REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 53 OF 2014

KISUMU CONCRETE PRODUCTS LIMITED……..…..PLAINTIFF

VERSUS -

PRIME STEEL MILLS LIMITED.....DEFENDANT

RULING

1. On 12th February 2014, the plaintiff instituted these proceedings by way of a plaint. Through the said plaint, the plaintiff asserted that the defendant breached the terms and the conditions of the contract between the 2 parties.

2. According to the plaintiff, the contract in issue was for a 2 year period, and it could only be terminated by either party *"in force majeure"* circumstances.

3. The plaintiff further asserted that even in the *"force majeure"* circumstances, the party wishing to terminate the contract had to give to other party, 3 months notice.

4. Being secure in the knowledge that the contract was for 2 years, the plaintiff says that he made a capital investment of Kshs. 37,059,888/-. The plaintiff then proceeded to perform its part of the contract.

5. However, the defendant was alleged to have failed to meet its obligations under the contract. Examples of the defendant's inappropriate actions were said to include the failure to make advance payment to the plaintiff, and the failure to pay the plaintiff on time, for the materials supplied to the defendant.

6. In a nutshell, the defendant was said to have made every effort to frustrate the plaintiff's attempts to perform the contract.

7. Ultimately, the defendant repudiated the contract on 14th November 2013.

8. Following the repudiation of the contract, the plaintiff left the mining site where the contract was to have been performed. By the time the plaintiff left the site, there were still 20 months remaining in the contract period, as only 4 months had lapsed.

9. It was the contention of the plaintiff that it had suffered losses and damages valued at Kshs. 156,000,000/-, as Special Damages. The plaintiff therefore claimed that sum, together with General Damages.

10. The defendant filed its Defence under protest. The primary reason for that was that the defendant deemed the parties to have compromised their respective positions by entering into an arbitral process. The said arbitral process was said to had led to a final and binding arbitral agreement dated 14th November 2013.

11. Through the Defence, the defendant gave Notice of its intention to apply to the court for the enforcement of the Arbitral Award.

12. The defendant has now moved the court for an order that the plaint ought to be struck out with costs. The defendant also requests this court to recognize the Arbitral Award as binding and enforceable.

13. It is that application by the defendant which is for determination before me.

14. On the one hand, the defendant insists that there was a lawful Arbitral Agreement entered into between the two parties herein.

15. On the other hand, the plaintiff appears to be conceding that although an Arbitral Agreement was executed on 14th November 2013, it was not lawful.

16. It is the plaintiff's contention that the said Arbitral Agreement was null and void as it was executed without lawful authority. The absence of a resolution by the plaintiff and the defendant was said to deprive the alleged Arbitral Agreement of legitimacy.

17. In any event, the persons who signed the alleged Arbitral Agreement were said to be strangers to the parties herein.

18. In comparison to the informal *"Arbitral Agreement"*, the plaintiff pointed out that the signatures to the contract between the parties specified their respective capacities in the companies, on whose behalf they were executing the contract. But in the Arbitral Agreement, the signatories were not only strangers, but they also did not specify their capacities.

19. Thirdly, the plaintiff took the position that a limited liability company can only execute an agreement lawfully if the said agreement was duly sealed or attested to as required by the law of contracts.

20. In any event, there was confusion in the Arbitral Agreement, as it specified some dates which had already passed, as being dates when the defendant was required to make payment at future dates. The resultant uncertainty was described as rendering the Arbitral Award null and void.

21. Another issue that was urged by the plaintiff was the lack of accord and satisfaction, which was always a key element in a compromise agreement.

22. In this case, the plaintiff contended that there was no lawful consideration from either the plaintiff or the defendant.

23. It is the plaintiff's further contention that there had not existed any dispute between the parties that could have been referred to arbitration.

24. As far as the plaintiff was concerned, the defendant had simply refused or deliberately failed to pay an indisputed debt.

25. And even if there had been any dispute, the plaintiff submitted that it did not participate in the mutual appointment of the alleged arbitrator. Indeed, the plaintiff asserted that the said arbitrator can be considered as having imposed himself.

26. Furthermore, the plaintiff pointed out that there was no place designated as the venue at which the arbitration was to have been undertaken.

27. There was also said to have been no legal framework, rules or procedures which were put in place to facilitate the alleged arbitration.

28. And because no party was accorded an opportunity to present his or her case to the arbitrator, the plaintiff asserted that there were neither pleadings nor evidence presented to the alleged arbitrator.

