REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY COURTS

CIVIL SUIT NO. 80 OF 2016

DINESH CONSTRUCTION LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

LA NYAVU GARDENS LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to a Notice of Motion Application dated 5th May 2016 brought under the provisions of section 6 of the Arbitration Act 1995, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law.

2. The applicant is seeking for orders that;

a) Spent

b) That a stay of proceedings be issued pending the outcome of the Arbitration proceedings

c) That cost of this Application be provided for.

3. The Application is premised on the following grounds:-

a) That there exists an Arbitration Agreement between the Plaintiff and the Defendant.

b) That alternative dispute resolution process including mediation and Arbitration were at all times envisaged by the Parties as a first resort in the event of a dispute.

c) That the Plaintiff did not commence and/or exhaust the alternative dispute resolution methods.

d) That a dispute has risen between the Parties which should be submitted to Arbitration for resolution and determination.

e) That the Defendant/Applicant is ready, willing and able to proceed to arbitration on any dispute arising between the Parties.

f) That the Cost of this Application be borne and paid by the Respondent.

4. The Application is also supported by an affidavit sworn by Haron Gekonge Nyakundi, a Director of the

Applicant Company. He deposed that the Applicant awarded Dinesh Construction Company Limited, (herein "the Respondent"), a turnkey contract for "infrastructure Works at Bogani Gardens. That the letter of acceptance dated 1st March 2012, expressly stipulated that the said Letter and the Respondent's tender documents were to serve as a binding Contract between the Parties. That a dispute has arisen between the Parties with both Parties alleging breach of contact against each other.

5. The Applicant avers that the Respondent filed the instant suit in Court in breach of the Arbitration Agreement and the Agreement of the parties that the alternative dispute resolution proceedings at all times is the first and last resort in the event of a dispute. Neither had the Respondent exhausted the alternative dispute resolution avenue before the commencement of this suit.

6. In that case the Court has no jurisdiction to entertain, hear or determine this suit as the dispute should have been referred to Mediation and then Arbitration in the event that the matter was not successfully resolved through mediation.

7. The Applicant averred that they wrote letter dated 25th March 2014, to the Respondent stating that the dispute should be referred to mediation, failing of which the Parties proceed to Arbitration, and a further letter dated 4th April 2014 requesting the Respondent to propose three names of possible mediators for the Applicant's concurrence and if they were not able to proceed to refer the matter for arbitration as per the contract.

8. That the Respondent through a letter dated 8th April 2014 accepted to have the matter referred to Mediation failing which an Arbitrator could be appointed, and proposed the appointment of Quantity Surveyor, Kairu Bachia as a Mediator.

9. The Applicant responded through a letter dated 28th April 2014 that it would revert on its concurrence or alternative names together with independent consultants' technical audit report on the work the Respondent had done.

10. Subsequently, Mr Dinesh Bhachu and Mr. Fredrick Opondo representatives of the Parties met with the deponent to try and resolve the dispute amicably. The last of such a meeting took place in the Respondent's office towards the end the year, 2015. The Applicants Argued that they are ready and willing to submit themselves to an Arbitral process in order to have the matter conclusively decided. That the dispute between the Parties should be fully canvassed before a sole Arbitrator as envisaged under the contract and under the Arbitration Act of Kenya, 1995.

11. The Application was opposed vide a Replying Affidavit dated 8th June 2016, sworn by Dinesh Bhachu. He deposed that, it is true that the Defendant awarded the Plaintiff a negotiated tender for infrastructure works at Bogani Gardens vide the letter dated 1st March 2012.

12. That it was a term of the said Acceptance letter that the tender documents and the Letter were to serve as a binding contract in the interim, but to this date the Defendant has never prepared any other contract documents as had been envisaged in its letter of acceptance and that the said letter of acceptance did not have a dispute resolution clause

13. That the Plaintiff executed its end of the bargain as contracted but the Defendant reneged on making contractual payments hence the filing of this suit. However, notwithstanding, the above the Plaintiff on 8th April, 2014 in good faith accepted the Defendant's request to have the matter settled by Mediation and proposed QS Kairu Bachia as its Mediator and the defendant was supposed to concur with the appointment of QS Kairu Bachia as Mediator or appoint another person to sit together with Mr. Bachia.

