REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 5 OF 2016

BRENDA NGII MUIU……..PLAINTIFF

VERSUS

PETER MWANGI KIMANI T/A

ELECTRO BROTHERS & GENERAL CONTRACTORS……1ST DEFENDANT

AMACO AFRICAN MERCHANT ASSURANCE COMPANY LTD…...2ND DEFENDANT

RULING ON PRELIMINARY OBJECTION

Introduction

0. This is a ruling on a Preliminary Objection taken by the 1st respondent **'**that the Plaintiff's suit and application dated 3rd March 2016 are ex facie incompetent and an abuse of the court process in that:

a. **By reason of arbitration clause in the agreement between the plaintiff and the 1st defendant which forms the subject matter of the dispute between parties, the High Court lacks the requisite jurisdiction to entertain the plaintiff suit.**
b. **There is pending before the honourable court an application dated 21st March 2016 to stay the proceedings herein which must first be heard and determined before any other or further proceedings.**
c. **The plaintiff's suit and the application dated are thus misconceived and an abuse of the court process.'**

0. The Plaintiff had sued the defendants and upon failure of defence, the plaintiff filed an application for summary judgment by Amended Notice of Motion dated 3rd March 2016 seeking principal orders that-

> **An order of summary judgment against the 2nd Respondent in the sum of Kshs.5,596,504/= being the performance bond sums in respect of the contractors insurance guarantee provided by the 2nd Respondent to the Applicants.**

0. The background of the suit is set out in the grounds of application as follows:

i. "The Applicant and the 1st Respondent entered into a construction agreement dated 30th April, 2015 which has been breached.

ii. The 2nd Respondent then issued a contractor's performance bond dated 7th May, 2015 in the sum of Kshs. 5,596,564/= guaranteeing the faithful and satisfactory execution of the construction works.
iii. The terms of the said performance bond provided that the 2nd Respondent was bound to the Applicant to the tune of Kshs. 5,596, 564/= in the event of contract default.
iv. On the strength of the said performance bond the Applicant paid the 1st Respondent (who was the insured) USD 185,000 or the equivalent of Kshs. 18,323,608/=.
v. The 1st Respondent commenced work in May 2015 after receiving the said sum of Kshs. 18,323,608/= but abandoned the site by October 2015, and defaulted in the contract with the result that the construction stopped.
vi. A valuation done by sage quantity surveyors revealed that only work worth Kshs. 10,940,935.98/= had done. This meant there was a credit balance of Kshs. 7,382,672.02/= in favour of the Applicant.
vii. There is no possibility of the 1st Respondent (contractor) returning to the site as he has now been in default for 85 days having left the project site in October 2015 without paying workers and the sub contractors who had supplied materials to the site. Legal reasons exists to justify the exercise by the court of its discretion to grant summary judgment.
viii. And the Affidavit of Brenda Ngii Muiu dated 19th February, 2016 and filed on 23rd February, 2016 and such further or other grounds as will be advised at the hearing thereof."

0. The 1st defendant entered appearance under protest on 21st March 2016 and filed an application dated 21st March 20016 for stay of the suit pending reference to arbitration, pursuant to section 6(1) of the Arbitration Act and rule 2 of the Arbitration Rules. The application was supported by an affidavit of the 1st defendant annexing the agreement between the parties which contains an arbitration clause (Clause 45) for settlement of disputes. This application for stay is still pending hearing and determination before the court.

The Preliminary Objection

0. In urging the 1st ground of the Preliminary Objection (apparently abandoning grounds (b) and (c) thereof) the 1st defendant, Counsel Mr. Olonde with whom Mr. Morara for the 2nd Defendant concurred, relied on section 6 (1) of the Arbitration Act and Clause 45 of the Agreement between the parties which provides for referral to arbitration of disputes between the parties. The case law authority of ***University of Nairobi v. N. K. Brothers Limited*** (2009) eKLR where the Court of appeal referred a High Court suit to arbitration having found a dispute between the parties as to what the contractor was entitled to under the contract which had binding arbitration clause.
0. In response counsel for the plaintiff Ms. Koki Mbulu relied on Article 50 (1) of the Constitution of Kenya 2010 which provides for determination by courts of disputes which can be dealt with by law as superior to and overriding the statutory provisions of Arbitration Act, 1995. Further reliance was had of the general unlimited jurisdiction of the High Court in criminal and civil cases under Article 165 (3) (a) of the Constitution. It was also contended that the provision of Alternative Dispute Resolution mechanisms under Article 159 of the Constitution could not prevail over equally entrenched provisions of Article 165 (3) (a) and Article 50 of the Constitution.