29. Therefore, the product of the flawed process was deemed to be anything but an Arbitral Award, said the plaintiff.

30. If the Arbitral Award was binding and enforceable, the plaintiff emphasizes that it would have to be enforced as it is. However, as the defendant conceded that the award had obvious mistakes, any attempt to re-write it would imply that the alleged award was not enforceable in its current form.

31. Meanwhile, the defendant submitted that the very essence of arbitration was to avoid wasting time, as normally happens when parties go through litigation. As far as the defendant was concerned, that is why it was important to keep arbitration flexible.

32. According to the defendant, the procedure to be adopted in any dispute should be appropriately tailored.

33. Quoting from the Court of Appeal Judges' decision in **KENYA OIL COMPANY LIMITED & ANOTHER APPEAL NO. 102 OF 2012,** the defendant emphasized that the parties can choose who is to be their arbitrator,

> *"and this means that they can choose a person with particular expertise involved in the dispute"*.

34. In effect, it does appear to me that both parties are in agreement about the need for participation in the choice of the arbitrator.

35. In the **KENYA OIL COMPANY LIMITED & ANOTHER VS. KENYA PIPELINE COMPANY** case, the Court of Appeal said;

> *"Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts".*

36. The first issue that needs to be resolved in this case is whether or not the parties did submit themselves to arbitration. The plaintiff says that it did not do so, whilst the defendant insists that both parties willingly submitted their disputes to arbitration.

37. Although the plaintiff pointed out that the Arbitral Agreement was not executed under seal, the defendant's position was that an arbitral agreement need not be under seal.

38. In any event, the contract between the two limited liability companies herein, was also not executed under seal; pointed out the defendant.

39. A perusal of the Contract dated 24th July 2013 reveals that it was not executed under seal. The contract was signed by two directors, who represented the plaintiff and the defendant, respectively.

40. Apart from the signatures of the said directors, the companies each affixed their respective stamps on the contract.

41. In my considered view, the plaintiff cannot be permitted to stand by the efficacy of the contract which was not executed under seal, but to then contend that the arbitral award was not valid simply because it was not executed under seal.

42. On the other hand, a flexible and affordable arbitration process must nonetheless be a structured one.

43. In the first instance, the parties must have a dispute between them.

44. The said parties must then agree to refer the matter to arbitration. Such an agreement would, ordinarily, have been inbuilt into the contract between the parties. However, even when a contract does not expressly provide for arbitration, the parties to the contract could always choose to refer any disputes to arbitration.

45. After a dispute is referred to arbitration, the parties would put forward their respective cases before the arbitrator.

46. Ordinarily, a case is put forward through evidence and submissions.

47. Once an arbitrator determines the issue placed before him, his award is final and binding on the parties. Thereafter, the jurisdiction of the court to intervene in the matters governed by the Arbitration Act is very limited.

48. At this point in time it is important to draw attention to the provisions of Section 32 A of the Arbitration Act, which makes it clear that the arbitral tribunal shall determine the matter referred to it.

49. It is upon that basis that the plaintiff founded its contention that there was no dispute which could have been referred to arbitration. In effect, if no specific matter, issue or dispute was placed before the arbitrator, it would be difficult to see that which the arbitrator would have proceeded to determine.

50. On the other hand if there was an arbitral agreement, which eventually gave way to an arbitral award, the aggrieved party ought to have asked the High Court to set aside the award.

51. Pursuant to the provisions of Section 35 (3) of the Arbitration Act, the aggrieved party would then have been required to move the High Court within 90 days from the date when that party received the arbitral award.

52. If the court was not moved within the prescribed period of time, the High Court would have no jurisdiction to give any consideration to an application seeking to set aside an arbitral award.

53. But in this case, the plaintiff was not seeking to set aside any arbitral award. As far as the plaintiff was concerned, it had come to court by way of a plaint, because there was no arbitral award.

54. If there was no arbitral award, then the plaintiff could not have come to court to have it set aside.

55. Having given due consideration to the facts and the submissions I now make the following findings.

56. The Contract between the two parties herein was dated 24th July 2013. It was a contract for 2 years, with an option for renewal.

57. The parties expressly stipulated that the contract was legally binding between them.

58. The signatories to the contract were **JATEEN PATEL** for Prime Steel Mills Limited, and **VIMAL RABADIA** for Kisumu Concrete Products Limited.

59. The contract bore the stamps of the respective parties. However, neither of the parties affixed their seals to it.

60. It was one of the terms of the contract that Prime Steel Mills Limited was to pay to Kisumu Concrete Products Limited, the sum of Kshs. 5,000,000/- as an advance payment. Pursuant to that term of the contract, Kisumu Concrete Products Limited were to deploy their mobile crushing unit and all other equipment, after being paid the advance payment.

