REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 45A OF 2013

MIDROC WATER DRILLING CO. LTD…..PLAINTIFF/RESPONDENT

Versus

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION….DEFENDANT/APPLICANT

RULING

Stay of proceedings & Referral to Arbitration

[1] The Defendant is a state corporation and is represented in these proceedings by Prof. Tom Ojienda. It has applied through the Motion dated 5th day of February 2015 for the following orders:-

> (i) ***Pending the hearing and determination of the suit or dispute, the Defendant to be at liberty to take over, from the Plaintiff, the site of construction of Badasa Dam in Marsabit County;***
>
> ***(ii) All further proceedings in this suit to be stayed and the suit be referred to arbitration;***
>
> ***(iii) The parties to concur in appointment of an arbitrator within fourteen days, failure to which the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint a single arbitrator to determine the dispute;***
>
> ***(iv) The jurisdiction of the arbitrator so appointed be delimited to determining outstanding issue(s) in the Consent Order granted on the 19th day of September 2013;***
>
> ***(v) The Plaintiff/Respondent's Statement of Issues dated 15th day of September 2014 be limited only to outstanding issue, if any, in the Consent Order granted on the 19th day of September 2013; and***

(vi) Costs.

[2] The application is supported by the Affidavits of CPA Evans Ngibuini sworn on 5th day of February 2015 and the grounds set out in the application. The application was canvassed by way of written submissions of the parties.

Submissions by the Applicant

[3] The Applicant gave a brief analysis of the reliefs sought in the application. It stated that, on 20th day of August 2013, the Plaintiff and the Defendant filed Consent in this Court setting out issues which they agreed that if performed, would determine this suit. The consent is at pages 17-18 of the Application bundle. Consent Order was granted by the Court on the 19th day of September 2013 in terms of Order 49 Rule 3 of the Civil Procedure Rules, 2010. And by law, Consent Order once entered into binds parties as an order of this Court. This fact has been repeatedly admitted by the Respondent in its Notice of Motion Application dated 16th day of January 2014. The Applicant also referred the court to the following averments in the said Plaintiff's Application:

> a) Paragraph 3 of the Certificate of Urgency of Ahmednassir Abdullahi, SC dated 16th January 2014 ***at page 20 of the Application bundle***;
>
> b) Grounds 4 & 5 of the Notice of Motion dated 16th January 2014 ***at page 23 of the Application bundle***; and
>
> c) Paragraphs 5 & 6 of the Supporting Affidavit of Mohammed Said Chute sworn on 16th January 2014 ***at page 28 of the Application bundle***.

[4] The Applicant further submitted that Consent Order, once entered into by parties, cannot be varied or set aside except on grounds of fraud, misrepresentation, illegality or lack of authority. They relied on the decision of the Court of Appeal in the case of **Kenya Commercial Bank Limited versus Benjoh Amalgamated Limited & Another, Nairobi Civil Appeal No. 276 of 1997 [1998] eKLR**, which restated the principles thereto as follows:

> ***"…any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them…and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…or if the consent was given without sufficient facts or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension…."***

They also cited Visram J (as he then was) on the sanctity of a consent order in the case of ***National Bank of Kenya Limited versus James Orengo*, Nairobi HCCA No. 557 of 2002**, when he held thus:

> ***"Now there is nothing in this case to show that such circumstances existed. There is no claim for fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been mistake or misapprehension. As Windham, J. said, in the introduction to the passage quoted above from Hiranj's case, "a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."***

And the decision of the Court of Appeal in the case of **Samuel Wambugu Mwangi versus Othaya Boys' High School, Nyeri CA No. 7 of 2014**, that:-

> ***"…an order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in the misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement…the consent order made on 23rd May 2013 binds the appellant; no ground for setting aside a consent order was laid before the learned judge; and the appellant is also stopped from denying the terms of the consent judgment…"***

[5] According to the Applicant, the Consent Order granted on the 19th day of September 2013 set out specific obligations to the Plaintiff and the Defendant. The key obligation of the Defendant is contained in paragraphs 7 and 12 of the Consent Order. Paragraph 12 of the Order states that:

> "***The Defendant to issue the Plaintiff with an appropriate certificate of works done up to the date of disengagement.***"

