



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 392 OF 2012**

**PROJECT INNOVATIONS LIMITED. .... PLAINTIFF**

**VERSUS**

**AZIZA RESIDENTIAL SUITES LIMITED. .... 1<sup>ST</sup> DEFENDANT**

**CATHERINE RUTH WAMUYU MIMANO. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

This is a ruling to a Preliminary Objection dated 18<sup>th</sup> October, 2015 and filed on the 19<sup>th</sup> October, 2015. The objection has been raised by the Defendants and the same is premised on the fact that this Honourable Court lacks the necessary jurisdiction to hear and determine the matter in dispute and that the Arbitration Tribunal is the only body competent to deal with the issues in dispute herein except for the Counter-claim.

The Plaintiff in this matter filed a Plaint on the 7<sup>th</sup> August, 2012 seeking a sum of Ksh.13,547,430/- plus interest at Commercial Rates of 22% from 2<sup>nd</sup> May, 2012 until payment in full. He has also sought costs of the suit.

The cause of action arose out of a contract entered into between the Plaintiff and the 1<sup>st</sup> Defendant on the 9<sup>th</sup> February, 2011 wherein the 1<sup>st</sup> Defendant employed the Plaintiff as a contractor in the construction to completion, of two blocks of Residential Apartments and Associated External Works at Mirema Road on L.R No. 7968/2012 for a contract period of 36 weeks at an agreed costs of Ksh.74,398,684/-.

It was expressly provided in the contract that the consideration for the employment of the Plaintiff would be in the sum of Ksh.74,398,684/- payable as stipulated in clause 34 and the Appendix to the Agreement.

The 1<sup>st</sup> Defendant had caused drawings and specifications to be prepared showing and describing the work to be done and the Plaintiff commenced the works on the 11<sup>th</sup> February, 2011.

The Plaintiff in its Plaint avers that, the 1<sup>st</sup> Defendant in clear breach of its obligations to the Plaintiff purported to terminate the contract by its letter dated 14<sup>th</sup> October, 2011 under the Provisions of Article 381 of the Agreement and requested for a joint inspection of the project with the project consultants.

The project was stopped by the City Council of Nairobi when it issued an Enforcement Notice dated 25<sup>th</sup> February 2011 directing that the construction and ongoing works be stopped for failure to comply with the Physical Planning Act Section 30(1) and (ii) and the City Council By Laws.

The works resumed on the 18<sup>th</sup> May, 2011 after being stopped for 77 days with the Defendants having engaged a New Architect who issued New Architectural and Structural Drawings. The Plaintiff was duly instructed to demolish the works previously executed in respect of the original Architectural Drawings.

The revised drawings had an immediate impact of varying the cost of the project upwards from the initial Ksh.74,398,684/-. The Bill of Quantities was prepared and priced at Ksh.117,258,727.75 but the first Defendant herein intimated that it had only made a provision for Ksh.85,000,000/- for the project.

On the 2<sup>nd</sup> September, 2011 the Plaintiff submitted an Application for payment giving sufficient details for payment valued at Ksh.16,330,807/13 and requested for the first interim certificate to be prepared for payment. The Project Architect did not prepare the Certificate but instead served the Plaintiff with a Notice of Default dated 26<sup>th</sup> September, 2011.

The Plaintiff further states that the Respondent's action of terminating the contract was premature, illegal, unlawful and unjustified and that in doing so the 1<sup>st</sup> Defendant was in breach of the terms and conditions of the contract.

An Inspection was carried out by the Project Architects, Ember Creations Limited and the Project Quantity Surveyors, Elite Project Consultancy and a final statement of Account prepared in the absence of Plaintiff's representatives. The Projects Architects issued a final Interim Certificate on 2<sup>nd</sup> May, 2012 for a sum of Ksh.13,547,430/-. The Plaintiff thus, claims the aforesaid sum of Ksh.13,547,430/- which it claims continues to be outstanding.

Under clause 34.5 of the Agreement the plaintiff was entitled to payment of the final interim certificate within fourteen days of its presentation to the 1<sup>st</sup> Defendant but in breach of its obligations under the contract the 1<sup>st</sup> Defendant has failed and/or refused to pay the sum of Ksh.13,547,430/-.

