



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 35 OF 2015

EPCO BUILDERS LIMITED.....PLAINTIFF

VERSUS

DR. ELLY OPOT.....1ST DEFENDANT

DR. LUKOYE ATWOLI.....2ND DEFENDANT

DR. SIMON KIGONDU.....3RD DEFENDANT

(SUED AS OFFICIALS OF

KENYA MEDICAL ASSOCIATION)

R U L I N G

1. The **Notice of Motion** application before the court is dated **17th March 2015** and filed by the Defendants herein pursuant to the provision of section 6 of the Arbitration Act, Cap 49 and section 3 a of the Civil Procedure Act Cap 21 Law of Kenya. The Application seeks to secure the following orders;-

1. ***That this Honourable court be pleased to refer the above matter for arbitration as provided for under clause 45 of the contract agreement dated 9th November 2008.***
2. ***That costs of the application be borne by the plaintiff.***

2. The application is premised on the grounds set therein and is supported by affidavit of the first plaintiff Dr. ELLY N. OPOT sworn on 17th March 2015. The applicant's case is that parties are bound with the terms of the contract agreement dated 9th November 2008 which stipulates for arbitration in case of a dispute. The applicant's case is that the very filing of this suit is an indication that a dispute exists and so under clause 45 of the said agreements this matter ought to be referred to arbitration.

3. The application is opposed by the plaintiff vide Replying Affidavit of Devji Versani Sworn on 10th April 2015. The plaintiff/Respondents cast in that there is in fact no dispute between the parties which may be referred to arbitration. Further the Respondent states that the sums claimed in the suit herein have been admitted by the defendants during various discussions before the parties and therefore there is no dispute and so judgment on admission should be entered for the plaintiff. The Respondents further submitted that the Application has not complied with clauses 45.1, 45.2 and 45.3 of the said contract. Further the Respondents submitted that if the applicant

intended to apply for this matter to be referred to arbitration, the application for referral ought under S 6 (1) of the Arbitration Act, to have been filed simultaneously with the filing of the appearance for the suit. On those grounds the Respondents have urged this court to dismiss this application.

4. I have carefully considered the application and the submissions of the parties. I raise the following issues for determination.

(i) Whether there is a dispute to be referred to arbitration.

(ii) Whether the applicant has complied with the law under S. 6 (1) of the Arbitration Act, and the relevant clauses under the said Agreement.

5. With regard to the first issue, as to whether or not there is a dispute, it is clear to me that a dispute exists and indeed that is why the current suit has been filed. The allegation by the Respondent that the sums demanded by the Respondent in this suit have been admitted has not been proved. Indeed at page 59 of the plaintiff's bundle there are minutes to show that the parties had acknowledged existence of a dispute and sought to have the same negotiated but this did not take place.
6. In terms of issue number two, what is now imported is how the applicant handled the said dispute with regard to this application, and whether the current application has satisfied both the law under the Arbitration Act, and under the said Agreements between the parties.
7. Under S 6 (1) (a) of the Arbitration Act, this court is empowered to stay proceedings and refer a matter to arbitration, where there exists a dispute. However for the court to do that, the application for referral to arbitration must have been filed simultaneously with the entering of appearances on the suit. This did not happen in this matter. The claim herein was filed on 30th January 2015. Apparently it was entered by the Defendants/Applicants on 5th March 2015, while this application was filed on 18th March 2015. Clearly, the application has not satisfied the requirement of S. 6 (1) (a) of the Arbitration Act.
8. Even if the court were to disregard the above failure, the applicant would still have to prove that it satisfied clauses 45.3 and 45.4 of the Agreement dated 9th November 2008. Those clauses regard the issuance of Notice of a dispute and attempts to settle the same amicably. Clause 45.3 states 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 the issue giving rise to the dispute.

With regard to above clause 45.3 I have carefully considered the application and the affidavit in support thereof. I have not seen any notice of a dispute given by the applicant to the Respondent in satisfaction of the clause.

Clause 45.4 states:

“Notwithstanding the issue by a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such a dispute or difference amicably with or without the assistance of third parties”.

9. Again, I have not seen any averments in the supporting affidavits, or annexures thereto, to the effect that there has been any serious attempt to amicably settle the disputes.

I have herein earlier referred to pg 59 of Plaintiff's bundle where there are minutes regarding the dispute. The meeting merely noted the existence of the dispute but did not try to solve it. That meeting ended without a solution, noting at paragraph 6 that

“The meeting closed with all parties seeking time to explore easier options”.

I do not consider that meeting held on 31st October 2015 to be what is intended by clause 45.4. But even if it was, still there was no complaint with clause 45.3.

10.The upshot of the above is that this court is not satisfied that the application to transfer this matter to arbitration is merited.

11.The application is dismissed with cost to the Defendant.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 22ND DAY OF JANUARY 2016.

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Osiemo for the Plaintiff

Mr. Makambo hb M/S Ligunye Defendant

Teresia – Court Clerk