Determination

0. Article 50 (1) of the Constitution is in terms as follows:

> "**50.** (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court ***or, if appropriate, another independent and impartial tribunal or body."***

0. The fair hearing provisions of Article 50 require hearing in accordance with the law, and it has not

been shown that the provisions of the Arbitration Act do not afford a party such fair hearing. Moreover, the arbitrator is a tribunal or body established by law within the meaning of Article 50 of the Constitution, and no inconsistency is shown between the provisions of the Arbitration Act and the Constitution. Indeed, the Constitution itself encourages arbitration as an alternative dispute resolution mechanism when it provides under Article 159 (2) (e) that –

> "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (*c*) **alternative forms of dispute resolution** including reconciliation, mediation, **arbitration** and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);"

0. Article 165 (3) (a) of the Constitution is a fall back provision in cases where no provision is made by law as to the dealing with the any cases of the nature of criminal or civil proceedings. It is reserve position that should only be adopted to fill gaps in the law and not to upset the provisions of the law that specifically place the jurisdiction over certain matters elsewhere than in the High Court. Indeed, it is now accepted since ***Speaker of the National Assembly v. Karume (2008) KLR (EP) 425***, that where there was a clear procedure for the redress of particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
0. Indeed, Article 10 of the Constitution recognizes the Rule of Law as one of the Guiding Principles of the Constitution. The Rule of Law principle must support provisions and procedures contained in Acts of Parliament which have not been declared unconstitutional and compliance with such Act cannot be said to be unconstitutional. Accordingly, the provisions of the Arbitration Act with regard to reference to arbitration of disputes between parties to a contract which contains an arbitration clause, cannot be said to be unconstitutional. As a procedure prescribed by an Act of Parliament, the same ought in accordance with the authority of ***Speaker of the National Assembly v. Karume*** case to be strictly followed.
0. Section 7 of the Arbitration Act provides that –

> *7. (1) It is not incompatible with an arbitration Agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.*
>
> *2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for purposes of the application.*

0. The Court can only determine whether the matter falls under the purview of the exception under section 7 of the Arbitration Act after hearing the suit or applications thereunder on the merits or upon the hearing of the application for stay of the suit under section 6(1) of the Arbitration Act pending referral to arbitration.
0. In accordance with ***Mukisa Biscuits Manufacturing Ltd. v. West End Distributors Ltd.*** (1969) EA 696 the leading decision on Preliminary Objections, a preliminary objection should not be raised where the determination of the question will call for ascertainment of facts:

> **"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if <u>any fact had to be ascertained</u> or if what is sought is the exercise of judicial discretion."**

0. In the present case, whether the plaintiff's claim is a dispute under the contract which in accordance with the Arbitration Clause under section 6 (1) of the Arbitration Act or a claim for interim measure of protection under section 7 of the Act, which need not be an order of injunction as the section recognizes 'other interim order', must be determined first. There is no doubt that

the Court has jurisdiction under the latter and that its jurisdiction or lack of it under the former section of the law is conditional upon the existence of certain matters 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 a party enters appearance or files any pleadings or takes any other step in the proceedings, 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 matters agreed to be referred to arbitration."

This matter calls for the ascertainment of the facts relating to the exceptions in section 6 (1) (a) and (b) and section 7 (1) of the Arbitration Act. As such, a preliminary objection on jurisdiction of the court is not properly taken. The 1st defendant ought to have prosecuted its application for stay under section 6 (1) of the Arbitration Act.

0. Accordingly, the 1st Defendant's Preliminary Objection is dismissed with costs to the Plaintiff.

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Olonde for 1st Defendant and h/b for Mr. Morara for 2nd Defendant

Ms. Koki Mbulu for the Respondent

Ms Doreen - Court Assistant.