REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL &TAX DIVISION

CIVIL CASE NO.322 OF 2016

SEYANI BROTHERS & COMPANY (K) LIMITED.....PLAINTIFF

-VERSUS-

ACME APARTMENTS LIMITED.....DEFENDANT

RULING

[1] Before the Court for determination are two applications filed herein by the parties. The first application is the Plaintiff's Notice of Motion dated **13 September 2016** and filed in Court on **15 September 2016**. The application is expressed to be brought under **Order 36 Rules 1 (a), (2),** and (**3)** as well as **Order 51 Rule 1** of the **Civil Procedure Rules**. The Plaintiff thereby seeks orders that judgment be entered against the Defendant in terms of the prayers pleaded in the Plaint; and that the costs of the application be borne by the Defendant.

[2] The second application is the Defendant's Notice of Motion dated **19 September 2016** and filed in Court on even date. The application is expressed to be brought under **Article 159** of the **Constitution, Section 3 (2)** of the **Judicature Act**, **Section 4 & 6** of the **Arbitration Act, 1995**and **Sections 1A, 1B, 3, 3A & 5** of the **Civil Procedure Act**. In the said application, the Defendant seeks for the following orders:-

[a] Spent

[b] Spent

[c] THAT the suit/proceedings herein be stayed and the time for referring the matter to arbitration be extended and the dispute be referred to arbitration in accordance with the Agreement and Conditions of Contract for Building Works dated 8 October 2012 executed by the Plaintiff and the Defendant;

[d] THAT, in the alternative to prayer 3 above, and in the event that the Court deems it just for the suit to proceed in Court, the Court do grant the Defendant extension of time and leave to file its Defence out of time and/or enjoin Team 2 Architects and Harold R Fenwick & Associates Chartered Quantity Surveyors as parties.

[e] THAT the costs of the application be borne by the Plaintiff.

[3] Directions were given on the **2 November 2016** that the two applications be disposed of simultaneously; and that written submissions be filed by the parties accordingly. Thus, the Plaintiff filed its written submissions on **10 February 2017**; while the Defendant's written submissions were filed herein on **13 March 2017**. The submissions were orally highlighted on **22 March 2017** by **Mr. Bundotich,** Counsel for the Plaintiff, and **Mr. Isindu** on behalf of the Defendant. It is worth noting, at this stage that, with respect to the application dated **19 September 2016**, **Mr. Isindu** opted to withdraw prayer (4) of the Notice of Motion as set out in [d] herein above for the joinder of the Project Architects and Quantity Surveyors, on the ground that as separate suit had been filed in that respect by the Defendant.

[4] Starting with the first application in time, dated **13 September 2016,** which seeks Summary Judgment pursuant to **Order 36 Rule 1 (1)(a), (2) and (3) of the Civil Procedure Rules** as read with **Order 51 Rule 1** of the **Civil Procedure Rules**, the grounds relied on by the Plaintiff were:

> [a] That the Plaintiff's claim arises out of unpaid Certificates Numbers 15 and 16 which were duly certified by the Project Architect and approved by the Quantity Surveyor;
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> [b] That pursuant to Clause 34.5 and 34.6 of the Contract, Interim Certificates Numbers 15 and 16 were payable by the Defendant within 14 days from the date of presentation; and that in default simple interest would be charged on the unpaid amount for the period it remained unpaid at commercial banks' lending rates in force during the period of default;
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> [c] That pursuant to Clause 34.9 of the Contract, it was mutually agreed between the Plaintiff and the Defendant that the amount stated as due in the Interim Certificate be the total value of work properly executed and the value of material and goods required for use in the works which had been delivered to the Works;
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> [d] That in view of the express provisions of the Contract, the Defendant cannot have a possible defence capable of defeating the Plaintiff's claim; and therefore that it is in the interests of justice that Summary Judgment be entered in the Plaintiff's favour in terms of the prayers set out in the Plaint.

