



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 153 OF 2015

HARRISON GITU MACHARIA T/A HAJAMA ENTERPRISES.....PLAINTIFF

- VERSUS -

ARROW DEVELOPERS LIMITED.....DEFENDANT

RULING

1. The defendant's application dated 6th May 2015 seeks the striking out of the Plaintiff. The basis for that application was that in the Agreement dated 13th December 2014, the plaintiff and the defendant had incorporated an arbitration clause.
2. It was the contention of the defendant that pursuant to the arbitration clause, all disputes between the parties were to be referred to arbitration. Therefore, as far as the defendant was concerned, the plaintiff ought not to have moved the court by filing the suit herein.
3. It is the view of the defendant that the plaintiff had violated and had totally disregarded clause 16 of the Agreement dated 13th December 2014.
4. The defendant's further submission was that if the suit was not struck out, the court should refer the dispute between the parties to arbitration.
5. In response to the application, the plaintiff submitted that there was no dispute which could necessitate reference to arbitration. The plaintiff believes that the defendant had simply failed to pay the sum of Kshs. 1,000,000/-.
6. Mr. Okwaro, the learned advocate for the plaintiff, submitted that before the court could refer the case to arbitration, it was imperative that the court be satisfied that there was actually a dispute between the parties. That submission was premised upon the fact that Clause 16 of the Agreement was under the Heading of "*Dispute Resolution*".
7. Therefore, if there was no dispute between the parties, the plaintiff believes that there would be nothing to be referred to arbitration.
8. It is noted that the plaintiff's claims were for the following reliefs;
 - a. **Unpaid balance of the purchase price....Kshs. 1,000,000/-**
 - b. **General Damages Kshs 10,000,000/-**
 - c. **Costs of the suit;**
 - d. **Interest at Court Rates; and**
 - e. **Any other or further relief as this Honourable**

Court may deem fit to grant.

9. In the light of those reliefs, which the plaintiff has sought in the Plaintiff, the court asked the plaintiff how the claim for General Damages could be dealt with. That question arose because Mr. Okwaro advocate had only addressed the question concerning the sum of Kshs. 1,000,000/- which the defendant had allegedly failed to pay.
10. The plaintiff's answer was that the claim for Kshs. 10,000,000/- was a claim under the common law governing contracts. Therefore, the plaintiff believes that that claim can be separated from the claim for Kshs. 1,000,000/-.
11. Mr. Okwaro said that the claim for Kshs. 10,000,000/- could be dismissed on the basis that it was not necessarily provable under the claim for Kshs. 1,000,000/-.
12. At that point, the court asked the plaintiff how the court would determine what was provable.
13. The plaintiff's answer was that the court could order that the case should not go to arbitration because the defendant had refused or failed to pay Kshs. 1,000,000/-.
14. The sum of Kshs. 1,000,000/- was, apparently, the outstanding balance after the defendant had paid Kshs. 9,000,000/-.
15. The plaintiff also said that the claim for General Damages amounting to Kshs. 10,000,000/- was not a claim under the Agreement between the parties.
16. Finally, the plaintiff submitted that the defendant did not give any reasons why the claim should go to arbitration.
17. In determining this application I take note of the fact that this whole case arose from the Equipment Purchase Agreement dated 13th December 2014. Pursuant to that Agreement, the defendant bought a Motor Grader Model CAT 140, from the plaintiff.
18. The agreed purchase price was Kshs. 10,000,000/-.
19. The defendant first paid a deposit of Kshs. 3,600,000/-. The balance of Kshs. 6,400,000/- was payable within 30 working days.
20. The Agreement also had a clause dedicated to the resolution of disputes. The said clause provided as follows;

"16. Dispute Resolution

All claims and disputes whatsoever arising under this agreement shall be referred to Arbitration in accordance with the provisions of the Arbitration Act of 1995, by a single arbitrator to be agreed between the parties. On failure of agreement, to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch, Nairobi on the application of either party"

21. It is obvious that the parties had made a conscious decision to have all claims and disputes referred to arbitration. Therefore, the plaintiff's contention, that only disputes could be referred to arbitration is not borne out from the wording of clause 16.
22. The parties wanted all claims and disputes to be referred to arbitration.
23. At paragraph 3 of the Plaintiff, the plaintiff put forth his claim against the defendant. It was a claim for Kshs. 1,000,000/-.
24. At paragraph 5 of the Plaintiff, the plaintiff put forth another claim: that was a claim that the defendant was liable to compensate the plaintiff for the massive loss of business which the plaintiff had suffered due to the defendant's failure to pay the balance of the purchase price.
25. To the extent that those 2 are claims, they fall squarely within the ambit of clause 16 of the Equipment Purchase Agreement. Therefore, the defendant did not have to specify the nature or scope of the dispute between the parties, before the court could order that the claims herein be referred to arbitration.
26. The plaintiff's assertion that the claim for General Damages does not arise under the Agreement, cannot stand scrutiny. I so hold because the plaintiff has expressly stated that that claim arose out of the defendant's default, in paying the balance of the purchase price. In effect, the claim for General Damages was interwoven with the claim for non-payment of the balance of the purchase price. It is therefore not a claim which could be independent of the claim for non-payment of the balance of the purchase price.

27.Pursuant to the provisions of Section 6 of the Arbitration Act, I now hereby stay all further proceedings in this case which is before the court.

28.I further order that the matters in issue, including the plaintiff's claims and disputes, if any, be referred to arbitration in accordance with the terms of the arbitration clause in the Equipment Purchase Agreement dated 13th December 2014.

29.The costs of the application dated 6th May 2015 are awarded to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of June 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Okwaro for the Plaintiff

Gacoka for the Defendant

Collins Odhiambo – Court clerk.