The Applicant submitted that the site engineer prepared an appropriate Final Exit Certificate dated the **5th day of November 2014** and on the very 5th day of November 2014, the Defendant issued the Plaintiff with the Final Exit Certificate in terms of the Consent Order. The Engineer's Final Exit Certificate is at pages 68-93 of the Application bundle. In the Final Exit Certificate:

a. The site Engineer valued the **liquidated damages** set out in paragraph 2 of the Consent Order that the Defendant was entitled to levy against the Plaintiff as being **Kshs. 76,200,000.00** as follows:

> ***"In the opinion of the Engineer, the employer is entitled to levy liquidated damages up to the time the Engineer certified to the Employer that the contractor is in default pursuant to sub-clause 47.1 and the Employer was to enter upon the site on expiry of fourteen days notice from 18th February 2013; which transalates to be 254 days. Based on the daily rate stipulated in the Contract of Kshs. 300,000, this would represent a debit of Kshs. 76,200,000.00."***

b. The site Engineer valued the Exit Account in terms of paragraph 7 of the Consent Order. Exit Account is the amount due to the Contractor (Plaintiff) taking into account the works done, monies so far paid to the Plaintiff by the Defendant, materials on site and the levies that the Defendant is entitled to charge in liquidated damages. The site Engineer valued the Exit Account at **Kshs. 11,636,421.36**. As deposed in paragraph 8 of the Supporting Affidavit of CPA Evans Ngibuini, it is the Plaintiff that has failed to pick from the Defendant the valued Exit Account of **Kshs. 11,636,421.36.**
c. The Site Engineer valued the cost of Plaintiff's materials on site, being only sand and ballast using rates that the Plaintiff proposed to the Defendant. The Plaintiff's letter of proposal of rates for materials on site is at pages 92-93 of the Application bundle. At page 91 of the Application bundle, the Site Engineer states as follows:

> *"The attached letter was previously sent by the contractor in support of some negotiations where justification of the rate of filter Band A and B was needed. The Engineer considers the value of the cost of delivering of materials from Bubisa to Badasa, given herein (Kshs 4,500 and 3,200 – for fine and coarse media respectively), reasonable and has therefore applied these values in the Exit Certificate."*

[6] The Applicant stated that, the Final Exit Certificate addressed issues that parties consented would determine this suit. At paragraph 11 of the Consent Order, parties consented as follows:

> "***Defendant will be entitled to take over the site within 7 days of submission of final certificate***."

Seven ***days of submission of final certificate*** lapsed on **12th day of November 2014**. The Consent Order has never been varied or set aside. Indeed, no Application has ever been made to vary or set aside the Consent Order. The cost of the Plaintiff's materials on site, which is the main claim by the Plaintiff, is already valued by the site Engineer using **rates** that the Plaintiff wanted the Defendant to use. The Defendant is not averse to paying the Plaintiff the valued amount. Therefore, the Defendant prays that in terms of paragraph 11 of the consent order, the Defendant be at liberty to forthwith take over, from the Plaintiff, the site of construction of Badasa Dam in Marsabit County.

[8] The subject **Tender No NWC/HQ/095/2008-09 – Construction of Badasa Dam**, was a public interest tender intended to enable the Government of Kenya avail to the Tens of Thousands of residents of Marsabit County their right to water as enshrined in Article 43(1) (d) of the Constitution of Kenya; but the Plaintiff, who is sorely and solely driven by its already determined commercial interests, is intent on using Court process to circumvent and perpetually frustrate the achievement of the long overdue noble duty of Government to the people of Marsabit County. The Plaintiff will not suffer any irreparable loss if the Defendant takes over the site of construction of Badasa Dam in Marsabit County in terms of the Consent Order, as the monetary claims by the Plaintiff, if otherwise proved than they have been already determined by the site Engineer, are compensable by way of damages.