[5] The application is supported by the affidavit of **Hirji Khimji Seyani** sworn on **13 September 2016** together with the annexures thereto. The brief background to the application is that vide a letter dated **18 August 2014** addressed to the Plaintiff, the Project Architect, namely **TEAM 2 ARCHITECTS**, notified the Plaintiff and the Defendant respectively that the Quantity Surveyors had valued the completed works. The Architect forwarded the interim Certificate Number 15 for **Kshs. 53,585,346.68** to the Parties and requested the Defendant to pay the same. Thereafter, vide a letter dated **6 February 2016** the Project Architect notified the Plaintiff and the Defendant that the Quantity Surveyor had valued the work completed on site. The Architect forwarded to the parties the Final Certificate Number 16 in the sum of **Kshs. 111,217,635.96** and similarly requested the Defendant to pay the same.

[6] It was further averred by the Plaintiff that, as regards the payments they had agreed with the Defendant, pursuant to **Clause 34.5**and **34.6** of the contract, that Interim Certificates Numbers 15 and 16 were payable by the Defendant within fourteen (14) days from the date of presentation. In default, the Defendant was to pay to the Plaintiff simple interest on the unpaid amount for the period it remained unpaid at the Commercial Bank lending rates. The Plaintiff contends that the Defendant did not honour the Architects instructions to pay the certified sums despite written demands issued by the Plaintiff to that effect; which is what prompted the Plaintiff to file the present suit for recovery of the same. It is the Plaintiff’s contention that in view of the express provisions of the Agreement, the Defendant cannot have a possible Defence capable of defeating its claim. Accordingly, the Plaintiff's prayer is for Summary Judgment to be entered against the Defendant in its favour.

[7] The application was opposed by the Defendant who relied on its affidavit filed in support of its application dated **19 September 2016**, sworn by **Purav B. Patel** and the Grounds of Opposition dated **4 October 2016.** It also relied on the supplementary affidavit sworn by **Bhupendra I. Patel** on **1**

November 2016. In the Grounds of Opposition, the Defendant contended that:

> [a] The suit and the Notice of Motion dated **13 September 2016** are incompetent as they were filed prematurely and in bad faith to defeat the intended verification of the subject construction works;
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> [b] The suit is based on a contract signed between the Plaintiff and the Defendant that contains an express arbitration clause, hence the suit is barred by the **Arbitration Act, 1995**;
>
> [c] The issues of the validity of the Final Account/Certificate and the irregular manner in which **Team 2 Architects** and **Harold R. Fenwick & Associates Chartered Quantity Surveyors** issued the same are pending determination before the Board of Registration of Architects & Quantity Surveyors - Kenya as between the said Architects and Quantity Surveyors;
>
> [d] The Defendant has filed in Court a Notice of Motion dated **19 September 2016** to give all the relevant parties a fair opportunity of being heard on the merits, so that the dispute can be conclusively determined.

[8] It was therefore the contention of the Defendant that it has a solid defence to raise herein; its posturing being that the Architect, Quantity Surveyor and the Plaintiff (Contractor) colluded to defraud it. The Defendant averred in the two affidavits aforesaid that there were unsanctioned variations in the construction and costs; and that the building works were poorly done in blatant breach of the agreement. The Defendant further averred that, while the Quantity Surveyor had expressly admitted in writing that the Final Account had substantial errors, it had declined to recall or suspend the Final Certificate which is the foundation of this suit. In the premises, the Defendant posited that it is only just and fair that this matter be referred to arbitration as provided for under **Clause 45** of the Contract; adding that it could not file a Defence for reason that it was intent on having the dispute referred to arbitration as provided for in the agreement between the parties.

[9] Having carefully considered the averments in the Plaint and the Supporting Affidavit, as well as the Grounds of Opposition and the written submissions filed herein by Learned Counsel for the parties, the main issue for determination in respect of the first application is whether the Plaintiff is entitled to Summary Judgment as sought thereby.In this regard, **Order 36 Rule 1** of the **Civil Procedure Rules** which states thus

> **1) In all suits where a Plaintiff seeks judgment for—**
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> > **(a) a liquidated demand with or without interest; or**
> >
> > **(b) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.**

[10] The rationale for Summary Judgment was well articulated by the Court of Appeal in the case of **Industrial & Commercial Development Corporation Vs Daber Enterprises Ltd (2000) 1 EA 75** thus:

> ***"The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination."***

[11] It is therefore trite that Summary Judgment can only be granted in plain and obvious cases where

there are no triable issues.The Plaintiff's case is that the Certificates issued by the Architect were final as the Defendant did not challenge them. The Plaintiff placed reliance on Clause 34.22 which provides that the final certificate would be considered conclusive evidence that the works had been properly carried out and completed in accordance with the contract in the absence of a written request to concur in the appointment of an arbitrator within thirty days after the issuance of such certificate.

