



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 410 OF 2013

AFRICA SPIRITS LIMITED.....PLAINTIFF

• VERSUS -

PREVAB ENTERPRISES LIMITED DEFENDANT

RULING

1. I have two motions before me. They are at cross-purposes. The first is dated 20th September 2013 by the plaintiff praying for injunctive relief. The second is dated 4th October 2013 by the defendant seeking to stay the proceedings and to refer the dispute to arbitration. The defendant also prays for a counter-injunction.
2. The fulcrum of the dispute is a construction agreement executed by the parties on 8th April 2013. Under the agreement, the plaintiff contracted the defendant to construct a factory and go downs on LR No. 18/459, Thika. It was a standard form agreement and conditions of contract for building works published by the Joint Building Council of Kenya. The consideration was Kshs 250,000,000. The plaintiff avers that it has advanced the contractor Kshs 38,000,000.
3. According to the plaintiff, the works were to commence on 21st March 2013 and to end on 19th August 2013. The plaintiff's case is that the defendant breached the contract. The fundamental breaches were: falling behind in the work schedule; failing to account for the monies paid; failing to meet set targets; and, doing shoddy or sub-standard work. For example, it is pleaded in the plaint that a wall under construction caved in and collapsed on 1st July 2013. The plaintiff thus delivered a termination notice and appointed a new contractor. Those matters are buttressed by a deposition of Peter Njenga Kuria, a director of the plaintiff, sworn on 19th September 2013. As the defendant has refused to hand over or vacate the site, the plaintiff has brought these proceedings for prohibitive and mandatory injunctions.
4. The defendant contests the motion and has filed a replying affidavit sworn by Martin Mateli on 7th November 2013. As I stated, the defendant in turn prays that this matter be stayed and be referred to arbitration. In addition it prays for a counter-injunction to restrain the plaintiff from appointing another contractor or interfering with the construction site. The defendant denies breaching the contract. The defendant instead blames the rain and architects for slowing down its progress. The plaintiff, as expected, contests the latter motion and has filed a replying affidavit by Peter Njenga Kuria sworn on 24th October 2013.
5. There is a material document marked "PN2" annexed to another affidavit of the same deponent sworn on 1st November 2013. It states that the plaintiff has appointed a new contractor at the site, Parklane Construction Limited.
6. On 21st November 2013, I directed both parties to file written submissions. Both parties filed

their submissions on 20th November 2013. I have studied the pleadings, the depositions and rival submissions. I will deal first with the defendant's motion dated 4th October 2013. Clause 45.1 of the construction agreement provided as follows –

“In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, whether during the progress 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 thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a 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 the Architectural Association of Kenya, on the request of the applying party”.

7. Section 6 of the Arbitration Act (As amended by Act 11 of 2009) is in the following terms –

“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 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 matters agreed to be referred to arbitration.*

(2) proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

6. The defendant entered an appearance on 4th October 2013. Contemporaneously with that appearance, it presented the summons dated 4th October 2013 to stay the proceedings. It also craved orders for injunction and for joint valuation. If matters had rested there, there would be no serious contest on the defendant's right to stay of proceedings. In fact, the court is enjoined to stay the proceedings until determination of that summons. See TM AM Construction Group Africa Vs Attorney General Nairobi High Court case 236 [2001] 1 EA 291, Westmont Power Kenya Limited Vs Kenya Oil Company Limited Nairobi, Court of Appeal, Civil Appeal 154 of 2003 (unreported), Corporate Insurance Company Limited Vs Loise Wanjiru Wachira [1995] LLR 394 (CAK).

7. The defendant however proceeded to file a defence and counterclaim on the same date, 4th October 2013. By so doing the defendant invoked the full jurisdiction of the court. But does that *ipso facto* render the summons defective? The plaintiff's case is that by filing the defence, the proceedings can no longer be stayed. The plaintiff's view is that the defendant has abandoned the ship of arbitration: the court is now fully seized of the dispute. I disagree. What section 6 requires is the defendant to file the summons to refer the matter to arbitration at the *earliest*: that is, at the time he enters an appearance in the matter. If the defendant files a defence first before filing the summons for stay, he would run afoul of the Act and be deemed to have resigned his fate to the jurisdiction of the court. But in the instant case, the defendant filed the memorandum of appearance, the summons to stay the proceedings and the defence *simultaneously*. The filing of that defence cannot, in my very humble view, invalidate the motion for stay.

