum would lack jurisdiction, if any arbitral proceedings were commenced.

9. The relevant Clause 45.3 of the JBC Agreement reads as follows:

45.3 Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.

10. All is consequently dependent on when the dispute arose.

11. In the instant case, it is not in controversy that a dispute arose more than one year ago. March 2016, to be more precise. It is also not in controversy that the Defendant who seeks to have the dispute referred to arbitration did not issue any notice under Clause 45.3 of the JBC Agreement. Indeed, no notice has been issued till date by the Defendant. Effectively, the arbitral process was time-barred pursuant to an agreement between the parties which clearly set the time lines for igniting the process of arbitration. On this ground alone, I would deny, the Defendant's Motion.

12. Additionally, I would add that the Defendant's Motion would also meet with dismissal order as a procedural sanction. The Defendant's Motion was filed on 20 February 2017; some three days after the Defendant had entered appearance. The motion was stated as being brought under s.6 of the Arbitration Act.

13. Section 6 of the Arbitration Act reads as follows

“6. (1) 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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

[emphasis mine]

14. Section 6 requires a party seeking the referral of a dispute already filed in court to lodge the application for stay of proceedings at the time of filing the Memorandum of appearance. Where the application is made after the appearance has been filed, the court is entitled to reject the application: see ***Niazons (K) Ltd v China Road & Bridge Corporation Kenya [2001] KLR 12.***

15. The conditions under s.6 of the Arbitration Act are not mere technical requirements which may be waived or cured through the application of Article 159 of the Constitution. Where a party does not comply with the express provision of s.6, then the court will decline the application for stay of proceedings: see the Court of Appeal decision in ***Eunice Soko Mlagui v Suresh Parmar & 4 others [2017]eKLR*** . The same case obtains in the current scenario.

16. The dispute for the avoidance of any doubts is itself not time barred. What is time-barred is the arbitral process. The parties must now prosecute their case before this court.

17. For all the above reasons, the Motion stands dismissed as directed and ordered by myself on 27 July 2017. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 31st day of July, 2017

J.L.ONGUTO

JUDGE