[9] The Applicant also supported the p*rayer for reference order.* Clause 67.3 of the ***Fidic Conditions of Contracts for Works of Civil Engineering Construction*** as read together with the ***Conditions of Contract Part II: Conditions of Particular Application*** mandatorily enjoined the Plaintiff and the Defendant to arbitrate a dispute between them related or incidental to the **Tender No. NWC/HQ/095/2008-09 – Construction of Badasa Dam**. Under section 7 of the Arbitration Act, the jurisdiction of Court in a matter which is a subject of arbitral agreement is limited to giving interim measures to parties. For instance, in the nature of take-over of site by the Defendant as sought herein as the duly appointed arbitrator determines the dispute with finality. The fact that parties have pleading in this Court is not a bar to issuance of a reference order. See the case of **Hausram Limited versus Nairobi City County, Milimani HCCC No. 421 of 2013 [2013] eKLR**, where despite parties to an arbitration agreement having expressly and unequivocally submitted to Court on the basis that they had abandoned arbitral process and acquiesced to the jurisdiction of the Court, Justice J.B. Havelock, in declining to assume jurisdiction in a matter held as follows at paragraphs 15-16 relying on leading Court of Appeal decisions as follows:

> ***"15…I do not accept the submissions of both parties hereto that by choosing to come before Court by Plaint as the Plaintiff has done, as well as the filing of a composite Defence and Counterclaim by the Defendant, that they have abandoned the arbitral process. It cannot be disputed that the Contractual terms and conditions, as above, stipulated that any dispute between the parties to those contracts were to be resolved by arbitration. The Arbitration Act and the Arbitration Rules provide for both the substantive and procedural manner in which matters referred to arbitration are to be dealt with. The role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the Arbitration Act. Section 10 of the Act provides that: "Except as provided in this Act, no Court shall intervene in matters governed by this Act."***
>
> ***16. By this Section, the jurisdiction of the Court is limited and restricted and may only be invoked in very clear and certain circumstances. This Section, as I read it, provides that the arbitral tribunal shall determine the matter referred to it and the intervention of the Court will be limited. In the Ruling of my learned brother Ogola J in Nairobi High Court Miscellaneous Civil Application No. 130 of 2011 Kay Construction Co. Ltd v AG & Anor (which this Court adopts) it was found: "It was held by the Court of Appeal in the case of East African Power Management Ltd v Westmount (K) Ltd [Nairobi Civil Appeal No. 55 of 2006] that the Court under Section 10 of the Arbitration Act had a limited role in intervening in matters where parties have agreed to refer matters to arbitration except where the Act specifically provided for such intervention. The Court consequently held that the said provision was mandatory and that the Court's role in***

arbitration matters was merely a facilitative one." In my opinion, it is quite clear from the said three Contracts as between the parties above referred to that they had entered into agreements in which their disputes were to be resolved by Arbitration. Once the parties had decided on this alternative mode of dispute resolution, which has been clearly recognised under Article 159 (2) (c) of the Constitution of Kenya, 2010, the Court as reiterated in the case of Kenya Shell Ltd v Kobil Petroleum Ltd (2006) eKLR will let the process take its course. The Court's intervention, in the process proper or the arbitral award thereafter, is limited and restricted to matters that are provided for under the Arbitration Act. The authorities quoted to this Court from England and Australia are merely persuasive. Further, the Judgement of Pall JA in the Kisumuwalla case (supra) was delivered (as a single Judge of Appeal) on 14th February 1997. This is well before the Court of Appeal decisions that I have referred to above, namely the East African Power Management and Kenya Shell cases. I believe that these authorities have superseded Pall JA's said Judgement. Further, I am of the belief that Article 159 (2) (c) of the Constitution, 2010 is expressed in mandatory terms and this Court is under a duty to promote alternative forms of dispute resolution. This is all the more so when the parties themselves have chosen the forum as is the case here. This Court, as the Defendant has pointed out in its submissions, cannot rewrite the Contracts already entered into between the parties… I direct that the Chairman of that Institute shall, within 21 days from the date of this Ruling, appoint a suitable arbitrator to consider and determine the disputes between the parties herein."

On that basis, the Applicant urged the court to grant the Notice of Motion Application dated 5th day of February 2015 as sought.