The Defendants filed a joint defence on the 8<sup>th</sup> October, 2012 and admitted inter alia that the Plaintiff was awarded a tender for the proposed construction of Aziza Residential suites on Plot Number L.R. 7968/12 owned by the 2<sup>nd</sup> Defendant for a value of Kshs.74,398,684/- and for a contract period of 36 weeks.

The Defendants also admitted that it had caused the drawings and specifications to be prepared showing the work to be done and that the Bill of Quantities for the project was signed on 9<sup>th</sup> February, 2011 together with a set of Architectural Drawings. It is also admitted that the Plaintiff commenced the works on the 11<sup>th</sup> February 2011 as provided for in the Agreement.

Further in their defence, the Defendants avers that the Plaintiff submitted a faulty Application for payment contrary to the Agreement and other attendant guidelines and defended the notice of termination issued to the Plaintiff blaming the Plaintiff for persistent and unreasonable failure on its part to provide Performance Bond. The Defendants have also blamed the Plaintiff for persistent and unreasonable failure to provide the appropriate insurance and acting in a manner calculated to frustrate the due performance of the contract.

The Defendants have also filed a counter-claim wherein they have sought general damages for breach of contract and for defamation and dismissal of the Plaintiff's claim.

In the Counter-claim the Defendants alleges that on the 8<sup>th</sup> day of October, 2011 an Employee/Director of the Plaintiff a Mr. Ibrahim C R Ngaru while acting in his capacity as a Director of the Plaintiff, printed and published a letter to the Director, Mortgages Division, KCB Limited which was defamatory of the 2<sup>nd</sup> Defendant which letter forms the basis of the 2<sup>nd</sup> Defendant's counter-claim for a cause of action in defamation.

The matter came up for hearing on 19<sup>th</sup> October, 2015 when counsel for the Defendants raised a Preliminary Objection and argued that the court has no jurisdiction to hear the matter and referred the

court to clause 45 of the contract which provides for Arbitration in all disputes that may arise out of the Contract.

I have looked at the said clause which provides in the relevant part that Clause 45.1

***“in case any dispute or difference shall arise between the employer or the Architect on his behalf and the Contractor, either during the process or after the completion or abandonment of the works such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within 30 days of the Notice.”***

Clause 45.2

***“The Arbitration may be on the Construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith including any matter or thing left by this contract .....***

Clause 45.10

***“The award of such Arbitrator shall be final and binding upon the parties”***

The counsel for the Plaintiff on her part argued that a Preliminary Objection can only be on a point of law. She submitted that the dispute envisaged in clause 5 is very different from the dispute before the court in that the Plaintiff is seeking payment of specific terms set out in the final certificate issued in the Architect’s Certificate.

She further submitted that the Defendants have a counter-claim on defamation which cannot be referred to Arbitration and that the Preliminary Objection has been raised too late in day.

The court has carefully considered the submissions by both counsels in support of and against the Preliminary Objection.

The court does not concur with the counsel for the Plaintiff that what is purported to be a Preliminary Objection does not meet the required standards. The essence of a Preliminary Objection was given by law JA Old Sir Charles Newbold P in the case **of Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) EA 696** where Law J A stated: -

***“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an Objection to the Jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to a suit to refer the dispute to arbitration.”***

The Preliminary Objection herein is based on a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Though clause 45.2 is clear that the dispute may be on construction of the contract or any other matter whatsoever nature arising thereunder, the provisions of Section 6 of the Arbitration Act is so specific on when a party can apply for stay of legal proceedings.

Section 6(1) provides: -

***“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 the party enters appearance or otherwise acknowledges the claim against which the stay of the 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 in regard to the matters agreed to be referred to arbitration.”***

The counsel for the Defendants ought to have moved the court by way of stay of proceedings not later than the time when the Appearance was filed which he failed to do but instead went ahead and filed the defence and waited until the matter came up for hearing. The objection was made too late in the proceedings and there is no provision in the Arbitration Act for extension of time within which to apply for a stay of proceedings.

Even assuming that the Preliminary Objection was raised not later than the time when the Appearance was filed, the same could not have succeeded because Section 6(1) of the Arbitration Act is clear on the procedure to use which is by way of stay of proceedings and not by way of a Preliminary Objection.

For the foregoing reasons, the Preliminary Objection herein is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 19<sup>th</sup> day of November, 2015.

.....

**L NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Plaintiff.

..... for the Defendants.