8. I am fortified by the amendments in Act 11 of 2009 to the Arbitration Act. That amendment removed the words “files any pleadings or takes any other steps in the proceedings” in the 1995 Act and replaced them with the words “or otherwise acknowledges the claim against which the stay of proceedings is sought”. The plain language is clear: the defendant, not later than the time he acknowledges the claim by the plaintiff, must file a summons for stay and reference to arbitration.

9. In a situation like the present one, it would be to turn logic onto its head to say that the defence filed *simultaneously* with the summons for stay precludes this court from referring the matter to arbitration. Like I have said, the situation would have been *different* if the defence was filed *first* and the defendant *subsequently* filed the summons for reference to arbitration. I cannot close my eyes to the fact that *not later than entering appearance and acknowledging the plaintiff’s claim*, the defendant filed a summons to refer the matter to arbitration. It would be to bury my head in the sand and pretend that the construction agreement signed by the parties, which has an express arbitration clause, is a phantom. It would be tantamount to scattering the freedom of contract to the four winds.

9. There is another reason that fortifies my view. Some of the leading decisions on section 6 of the Act that I set out earlier, predate the 2009 amendments to the section. Fundamentally, they *predate* the Constitution of Kenya 2010. Article 159 (2) of the Constitution now provides that 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);*

(d) *Justice shall be administered without undue regard to procedural technicalities”.*

10. Even in the old corpus of decisions, there were still some that were truly forward looking: they correctly held that all that an applicant was obliged to do by section 6 of the Arbitration Act was to bring the summons promptly. In Niazsons (K) Limited Vs China Road & Bridge Corporation Kenya [2001] KLR 12 Bosire J.A, with whom O’Kubasu J.A concurred, stated at page 21-

“Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The aforementioned section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly”.

10. In the end, I have found that the *Agreement and Conditions of Contract for Building Works* executed by the parties on 8th April 2013 contains an *express* arbitration clause. From the facts I set out at the beginning, it is evident that there is a *dispute* between the parties. That dispute relating to performance or breach of the contract is *capable* of reference to arbitration. I have also found that the defendant, *simultaneously* with filing pleadings in this case filed a summons to refer the matter to arbitration. The fact that a defence was filed at the *same* time with appearance and the summons for stay does not impeach the summons.

11. In a synopsis, I find that the defendant is well within the confines of section 6 of the Arbitration Act. I hold that the defendant has established proper grounds to refer this matter to arbitration. Accordingly these proceedings in the High Court are stayed. As a corollary, the remainder of the defendant’s summons seeking injunctive relief is stayed.

12. My findings on that application make the plaintiff’s notice of motion dated 20th September 2013 a *fait accompli*. The entire suit is stayed pending arbitration. In the result, I order as follows:-

a. As per clause 45.1 of the agreement, the dispute shall be referred to arbitration and final decision of a person to be agreed between the parties. Failing concurrence, the arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya, on the request of either party.

b) In the interests of justice, and taking into account that the contract between the plaintiff and defendant was terminated, and pending the formal appointment of the arbitrator, the *status quo* obtaining at the construction site shall be maintained until further orders of the arbitral tribunal. For the avoidance of doubt, that means that the defendant shall not re-enter or interfere with the site or the works being carried out by the new contractor, Parklane Construction Limited, until further orders of the arbitral tribunal.

c) Either party is at liberty to apply.

d) The costs shall abide the final arbitral award.

It is so ordered.

SIGNED at NAIROBI

GEORGE KANYI KIMONDO

JUDGE

DATED, COUNTERSIGNED and DELIVERED at NAIROBI this 23rd day of January 2014

JACQUELINE KAMAU

JUDGE

Ruling read in open court in the presence of

Mr.....for the Plaintiff instructed by Kinoti & Kibe Advocates.

Mr..... for the Defendant instructed by David Mutunga & Company Advocates.

Mr. C. Odhiambo, Court clerk.