[12] It was therefore the Plaintiff's contention that the Defendant could not have a Defence to their case as they did not raise a dispute with regard to the certificates within the time frame provided for in the contract. It is noteworthy, however, that the said provisions have exceptions as set out in sub-clauses 34.22.1, 34.22.2 and 34.22.3, which provide that the said certificates shall not be considered conclusive in so far as the sums mentioned therein are erroneous by way of fraud, dishonesty or fraudulent concealment relating to the works therein;or where there is any defect including any omission in the works which reasonable inspection during the carrying out of the works would not have revealed; or where there is accidental inclusion or exclusion of any work, materials goods or figure in the computation.

[13] The Defendant herein has alleged that the Plaintiff, the Architect and the Quantity Surveyor had fraudulently colluded in coming up with the figures in the Final Certificate. The Defendant relied on the bundle of correspondences marked as **"PBP 1"** and attached to its supporting affidavit sworn on **19 September 2016** in support of its allegations of collusive conduct on the part of the Project Architect, Quantity Surveyor and the Plaintiff herein.

[14] Having perused the said correspondences, it is manifest that queries were raised on the final certificate by the Defendant; and that the Defendant raised concerns with regard to certain variations thereto, which it contended were done without its participation and approval. The variations appear not to have been disputed by the Architect. The Architect's explanation was however that the said variations were made after instructions and in the presence of 'the three partners'. It is however not clear whether the Defendant was part of the three partners. In addition, the issue of interest rates on the delayed payments is also disputed. It was the Defendant's position that the rate applied was not the central bank mean rate as agreed between the parties. This was also conceded to by the Quantity Surveyors in their letter to the Defendant dated **5 July 2016**.

[15] In the circumstances, it cannot be said that the amount claimed herein by the Plaintiff is undisputed. Indeed the Defendant has raised *bona fide* triable issues to controvert the claim. Accordingly, it is my considered finding that this is not a fit or proper case for the entry of Summary Judgment under **Order 36 Rule 1** of the **Civil Procedure Rules**. That being my view of the matter, I would dismiss the Plaintiff's application dated **13 September, 2016** with an order that costs thereof be in the cause.

[15] The second application is the he Defendant's application dated **19 September 2016.** It seeks to have the dispute referred to arbitration. The application is supported by the affidavit of **Purav B. Patel** sworn on **19 September 2016** together with the annexures thereto.The facts leading to the present suit as stated in the Plaint filed on **9 August 2016**are that on the **8 October 2012**, the Plaintiff and the Defendant entered into an agreement titled 'Agreement and Conditions of Contract for Building Works' whereby the Defendant was the Employer on one part and the Plaintiff was the Contractor on the other part. In the said agreement, the Plaintiff at the request of the Defendant agreed to erect and complete works with regard to the construction of 3 Apartment blocks and associated services, installations and external works popularly known as **ACME Apartments** on **L.R No. 205/83 Riverside Lane** at a cost of **Kshs. 431,529,942.50**or such sum as shall become payable.

[16] The Plaintiff averred that it carried out and completed the works in accordance with the agreement and to the satisfaction of the Defendant and handed over the premises. It is however the Plaintiff's contention that the Defendant breached the terms of the agreement in defaulting to pay part of the contract price inclusive of interest on delayed payments to the tune of **Kshs. 128,122,937.44**. The Plaintiff's claim against the Defendant therefore is for the said amount as particularized at Paragraph 5 of the Plaint together with interest at the rate of 17% p.a from **11 June 2016** until full payment.