61. It would appear that the intended advance payment was never made. However, the work commenced.

62. By 22nd October 2013, the defendant complained to the plaintiff about the lack of requisite capacity to perform the contract.

63. The plaintiff wrote back to the defendant saying that the defendant should pay the advance payment. The plaintiff also insisted that it had the capacity to discharge its contractual obligations.

64. The plaintiff's advocates, who wrote the letter dated 31st October 2013 made the following statements, amongst others:

> *"6. Some of the issues you raise are of repetition from your letter of 22nd October 2013 and our client's position remains as stated in our letter of 23rd October 2013.*
>
> *We confirm that our client is ready and willing to find an amicable resolution of the issues".*

65. The defendant's advocates replied to that letter on 4th November 2013, indicating that their client had arranged for a meeting with the plaintiff's directors, hoping that the said meeting would find an amicable resolution to the issues.

66. In my understanding of that exchange of correspondence, both parties appreciated that there were *"issues"* which needed to be resolved. The avenue of choice, for resolving the said issues was a meeting of the directors.

67. From the correspondence, it is clear that the meeting was scheduled for 12th November 2013.

68. On 18th November 2013, L.G. Menezes Advocates wrote to the plaintiff in the following terms;

> *"Reference is to our above named client and to the meeting held between the parties at the offices of Kibos Sugar and Allied Industries Limited, under the arbitrator, Mr. Raghbir Singh Chatthe…."*

69. That letter made specific reference to the *"Executed Agreement dated 14/11/2013"*, pursuant to which Prime Steel Mills Limited were to pay a total sum of Kshs. 6,450,000/- to Kisumu Concrete Products Limited, between December 2013 and May 2014.

70. Kisumu Concrete Products Limited responded immediately, on the same day, and returned the cheques for Kshs. 6,450,000/-.

71. On 15th January 2014 the plaintiff's advocates wrote to the defendant, demanding the sum of Kshs. 156,000,000/-. It was their contention that that was the quantum of the profits they would have made over the period of the 20 months which remained in the contract period. That sum was pegged to the monthly profit of Kshs. 7,800,000/-.

72. Of great significance to the matter before me are the following words in the letter from Rachuonyo & Rachuonyo Advocates, dated 15th January 2014;

> *"Our client has instructed us that the parties engaged arbitrators to attempt a resolution of the dispute arising out of a contract executed on 24th July 2013. It was agreed inter alia that you would make payment of any deliveries by our client within seven (7) days. You instead issued post –dated cheques in blatant breach of the said term. By letter dated 18th December 2013, our client notified you of the said breach and returned to you the post-dated cheques issued in payment of Kenya shillings Six Million Four Hundred and Fifty Thousand (Kshs. 6,450,000/-) whose details are well within your knowledge".*

73. In the light of those words, the plaintiff cannot now purport not to have been involved in the process of engaging an arbitrator. They had expressly stated that the *"parties engaged arbitrators"*.

74. Secondly, they went on to say that there was an agreement. They called that agreement *"the compromise agreement"*.

75. That phrase *"compromise agreement"* was first coined by the plaintiff, in their letter dated 18th December 2013.

76. Prior to that, the defendant had simply made reference to *"the executed agreement dated 14/11/2013"*.

77. At present there is only one Agreement before this court, which is dated 14th November 2013.

78. Pursuant to that Agreement, the contract between the parties was being terminated by both parties.

79. The Agreement names the plaintiff and the defendant as the two parties to the Agreement.

80. The signatories to the account were as follows;

i. *MAHENDRA PATEL*
ii. *JATEEN PATEL*
iii. *CHANO RABADIA*
iv. *VIMAL RABADIA*
v. *RAGHBIR SINGH CHATTHE*
vi. *PAKU SHAH*
vii. *MITHELL MENEZES*

81. Although the plaintiff has asserted that the signatories were strangers, it is noteworthy that both **JATEEN PATEL** and **VIMAL RABADIA** signed the Compromise Agreement as well as the contract document.

82. Surely, if their signatures were binding upon the parties to the contract, the same persons signatures would be similarly binding to the same parties when they executed the Compromise Agreement.

83. Of the other five (5) signatories, one is Mitchell Menezes, a partner in the Law firm of L.G. Menezes Advocates; whilst another one is **RAGHBIR SINGH CATTHE,** who was named as the arbitrator, in the letter dated 18th November 2011, which was signed by Mitchell Menezes.