14. The Defendant failed and neglected to facilitate the Mediation process by refusing to concur with their proposed Mediator or propose one of their own and willfully refused to follow through on its Mediation proposal in a move calculated to frustrate the Plaintiff.

15. That on various dates in 2015, the Plaintiff through its advocates wrote to the Defendants seeking payment of the contractual sums and also of its intention to sue in default. It is over two years since this dispute arose and the Defendant has been using the ruse of settlement meetings to delay the recovery of sums due to the Plaintiff.

16. That the concomitant to the promotion of alternative dispute resolution as enshrined in the constitution is the requirement that justice should not be delayed. The Defendant has inordinately delayed and also failed to follow through on its mediation proposal and that the Plaintiff's wish that this matter be ventilated before this Honourable Court.

17. The Applicant argued that the court cannot rewrite the terms of a Contract for the Parties and therefore a dispute resolution clause cannot be interfered where there is none. It is therefore just and fair that this application be denied with costs.

18. The Applicant filed a supplementary affidavit sworn by Haron Gekonge Nyakundi in which he reiterated that the Respondent's letter dated 4th April 2014 contained in its bundle of documents refers to the spirit of the contract as envisaged under clause 45 of the "Conditions of Building Works published by the Joint Building Council, Kenya (April 1999)" edition except as varied.

19. That the Respondent contract documents directly incorporated clause 45 of the said "Conditions of Building Works" and is included in the bundle of documents. The clause 45 of the "Condition of Building Works" published by Joint Building Council, Kenya (April 1999) provides for Arbitration as the dispute resolution mechanism.

20. At the conclusion of the arguments by the Parties the parties agreed to dispose of the application by filing submissions, and subsequently highlighted the same. The Applicant's submissions were filed through the firm Wambui Kiama & Company Advocates. The Court was asked to determine the following issues:

i. Whether there exists a dispute between the Respondent and the Applicant; and

ii. Whether there is an Arbitration Agreement between the Respondent and the Applicant.

21. The Applicant's submissions basically reiterated the content of the affidavit in support of the application and the supplementary affidavit thereto arguing that the letter of acceptance together with the tender documents creates a legally defined relationship between the Parties and that clause 45 of the Conditions of Building Works which were published by the Joint Building Council, Kenya (April 1999) edition excepting in so far as is varied between the Parties, provides for Arbitration as the dispute resolution mechanism which is applicable herein

22. Reference was made to the case of ***UAP Provincial Insurance Company Limited Vs Michael John Beckett*** where the learned Judge stated:

> *"**If any Party to an Arbitration to which this Section applies, or any person claiming through or under him, commence any legal proceedings in any Court against any other Party to the Agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any Party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, unless satisfied that the Arbitration Agreement is null and void, inoperable or incapable of being performed or that there is not in fact any dispute between the Parties with regard to the matter agreed to be referred, shall make an order staying the proceedings**."*

23. The Applicant further submitted that Section 3 of the Arbitration Act, of 1995 of the Kenya, defines an "Arbitration Agreement" as:

"an Agreement by the Parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship; whether contractual or not"

24. Therefore, there does not have to be a contract between the Parties, for there to arise an Arbitration Agreement, provided that there exists a defined legal relationship, from which it can be discerned that the Parties had agreed to submit all or certain disputes, to arbitration, it would be deemed that there was an Arbitration Agreement.

25. That although it is admitted in this matter that the Turnkey contract dated 1st March 2012 does not contain an arbitration clause, at no point does the Respondent dispute the fact that the matter would be referred to Arbitration in the event that the mediation failed. In fact the Respondent refers to the spirit of clause 45 quoted above which refers to Arbitration.