[17] The Defendant entered appearance on **2 September 2016** and filed the instant application seeking

that the suit/proceedings herein be stayed and the dispute be referred to arbitration. It is the Defendant's case that theAgreement dated **8 October 2012** executed between the parties, specifically provided that all disputes, such as the one before this Court, pertaining to the said agreement were to be referred to arbitration. The Defendant referred to **Clause 45** of the agreement which provided for the mode of settlement of disputes between the parties. It is therefore the Defendant's contention that the Plaintiff's suit is premature and incompetent as the same should have gone for arbitration first by virtue of the terms of the said agreement.

[18] In response to the application, the Plaintiff filed the Replying affidavit sworn by **Hirji Khimji Seyani** on **30 September 2016** and filed in Court on **3 October 2016**. The Plaintiff confirmed that **Clause 45** of the agreement provided that disputes between the parties would be referred to arbitration. It was however the Plaintiff's averment that in the said clause, it was also provided that arbitration proceedings could only be commenced if a party had given notice of a dispute or difference between the parties within ninety (90) days of the occurrence or discovery of the matter or issue giving rise to the dispute. The Plaintiff's case therefore is that the Defendant was required to give a Notice of dispute within the ninety days which they did not do. It is further the Plaintiff's case that the Defendant did not give any notice of intention to refer the dispute with regard to the Certificate issued by the Architect to arbitration within thirty (30) days of issuance as provided for in clause 34.22 of the agreement. In the circumstances, the Plaintiff's contention is that the Defendant's request to refer the matter to arbitration is time barred.

[19] Section 6 of the **Arbitration Act** is explicit in terms. It provides that:

> **A court before which proceedings are brought in a matter <u>which is the subject of an arbitration agreement shall</u>, 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) <u>that the arbitration agreement is null and void, inoperative or incapable of being performed</u>; or**
>
> **(b) <u>that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.</u>**

[20] Accordingly, from the purview of **Section 6** aforementioned, the pre-requisites to look out for in such an application would be answered by the following questions:

> [a] Is there a valid arbitration agreement?
>
> [b] Is there a dispute between the parties that falls within the arbitration agreement?
>
> [c] Has the application for referral been timeously made?

In the case of **<u>UAP Provincial Insurance Company Ltd Vs. Michael JohnBechett [2013] eKLR</u>** this was reiterated thus:

> **"It is clear from this provisions that the enquiry that the court undertakes and is required to undertake under Section 6(1) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such a dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute."**

[21] Clause 45 of the Agreement between the parties herein provides for the settlement of disputes

arising within the context of that Agreement. A reading of the entire Clause, which has ten sub-clauses (45.1 to 45.10) indicates that arbitration is the primary way of choice by the parties for resolving any disputes between them. It is also clear at clause 45.10 that the arbitral award was intended by the parties to be final and binding upon the parties. **Clause 45.1** of the Contract is reproduced here below for its full tenor and effect:

> **45.1 In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya, on the request of the applying party.**

In the light of the foregoing, it is clear that there is an arbitration agreement between the parties herein and its validity is not in question. Moreover, there is nothing to suggest that the arbitration clause/agreement is null and void.

[22] The second consideration is whether there is a dispute between the parties with regard to the matters agreed to be referred to arbitration. The scope of arbitration was provided for under **Clause 45.2** which states as follows:

> **"The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract."**

[23] The Plaintiff's claim is with regard to unpaid certificates on account of the building works they did under the Defendant's instructions. The interim and final certificates issued by the Architect which remains unpaid to date were issued on **18 August 2014** and **6 February 2016** respectively. It is not in dispute that the Defendant did not pay the certified sums within the time frame agreed in the agreement between the parties. (See clause 34 of the agreement on payments). Subsequently the Plaintiff filed the present suit to demand the sums due. The Defendant has challenged the sums in the unpaid certificates. It is their contentionthat the Architect and the Quantity surveyors fraudulently colluded with the Plaintiff to overstate the cost of the project. In essence, the dispute of non-payment raised by the Plaintiff arises out of the agreement between the parties and is therefore within the matters agreed by the parties to be referred to arbitration. Accordingly, there is sufficient material before the Court to show that there is a dispute between the parties that is the subject of the arbitration agreement as envisaged by them in **Clause 45** of the Contract.