The Plaintiff resisted the application

[9] The Respondent is represented by Ahmednasir, SC. The Respondent opposed the application dated 5th February 2015 and filed a Replying Affidavit sworn by one Mohamed Chute filed on 12th February 2015. The Respondent set out the issues it thinks are critical and should be determined by the court. The first issue is:

a. Whether the Applicant should be allowed to take over the site of construction of Badasa Dam:

Their answer was in the negative for reason that the entire Application is misguided as it is solely premised on the first consent of 20th August 2013 and totally ignores the Second consent of 29th January 2014 that effectively allows the Respondent to retain the site until such a time the issue of the Final Certificate is resolved. The Respondent deposed in the Replying Affidavit inter alia at paragraphs 19, 44-45**,** that**,** the disagreement relating the values in the final Certificate still lingers. The said consent is intact and has not been reviewed and/or varied. Through this application the Applicant is in effect asking the court to vary the same and yet there is no such prayer nor has the court been moved through the relevant provisions! And in agreeing with the authorities cited by the Applicant, the consent cannot be varied, and/or set aside other than in the manner provided for by law. Further, the Respondent has gone to great length and has set out in the Replying Affidavit the efforts that the court has engaged in this matter to the point where the Court deemed it fit to direct that *STATUS QUO* be maintained until the hearing and determination of this matter. In the absence of an application for review, the prayer to take over the site amounts to and is indirect challenge of the interim measures ordered by the court. Thus, this court cannot sit on appeal over its own decision. Further this matter has been certified ready for hearing pursuant to the provision of order 11. The importance of pre-trials under order 1 was echoed by Hon. Lady Justice Gitumbi, in the case of ***Daudi Samuel Sumba & Another vs Pentoville Holdings Limited[2014]e KLR.***

[10] The second issue according to the Respondent is:-

b. Whether the present proceedings should be stayed and the matter refereed to arbitration.

They said that this matter has been in Court for Over **TWO (2) YEAR**. The Applicant has been

represented by a competent Counsel. And the provisions of ***Section 6 of the Arbitration Act*** are clear on the request for stay and referral of dispute to arbitration. The section provides as follows:

> ***'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 that 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.....***

The Applicant has not only entered appearance and filed a Defence and Counter Claim, but also proceeded to record not one but two consents which have been partly performed. In addition, the Court has issued substantive directions on the matter and proceeded to certify the same ready for hearing. There has been inexcusable and **INORDINATE DELAY** in filing this application and the order sought should not issue. See the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya [2001],** the judges of Appeal *inter alia* stated as follows:

> ***'All that that an applicant for stay of proceedings under section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application PROMPTLY. The Court will be obliged to consider three things: whether the applicant has taken any steps in the proceedings other that the steps allowed by the section; whether there is any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration.***

The Respondent believes that this honourable court is now **FULLY** and **FIRMLY** seized of this matter and the stay of proceedings sought cannot issue nor can the matter be referred to arbitration. By engaging to the extent that it has, even if such room existed to have the matter referred to arbitration, the same was effectively waived. See also the case of **Maluki vs Oriental Fire & General Insce [1973] E.A page 162**, where the judges of appeal held as follows:

> ***'As the application was made after the filing of the defence a stay should not have been granted'***

Similarly in the case of **Corporate Insurance Co. vs. Wachira, [1995-1998] EA Pg 21,** the Court of Appeal held as follows:

> ***'The arbitration clause was in the nature of scott v avery clause, which provides that all disputes shall be referred to arbitration ....a scott v avery can provide a defence to a claim but the party relying on it CANNOT circumvent the statutory requirement to apply for a stay of proceedings. If the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading. By filing a defence the appellant had lost the right to rely on the clause..'***

The above position was echoed by Hon. Lady Justice J Kamau in the case of **Martin Otieno Okwach & Charles Ong'ondo Were T/A Victoria Cleaning Services vs Kenya Post Office Savings Bank [2014]e KLR** , wherein she stated that:

> ***'..although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having duly filed its statement of defence in this matter...unless parties consent to have the matter referred to arbitration under Order 46 Rule 1 of the Civil Procedure Rules 2010, they are firmly stuck in the court system. Indeed while Article 65 of the constitution gives the High Court Supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only***

be exercised within the parameters of section 10 of the Arbitration Act which provides that: except as provided in this Act, no court shall intervene in matters governed by this Act'

This issue was discussed by Hon Justice Mabeya in the case of **Safaricom Limited vs Flashcom Limited [2012] e KLR** as well as by Justice Havelock in the case of **Thrishcon Construction Co. Ltd vs Leo Investments Ltd [2013] eKLR.**

[11] The third issue is:-

c. Whether some issues in the Respondents List of issues should be struck out or varied;

