



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 148 OF 2014**

**VIHAR CONSTRUCTION COMPANY LIMITED.....PLAINTIFF**  
**VERSUS**  
**UHANI LIMITED.....DEFENDANT**

**RULING**

1. The Defendant's Notice of Motion application dated and filed on 30<sup>th</sup> April 2014 was brought under the provisions of Article 159 (2)(d) (sic) of the Constitution of Kenya, Section 6 of the Arbitration Act, Rule 6 and 11 of the Arbitration Rules, Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, Order 46 Rule 1, 3 (2) and 20 (2) of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following prayers:-
  1. **THAT an order for stay of proceedings in this suit be granted.**
  2. **THAT the dispute herein be referred to arbitration.**
  3. **THAT the cost (sic) of this Application and suit be awarded to the Applicant.**

**THE DEFENDANT'S CASE**

2. In support of the said application, on 30<sup>th</sup> April 2014, Farida Bano Raza, the Defendant's General Manager swore an Affidavit on its behalf. Her Further Affidavit was sworn on 5<sup>th</sup> June 2014 and was filed on the same date. The Defendant's written submissions were dated 23<sup>rd</sup> June 2014 and filed on 24<sup>th</sup> June 2014.
3. The Defendant's case was that by a written agreement it made with the Plaintiff on 16<sup>th</sup> February 2012, the Defendant engaged the Plaintiff to undertake construction works in the Defendant's premises. It said that Clause 45 of the said Agreement specifically provided that in the event a dispute arose between them during the progress or after the completion of works or abandonment of works, such a dispute would be referred to arbitration. It urged the court to refer the matter to arbitration in accordance with the parties' wishes.

**THE PLAINTIFF'S CASE**

4. The application was opposed by the Plaintiff who filed its Notice of Preliminary Objection dated

9<sup>th</sup> July 2014. It was not clear when the same was filed as the copy in the court file did not bear a court stamp. The grounds were as follows:-

1. **That the Defendant's application herein offended provisions of Section 6 (1) of the Arbitration Act, 1995.**
  2. **That the Defendant's application was in flagrant disregard of the express provisions of clause 45 of the agreement and conditions of contract for building works entered of the conditions and steps which had to be fulfilled prior to evoking of disputes to arbitration.**
  3. **The Defendant (sic) application herein was an after thought as clause 45 of the contract entered herein by the suit parties herein barred this court from assuming jurisdiction and referring the matter for arbitration.**
5. Its written submission were dated and filed on 17<sup>th</sup> September 2014.

### LEGAL ANALYSIS

6. The Plaintiff submitted that a party who had participated and taken part in the proceedings in court was barred from seeking a stay of the proceedings. It was its argument that the Defendant had acknowledged that there was no dispute to warrant trial in the first instance, that parties had recorded consents in court and that the Defendant had attended court several times thereafter.
7. It contended that the orders issued by the court were still alive but that instead, the Defendant had disobeyed the same. It also submitted that as parties had already agreed on a settlement, there was nothing to be referred to arbitration.
8. It referred the court to the cases of UAP Provincial Insurance Co Limited vs Michael John Beckett [2014] eKLR, Trishcon Construction Co Limited vs Leo Investments Ltd [ 2013] Eklr and Joel Kamau Kibe vs Kenyan Alliance Co Limited [2008] eKLR in this regard. It did not, however, attach copies of the said authorities for perusal by the court.
9. On the other hand, the Defendant placed reliance on the case of Niazsons (K) Limited vs China Road & Bridge Corporation Kenya [ 2001] 1 KLR 12 and Africa Spirits Limited vs Prevab Enterprises Limited [ 2014] eKLR where the common thread was that where there was a valid arbitration clause, a court would stay proceedings in court and refer the dispute to arbitration.
10. It argued that it filed a Memorandum of Appearance on 30<sup>th</sup> April 2014 which was the same date that it filed the present application as a result of which the court ought to refer the matter for determination to arbitration.
11. Clause 45 of the Agreement provided as follows:-

**“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 disputes shall be notified in writing by either party to other with a request to submit 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 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. “**

12. The arbitration agreement was in writing in line with Section 4 (1), (2) and (3)(a) of the Arbitration Act Cap 49 (Laws of Kenya).
13. In its Complaint that was dated and filed on 17<sup>th</sup> April 2014, the Plaintiff had sought the following prayers:-
  - a. **An injunction to restrain the Defendant whether by themselves, servant (sic) and agents from assigning, handing over or transferring the construction site to any party known or unknown taking of accounts and assessment of works by the Plaintiff as at 10<sup>th</sup> April 2014.**
  - b. **A declaration that the Defendant whether by themselves, servant (sic) and agents are not entitled to enter, transfer, assign, use and handover the construction site to any other**