[24] As to whether the application for referral was made in time, it is the Plaintiff's contention that the time within which the matter should have been referred to arbitration has since lapsed. **Clause 45.3** of the Agreement of the parties was relied on in support of this contention. It provides as follows:

> **"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."**

[25] It was however the Defendant's submission that they had given such notice through their letter dated **5 May 2016** which was within the aforementioned time frame of ninety days. The Defendant submitted that the Final Certificate was delivered to them on **28 February 2016**. It is however not certain when the dispute as to the amounts in the final certificate arose. From the Court record, there are several correspondences between the parties herein as well as the Architect and Quantity Surveyor where it

appears the parties were still having discussions as to the issue of the figures in the final certificate due for payment. Nonetheless, I have perused the said letter which was addressed to the quantity surveyors and copied to the Architects and the Plaintiff herein. Although the contents therein are a clear indication that the Defendant disputed the final certificate, the Defendant was obliged, by dint of **Clause 45.1** of the Agreement to give notice of the dispute to the Plaintiff. That Clause reads:

> **"…such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice."**

[26] It is apparent therefore that the letter dated **5 May 2016** does not seem to be in conformity to the provisions of **Clause 45.1** of the Agreement as it has not been addressed to the Plaintiff and there is no request therein that the said dispute be referred to arbitration. In the circumstances, the Defendant's submission that the letter of **5 May 2016** amounted to a notice of dispute or difference as envisaged in clause 45.1 and 45.3 of the agreement is clearly untenable. There is therefore no evidence on record to show that the Defendant invoked Clause 45 on arbitration with regard to the dispute on the inflated cost of the project or the alleged fraud between the architect, Quantity Surveyor and the Plaintiff.

[27] Similarly, there is also no evidence on record that the Plaintiff referred the dispute of non-payment of the certificates to arbitration as provided for under **Clause 45** of the Agreement prior to filing this suit or during the pendency of this suit. It therefore appears that the ninety days (90) within which either party (the Plaintiff and the Defendant) could have referred any dispute or difference to arbitration may have since lapsed depending on when the dispute between the said parties arose.

[28] The foregoing notwithstanding, it is now a constitutional imperative that alternative dispute resolution mechanisms, including arbitration, be given pride of place. **Article 159(2)(c)** of the **Constitution of Kenya** stipulates that:-

> **"In exercising judicial authority, the courts shall be guided by the following principles:-**
>
> **alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."**

[29] What this means, to my mind, is that where appropriate, the Court would still have the residual power to have a dispute referred to arbitration, notwithstanding that there was no declaration of a dispute as envisaged by the parties in the arbitration agreement. Additionally, **Order 46 Rule1** of the **Civil Procedure Rules** recognizes that:

> **"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."**

It is therefore permissible, under the aforesaid provision, for the Court to give directions, on the basis of the Arbitration Agreement to have the dispute herein referred to arbitration. It is instructive that for purposes of court proceedings such as the instant one, it suffices, by dint of **Section 6(1)** of the Arbitration Act, that an application for reference be made at the time of entering appearance; which is what the Defendant herein did.

[30] Finally, there is no gainsaying that the issue of limitation with regard to when the arbitration proceedings were to commence, being a matter that touches on the jurisdiction of the Arbitral Tribunal, are matters which fall within the purview of the Arbitral Tribunal under **Section 17** of the **Arbitration Act,** which provides that:

> **"The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement..."**

Accordingly, it is manifest from the foregoing that there is a valid arbitration agreement between the parties; and that there is a dispute between the parties that ought to be referred to arbitration. The dispute raised by the Plaintiff herein is that of non-payment of the final certificate with regard to the building works executed under the agreement; while the Defendant has alleged collusion and fraud. In the circumstances, I find merit in the Defendant's application dated **19 September, 2016** and would allow the same and issue orders in terms thereof as follows:

> **[a] That the dispute herein be referred to arbitration in accordance with Clause 45 of the Contract dated 8 October 2012;**
>
> **[b] That in the interim, these proceedings be stayed pending arbitration as per [a] above;**
>
> **[c] The costs of the application to be in the cause.**

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF AUGUST, 2017

OLGA SEWE

JUDGE