The Respondent submitted that, one of the cardinal roles of the Courts is, guided by the law to determine all disputes that come before it. As stated in the Respondent's Affidavit, the issue that the Applicant seeks to have varied and/or struck out is an issue brought about by its own actions of attempting to renege on a position already agreed upon. Elaborate explanation on this has been provided at paragraph **29, 44-45** of the Respondent's replying affidavit. At the very least the Applicant who has able Counsels on record ought to know and appreciate the doctrine of *estoppels*, which is old age doctrine and is available to the parties and inevitably this honourable court will be required to address its mind to that issue. The Applicant has not stated what prejudice he suffers by having this as an issue! He should table evidence at the trial showing how the issue is a non-issue. Further, the court needs to take cognisance of the fact that the Applicant has defied express orders and/or directions to file its own issues. Parties had the chance to come up with a list of agreed issues but they could not agree on a common list; the Respondent resulted to filing its own list of issues as directed by the court.

[12] The fourth issue is:-

d. Whether the Respondent is entitled to the prayers sought pursuant to the legal provisions that the application is premised

For reasons stated above, the Respondent answered this question in the negative. But the Respondent added that; whereas courts should not re-write contracts between parties, it is nevertheless a cardinal principle of law that, contracts are subject to the law. The court is being called to exercise discretion in this case, but it should do so judiciously and within the parameters set out by the law. The conduct of the Applicant in these proceedings is quite telling and the Respondent urged the court to consider the frustrations the Respondent has had to endure at the hands of the Applicant. The Applicant in this case is only hell bent on delaying the determination of this matter. They accused the Applicant of abusing the court process and by extension violating the overriding objective envisioned in the provisions of Sections 1A and 1B of the civil procedure Act and as such it cannot invoke the provisions. See the position that has been taken by the court in respect to the application of Sections 1A, 1B and 3A of the Civil procedure Act in the cases of **Hanif Sheikh vs Alliance Nominees Ltd & 17 Others[2014] eKLR** and **Hunker Trading Company Limited vs Elf Oil Kenya Limited e KLR**.

[13] The Respondent further stated that the provisions of section 5 of the Civil Procedure Act cannot apply as the court is now seized of the matter and has jurisdiction to hear the same to conclusion. Also, the provisions of Section 67(2) of the Civil Procedure Act have no bearing whatsoever to the current application. Similarly the provisions of Order 49 Rule 3 does not aid the Applicant as there is no dispute that consents were indeed executed and filed in court. As regards the provisions of sections 10 and 11(2) of the Arbitration Act, they too do not aid the Applicant.

[14] The fifth issue is:-

e. Who should bear the costs of this application

The Respondent argued that costs should follow the course. The application should be dismissed with costs.

DETERMINATION

[15] Other than the issue on costs, I see three significant issues for determination:

a) Whether the court should allow a take-over of the site herein;

b) Whether these proceedings should be stayed and the dispute herein referred to arbitration; and

c) Whether some issues in the Respondents List of issues should be struck out or varied.

[16] Under issue one, I will discuss the fact of existence of two consent orders and the import of those consents. From the record, parties herein recorded two consents. One is dated 20th August 2013 and the other 29th January 2014. The issue of take-over of the site in question is addressed in both consents. The application before me is, however, premised upon the consent letter dated 20th August 2013 and which received the superadded authority of the court on the 19th day of September 2013. The Applicant relied on the said consent and specifically paragraphs 7 and 12 of the Consent Order. Paragraph 12 of the Order stated that:

> "***The Defendant to issue the Plaintiff with an appropriate certificate of works done up to the date of disengagement.***"