26. The Applicant continued to submit that the Arbitration Agreement between the Parties to this suit meets the criteria set out in Section 4 of the Arbitration Agreement, which provides that:

1) ***"An Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate Agreement.***

2) ***An Arbitration Agreement shall be in writing.***

3) ***An Arbitration Agreement is in writing if it is contained in-***

a) ***a document signed by the Parties***

b) ***an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the Agreement; or***

c) ***An exchange of statements of claim and defence in which the existence of an Agreement is alleged by one Party and not denied by the other Party.***

4) ***The reference in a contract to a document containing an Arbitration clause shall constitute an Arbitration Agreement if the contract is in writing and the reference is such as to make that Arbitration clause part of the contract.***

27. The Applicant relied on Article 159(2) of the Kenyan Constitution that set out the principles that should guide the Courts in the exercise of its judicial authority and which stipulates that the Judiciary shall be guided by alternative forms of dispute resolution including arbitration amongst others.

28. The Applicant cited Section 6(1) of the Arbitration Act to argue that a Court in which proceedings are brought in a matter which is the subject of an arbitration shall, if a Party so applies not later than the time when that Party enters appearance or otherwise acknowledges claim against which the stay of proceedings is sought, stay of proceedings and refer the Parties to Arbitration. That Section 6 of the Arbitration Act 1995 envisages that a Party who seeks to take advantage of an Arbitration Agreement must apply to the Court not later than the time of entering appearances, filing any pleadings or taking any other step in the suit.

29. The Applicant submitted that it did not file any pleadings in this suit except this Application for stay of proceedings timorously. The Applicant relied on several judicial authorities as follows:

i. ***Nanchang Foreign Engineering Company (K) Limited V Easy Properties Kenya Limited (2014) eKLR*** where the Court stated that:

"This Court therefore has jurisdiction to stay proceedings filed in Court pending the hearing and determination of Arbitral proceedings under Section 6 of the Arbitration Act,

1995."

ii. ***Harnam Singh & Others VsMistri (19971)EA 122*** where Spry J referred to the case of ***Jadva Karsan Vs Harnam Singh (1953)20 E.A.C.A 74*** where it was held that:-

> *"**There is no doubt that there is an inherent power of stay of proceedings where the ends of justice so require…."***

iii. **Kenya Power & Lightning Company Limited Vs Esther WanjiruWokabi (2014) Eklr** where the Court held that

> ***"As I understand the Law, whether or not to grant a stay of proceedings on a decree or Order appealed from is a matter of judicial discretion to be exercised in the interest of justice….The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously".***

iv. **Winding up Cause No.43 Of 2000, In The Matter of Global Tours & Travels Limited** where Honorable Justice Ringera held as follows:

> ***"As I understand the Law, whether or not to grant a stay of proceedings on a Decree or Order appealed from is a matter of judicial discretion to be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of Justice to order a stay of proceedings and is it on what terms it should be granted. In deciding whether to Order stay of the Court should essentially weigh the pros and cons of granting or not granting the Order."***

30. The Respondent filed response submissions through the firm of Mwaniki Gachoka & Co. Advocates reiterating that Parties herein utilized the Letter of Acceptance dated 1st March, 2012, together with the tender documents in executing the project works, only in the interim basis and that intention of the Parties is well captured in the primary document which is the letter of acceptance. The Applicant was to prepare the other contract documents for purposes of execution as envisaged in the letter of acceptance but failed, refused and or neglected to prepare the documents during the subsistence of the project works or at all.

31. The Respondent maintained that there is no other contract agreement that was executed by the Parties waiving their rights of seeking redress before the Honorable Court. That one of the cardinal tenets of a civilized, open and democratic society is the dicta that justice should not be denied or delayed. This is only achievable if the Respondent is given a fair opportunity to present its case in a timeous manner and for the same to be adjudicated upon on its merits.

32. The case of; ***Locke Vs Bellingdon Ltd Others (No. 2) (2002) 65 wir 19 (Court of Appeal of Barbados) and Maser Vs Cameron (1954) 91 CLR 353, Dixon Cj High Court Of Australia*** was cited where it was stated as follows:

> *"**it may be one in which the Parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which the be fuller or more precise but not different in effect. Or secondly, it may be a case in which the Parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon execution of a formal document. Or thirdly, the case may be one in which the intention of the Parties is not to make a concluded bargain at all unless and until they***

execute the contract.”