- constructor, entity or persons until payments of the Plaintiff valuation number 9 and other pending payments.
- c. **The assessment and account of materials on site, work completed and costs of sums owed to the Plaintiff from the date of forceful takeover (sic) 8<sup>th</sup> day of April 2014 by the parties.**
  - d. **The payment of Kshs. 21,303,121.90 for labour, work done and materials delivered, loss of income and cost incurred due to breach of contract by the Defendants.**
  - e. **Exemplary damages for delay, breach and costs of repudiation of contract calculated at Kshs. 50,000/= per week together with Costs and interest at court rates of (sic) (a), (b) and (c) above from the date of filing suit until payment in full.**
14. The Defendant's letter dated 19<sup>th</sup> March 2014 to the Plaintiff Exhibit marked "FBR 2" that was annexed to the Defendant's Further Affidavit shows that the Defendant terminated the contract as the Plaintiff was said to have abandoned the works and failed to meet the necessary contractual requirements in accordance with Clause 12 and 13 of the Agreement.
15. It is not clear to the court why the Plaintiff opted to file suit instead of initiating the arbitral process for the determination of the dispute between them. What is evident from Paragraphs 12 and 13 hereinabove was that for all purposes and intent, there was a valid arbitration agreement with an express wish by both the Plaintiff and the Defendant to refer any dispute between them to arbitration and that there was in existence, a dispute between them.
16. Having said so, it is important to establish whether or not the Defendant complied with the provisions of Section 6 (1) of the Arbitration Act as it had contended and whether the dispute between the parties was capable of being referred to arbitration. The said section provides as follows:-
1. **A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if it 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 matter agreed to be referred to arbitration.**
17. The operative and key words are **"not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought....."**
18. The essence of Section 6(1) of the Act is that the Defendant ought to have filed an application for stay of proceedings at the time it filed its Memorandum of Appearance on 30<sup>th</sup> April 2014 and before taking any other step in the proceedings herein.
19. As was rightly pointed out by the Defendant in the holding in the case of **Niazsons (K) Ltd vs China Road & Bridge Corp** (Supra), before staying proceedings, the court has to consider whether the applicant had taken any steps in the proceedings other than the steps allowed by Section 6 (1) of the Arbitration Act. From the facts of this case, it did appear to the court that the Defendant fully complied with the provisions of Section 6 (1) of the Arbitration Act as it filed the present application on the day that it filed its Memorandum of Appearance in this case.
20. The Plaintiff's arguments that the Defendant had participated in the proceedings by recording consents did not represent the correct position of the law. When parties attended court on 30<sup>th</sup> April 2014, they agreed to negotiate a consent in respect of the Plaintiff's Notice of Motion application dated 17<sup>th</sup> April 2014 that had been filed together with the suit herein. They were to appear in court on 8<sup>th</sup> May 2014 to record a final settlement. When they appeared in court on 8<sup>th</sup> May 2014, the parties agreed that the Plaintiff would move out of the site and that they would jointly prepare a Valuation Report.
21. It did appear from the Plaintiff's submissions that the joint valuation had not been undertaken as at the time the present application was reserved for a ruling. The court was disinclined to accept the Plaintiff's submissions that the mere fact that both parties recorded the consent for it to vacate the

- site firmly brought the matter within the jurisdiction of the court.
22. The court cannot re-write contracts that have been entered into by the parties. They must therefore be bound by the terms therein. The intervention by the court is limited as can be seen in the provisions of Section 10 of the Arbitration Act which provides as follows:-

**“Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

23. While rendering its determination with regard to the issue of reference of matters to arbitration under Section 6 of the Arbitration Act, in the case of **Mali Developers Ltd v Postal Corporation of Kenya (2014) eKLR**, this court stated as follows:-

**“The Arbitration Act is a complete code for resolution and determination of disputes and the provisions of the Civil Procedure Act are limited in so far as they are appropriate as envisaged in Rule 11 of the Arbitration Rules 1997...Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function to ensure the administration of justice and it would therefore be in order for this court to interrogate the whole proceedings and evidence to ensure that justice was done. However, the court recognizes that it can only intervene in arbitral proceedings within the parameters envisaged by Section 10 of the Arbitration Act.”**

24. Accordingly, having carefully considered the pleadings, affidavit evidence and the written submissions relied upon by the parties, the court found that the issues that had been raised by the Plaintiff in its Plaint were technical in nature and fell within what was envisaged in the Agreement and Conditions of Contract for Building Works. They were not legal in nature and are best handled in the manner the parties initially intended them to be at the time they entered into their agreement. As the court cannot re-write the contract between the parties herein, they must be left to have their dispute resolved in the forum they voluntarily opted for.
25. As an *obiter*, the court wishes to observe that the provisions of Order 46 Rules 1 and 20 of the Civil Procedure Rules and the provisions in the Civil Procedure Act that were cited by the Defendant are not applicable in matters that are governed by the Arbitration Act.
26. Order 46 Rule 1 of the Civil Procedure Act would only have been applicable if there had been no arbitration agreement in writing between the parties but they agreed to refer the suit filed in court for determination by an arbitrator. Order 46 Rule 20 of the Civil Procedure Rules would only be applicable in matters being referred to other alternative dispute resolution methods other than arbitration.
27. While an application cannot be dismissed for citing wrong provisions of the law, parties are encouraged to indicate correct provisions when presenting applications under the Arbitration Act and to differentiate between summons and motions as provided for in Rule 2 of the Arbitration Rules, 1997. The court opted to disregard the technicality in the way the application for stay of proceedings of the suit herein was presented as the court is enjoined by Article 159 (2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to technicalities. The court would not wish to keep the parties in court for a minute longer when in fact they are supposed to be in another forum that they voluntarily and freely agreed to for the resolution of their dispute.

### **DISPOSITION**

28. For the aforesaid reasons, the upshot of this court’s ruling is that that the Defendant’s Notice of Motion application dated and filed 30<sup>th</sup> April 2014 was merited and in the circumstances, the same is hereby allowed in terms of Prayer Nos (1) and (2) therein. The Plaintiff shall bear the Defendant’s costs of this application.
29. For the avoidance of doubt, the injunctive orders that had been issued by Gikonyo J on 14<sup>th</sup> November 2014 are no longer in force. The same were neither extended when parties appeared before him on 28<sup>th</sup> November 2014 nor reinstated when parties appeared before this court on 8<sup>th</sup> December 2014.
30. It is so ordered.

**DATED and DELIVERED at NAIROBI this 19<sup>th</sup> day of January 2015**

**J. KAMAU**

**JUDGE**