The Applicant argued that the site Engineer valued the **liquidated damages** set out in paragraph 2 of the Consent Order and prepared an appropriate Final Exit Certificate dated the **5th day of November 2014** and on the very 5th day of November 2014 the Defendant issued the Plaintiff with the Final Exit Certificate in terms of the Consent Order. I would have let the matter rest there were it not for the fact that on 29th January, 2014, parties signed another consent which was also filed and recorded in court. The subsequent consent allowed new bidding for tender to complete the dam in question to continue except, it stated expressly that the Defendant will not allow, authorize, license or permit the successful bidders for the Tenders to enter into the Badasa Dam site and or take-over or undertake any works whatsoever on the said Dam site pending approval, finalization and issuance of the final Certificate signed by both parties in respect of the Tender No NWC/HQ/095/2008-09 (Construction of Badasa Dam). It went on to state that the parties with their respective engineers, consultants and legal counsels were to meet, approve and finalize the Final Certificate between the parties from the date of adoption of the said consent. The Defendant was to advise the plaintiff of the date of the new meeting which was to be held not later than 31st January 2014. The consent did not stop there. It provided that the Defendant and the Plaintiff were to resolve the issue of liquidated damages within 14 days from the date of adoption of the consent order as the order of the court, which failing the court was to determine the matter as well as the application dated 16th January, 2014 on merit. The consent was recorded in court and adopted as order of the court on 4th February 2014. The question now becomes: what is the effect of the subsequent consent?

[17] I must admit the application before me does not evince the presence of the consent dated 29th January, 2014. It is made without reference to the said consent order of the parties. I, however, agree with all the judicial decisions cited by the Applicant on consent orders. But, since the decisions on this point are legion, I do not wish to multiply except to cite one; i.e. **Kenya Commercial Bank Limited versus Benjoh Amalgamated Limited & Another, Nairobi Civil Appeal No. 276 of 1997 [1998] eKLR**, which restated the principles thereto as follows:

> ***"…any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them…and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…or if the consent was given without sufficient facts or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. No such circumstances have been shown to exist in this case.***

There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension…."

Accordingly, consent orders can only be varied or set aside by consent of the parties or by the court on grounds on which a contract can be varied or set aside, to wit, grounds of fraud, misrepresentation, illegality or lack of authority. In view of the circumstances of this case, I should re-emphasize, before it is forgotten, that a consent order can be set aside or varied by consent of the parties.

[18] Accordingly, the consent of 29th January 2014 varied terms of the earlier consent order especially on take-over of the site and determination on liquidated damages. The Final Certificate was to be approved and finalized in a meeting of all the parties with their engineers, consultants and legal counsels. The take-over of the site was to take place after the issuance of Final Certificate in accordance with this consent. This being the later consent order, by rules of construction takes precedence on matters it has provided for. There have been other attempts and which were recorded in court record on the measurements of work done and ascertainment of the liquidated damages but all were in vain. Parties could not eventually agree on the liquidated damages and the take-over of the site which prompted the court to give clear directions on the way forward on 14th March 2014, 6th May, 2014, 19th May 2014 and 29th May, 2014. Meanwhile, the court made an order on 29th May 2014 that the obtaining status to be maintained until this matter is heard. Whereas the court was fast tracking the matter given the public-interest element in it, the Defendant has not been complying with court orders to facilitate expeditious disposal of the case. In light of the record, and without insinuating anything, I am not able to say why the application is oblivious of these fundamental occurrences. Therefore, I refuse orders for take-over of the site as prayed for in the application dated 5th February, 2015. What about stay of proceedings and referral of the dispute to arbitration?

Stay of proceedings and referral to arbitration

[19] If I understood the Applicant well, it submitted that as long as a suit is founded on a subject of arbitration agreement as is the case here, it must be referred to arbitration. They cited ample judicial as well as statutory authorities on the matter. I admit the argument is formidable; powerful and could be mind-boggling. But I will resort to judicial high wit and experience to resolve the matter. I am pleased to note that the Applicant as well as the Respondent cited or alluded to section 10 of the Arbitration Act which provides that:

"Except as provided in this Act, no Court shall intervene in matters governed by this Act."

This section will have to be read together with section 6 of the Arbitration Act in order to provide unassailable perspective of the law on this matter. The section provides

"A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies <u>not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings,</u> stay the proceedings and refer the parties to the 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 matters agreed to be referred to arbitration***
c.