33. The Respondent invited the Court to note that the letter of acceptance did not contain an arbitration clause or implied existence of the same or as envisage under Section 3(2) of the Arbitration Act, 1995, and that a signature in an Agreement is an irrefragable evidence of assent to the whole contract. In this particular case there is no such evidence of assent to any other contract agreement with an arbitration clause by the Respondent.

34. That it is trite law that judicial pronouncements are hackneyed that the Courts cannot re-write a contract for the Parties. The Court is only enjoined to interpret and enforce the terms of a contract that Parties have agreed. The case of **Kenya Breweries Ltd Vs Kiambu General Transport Agency Ltd, Civil Appeal No.9 of 2000[2000] 2 EA 398**, was cited where the Court of Appeal expressed itself as follows**.**

> *“**A variation of an existing contract involves an alternation as a matter of contract of the contractual relations between the Parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the Parties must be ad idem in the same sense as for the formation of a contract and the agreement for variation must be supported by consideration…if the agreement is mere nudum pactum it will not cause action for breach particularly if its effect was to give a voluntary indulgence to the other Party to the agreement….A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract.”***

35. Further the case of; ***David Ombisi Vs Joseph Wambugu Njeri[2004] EKLR,*** was quoted where the Court expressed itself thus-

> “**As regards contracts between persons not under a disability or at arm’s length, the Courts of Law should maintain the performance of the contracts according to the intention of the Parties and should not overrule any clearly expressed intention on the basis that the Judges know the business of the Parties better than the Parties themselves.”**

36.The Court was invited to see through the Applicant’s intention which is to delay the Respondent’s claim and reach one inescapable conclusion that there was no Arbitration clause and/or Agreement or that the Parties herein did not intend to waive the right of access to the Courts and dismiss the Application with costs.

37. I have considered the application and find that the key question to determine is whether the agreement entered into by the Parties provided that alternative dispute resolution would be the mode of dispute resolution herein. The main document executed as agreed by all the parties is the Letter of Acceptance dated 1st March, 2012, together with the tender documents. There is no dispute that the said documents do not contain a clause for settlement of disputes through alternative dispute resolution.

38. However it is also clear that the Parties exchanged correspondences with a view to refer the matter to Mediation failing of which they would proceed to Arbitration. This communication may have been based on mutual understanding but it is also backed by clause 45 of the Conditions of Building Works which was published by the Joint Building Council, Kenya (April 1999) edition, and which both Parties have acknowledged and referred to. The criteria set out in S.4 of the Arbitration Act gives effect to such correspondences.

39. The legal authorities cited herein clearly indicate that the Court has the power to stay proceedings to enable the parties refer it to an alternative dispute resolution. This is supported by Article159(2) of the Kenyan Constitution.

40. But even then one party cannot purpose to use the alternative dispute resolution mechanism to frustrate the other. The Respondent has averred as to how the Applicant has not been vigilant in pursuing the alternative dispute resolution mechanism. That the Plaintiff wrote to*;*

> "*the Defendants seeking payment of the contractual sums and also of its intention to sue in default. It is over two years since this dispute arose and the Defendant has been using the ruse of settlement meetings to delay the recovery of sums due to the Plaintiff*."

41. In my considered opinion, if the Defendant's intention is to delay the Plaintiff's claim then the Defendant will be acting in bad faith. That however can be remedied by the Court fixing timelines within which the matter must be referred to Mediation. In my considered opinion if conclusion, I order that this matter be referred to Mediation and Arbitration within (30) Thirty days of this order Failure of which this Order will be vacated and the Respondent will be at liberty to pursue these proceedings at the expiry of the said 30 days.

42. The costs of this application will be in the cause.

43. It is so ordered.

Dated, delivered and signed in an open Court this 24th day of October, 2017.

G.L. NZIOKA

JUDGE

In the presence of:-

Mr. Mumia for the Plaintiff

No appearance for the Defendant

Teresia …….. Court Assistant