84. In effect, four (4) out of the seven (7) signatories are clearly identified. They are not strangers.

85. I find that the signatures of the other three persons, namely Mahendra Patel, Chano Rabadia and Paku Shah, cannot have invalidated the Compromise Agreement.

86. I also find that the term *"Compromise Agreement"* cannot have been coined by the plaintiff for no reason. To my mind, that term was intended to describe the compromise which the parties had arrived at, during their meeting, at which they had gone to try and find an *"amicable resolution"* to the issues which had arisen between the parties.

87. The meeting itself was held at the offices of the Kibos Sugar & Allied Industries.

88. If the plaintiff wished to dispute any of the assertions regarding either the identity of the arbitrator or the place where the meeting was held, it could done so on 18th November 2013, when they returned the cheques for Kshs. 6,450,000/-.

89. But none of those matters were raised at that time. Therefore, the plaintiff must be deemed to have accepted those statements as being factually correct. It was therefore not in order for the plaintiff to raise the issues so much later, when the defendant had asked this court to declare that there was an arbitral award.

90. The arbitrator was not imposed on the parties. He was (or they were) appointed or engaged by the parties.

91. But where is the arbitral award?

92. Both parties were desirous of finding an *"amicable resolution"* to the issues which had arisen between them.

93. Their said desire appears to have yielded fruit at the very first meeting. Thereafter, the parties and the arbitrator signed a compromise agreement.

94. Through that compromise the parties agreed to terminate the contract.

95. They also agreed that the defendant would make the following payments;

"a) ROAD WORKS: Kshs. 600,000/-

b) MOBILIZATION & DEMOBILIZATION Kshs. 850,000/-

c) BLASTED MATERIAL: to be crushed by Kisumu Concrete Products Limited & delivered to Awasi at the same rate.

(Kshs. 3,900 plus VAT) M/s Kisumu Concrete Products Ltd to ensure and do its utmost to reduce adulteration of the material.

d) STANDING CHARGE (PLANT & MACHINERY)

Computed: 225 tons (daily) X 37 days X 350/- P.T = 2,900,000 (Rounded).

e) TERMINATTION: Ex-Gratia payment Agreed –

Kshs. 2,100,000/-

Kshs. 6,450,000/-.

f) Current delivery to be paid within 7 days from date of delivery.

The sum of Kshs. 6,450,000/- shall be settled by M/s Prime Steel Ltd in the following manner:-

1. ***December 2013 510,000/-***
2. ***January 2013 990,000/-***
3. ***February 2013 990,000/- + 990,000/-***
4. ***March 2013 990,000/-***
5. ***April 2013 990,000/-***
6. ***May 2013 990,000/-"***

96. The item numbered (e) makes reference to an Ex-Gratia payment of a sum amounting to Kshs. 2,100,000/-.

97. To the extent that that sum is not in respect to a payment for a specific product; and because it was being paid Ex-gratia, it may be deemed as the consideration being paid by the defendant, for the early

termination of the contract.

98. Parties go to court or to arbitration when they have a dispute between them. The court or the arbitral tribunal would be expected to make a determination after hearing the parties.

99. However, the fact that parties had come before either the court or before an arbitral tribunal, does not prevent them from continuing to find an amicable solution.

100. Oftentimes, parties will resolve the dispute between them even when they were already before a court of law or an arbitral tribunal.

101. The amicable solution arrived at can become an enforceable order or decree.

102. Therefore, the arbitral award herein is the "*compromise* agreement" which was signed by the parties and the arbitrator on 14th November 2013.

103. The said "*compromise agreement*" was not a variation of the contract.

104. It actually included a provision for the termination of the contract.

105. And alt hough the compromise agreement may have incorporated a bad bargain on the part of the plaintiff, that was not reason enough, in law, to re-open an otherwise final and binding arbitral award.

106. In the circumstances, I declare the arbitral award dated 14th November 2013 as final, binding and enforceable. Therefore, by bringing a claim through the plaint filed herein, the plaintiff is attempting to re-open a matter which had already been determined. This court has no alternative but to tell the plaintiff that its plaint constitutes an abuse of the process of the court. It is therefore hereby struck out, with costs to the defendant.

107. I also order the plaintiff to pay to the defendant, the costs of the application dated 24th March 2014.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **28th** day of **July** 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Odhiambo for the Plaintiff.

Allen Gichuhi for the Defendant.

Mr. C. Odhiambo, Court clerk.