[20] The decisions of the Court of Appeal in the cases of **Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya [2001]; Maluki vs Oriental Fire & General Insce [1973] E.A page 162;** and **Corporate Insurance Co. vs. Wachira, [1995-1998] EA Pg 21** give an excellent exposition on section 6 of the Arbitration Act in a pointed manner. I also find great comfort in the case of **LOFTY v BEDOUIN ENTERPRISES LTD – EALR (2005) 2 EA;** first, because it is a decision of the Court of Appeal; and

second, it is in a pointed manner to the issue herein, i.e. section 6(1) of the Arbitration Act. The Court of Appeal was categorical that:

> ***"We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied <u>the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance</u> or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]***

[21] The rationale of the decision in the Lofty case is expressed in the statement by Githinji J. (as he then was) in HCCC 1756 of 2000, and which the learned judges of Appeal approved, that;

> ***"In my view, section 6(1) of the Arbitration Act of 1995 which the court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of Section 6(1) of the Arbitration Act of 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest state of the proceedings. Section 6(1) of the Arbitration Act, Chapter 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act of 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance."***

[22] This court takes similar view. I should restate, however, that an arbitration clause does not necessarily take away a party's right of action in court to enforce his claim. It is also true that an arbitration clause may be nothing more than collateral term of the contract between the parties by which a tribunal for determining disputes is provided. When a suit is brought upon a contract which has an arbitration clause, all that a party should do is to apply for stay of proceedings and referral of the dispute to arbitration in accordance with the arbitration agreement. Except, such application should be made in accordance with the Arbitration Act, which brings me to ponder whether a court of law which assumes jurisdiction on a case in accordance with section 6 of the Arbitration Act will in any way have violated article 159 of the Constitution or the Act. I do not think so. Section 6 is part of the Arbitration Act and enjoys a rebuttable presumption of constitutionality; importantly, the section guards against delay, serves the overriding objective and the principles of justice in article 159 of the Constitution by ensuring that applications for referral of the dispute in question to arbitration are made promptly. Therefore, whoever does not apply within the parameters set out in section 6 of the Arbitration Act offends the law and the Constitution, and will be deemed to have forfeited his right to rely on the arbitration agreement. I am, however, well aware that, despite violation of section 6 of the Arbitration Act, the court could still refer the dispute to arbitration but only with the consent of all the parties. The bottom line is that each case should be decided on its own facts and circumstances. I am persuaded by the appreciation by Kamau J in **Martin Otieno Okwach & Charles Ong'ondo Were T/A Victoria Cleaning Services vs Kenya Post Office Savings Bank [2014] eKLR**, on this jurisdiction of court when she stated that:

> ***'..although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having duly filed its statement of defence in this matter...unless parties consent to have the matter referred to arbitration under Order 46 Rule 1 of the Civil Procedure Rules 2010, they are firmly stuck in the court system. Indeed while Article 65 of the constitution gives the High Court Supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of section 10 of the Arbitration Act which provides that: except as provided in this Act, no court shall intervene in matters***

governed by this Act'

[23] Therefore, the intervention by the court in assuming jurisdiction under section 6 is provided for and permitted by the Arbitration Act. Thus, such intervention is envisaged under section 10 and is not interference whatsoever. For sure, this application is hopelessly out of time and violates section 6 of the Arbitration Act as well as the principles of justice on expeditious disposal of cases. On that basis, I refuse to stay proceedings or refer the dispute to arbitration. I should state that considerable time has been lost due to the back-and-forth tendencies of parties herein, which makes it absolutely necessary that this case be fast tracked for purposes of expeditious disposal thereto. I note there is public-interest element herein, i.e. provision of water to the people of Marsabit without delay. Accordingly, I direct parties to file all the necessary documents within 30 days. The case shall be mentioned on a date to be agreed between the parties for purposes of confirming compliance with all preparatory procedures and taking of a date for the hearing of the case. For completeness of record, estoppel is a matter of law and would apply where circumstances are apt. Needles to state also that issues arise from pleadings or from evidence or from such other subsequent matters done or recorded by the parties in the proceedings. There were later developments in this case after the consent order of 19th day of September 2013 which is part of record of the court. Therefore, I see nothing wrong with the Plaintiff/Respondent's Statement of Issues dated 15th day of September 2014. In any event, it is for the court to settle and determine the issues in the case as presented by parties in the court. I will not limit the issue to the consent of 19th day of September 2013. The upshot is that I dismiss the application dated 5th day of February 2015 in its entirety. I will not, however, condemn the Respondent to pay costs given the circumstances of this case. It is so ordered.

Dated, signed and delivered in court in Nairobi this 29th day of April 2015

F. GIKONYO

JUDGE