REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL &ADMIRALTY DIVISION

CIVIL CASE NO. 188 OF 2013

EPCO BUILDERS LIMITED :: PLAINTIFF

VERSUS

SOUTH DEVELOPMENT COMPANY LIMITED :::::::::::::::::::::: DEFENDANT

R U L I N G

1. The **Chamber Summons** before the court is dated **17th June 2013** and is filed by the Defendant under Section 6 of the Arbitration Act 1995, Rule 2 of the Arbitration Rules, 1997; Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. The application seeks the following orders:-

> ***1. That this Honourable court be pleased to stay the suit herein pending the hearing and determination of the dispute through Arbitration.***
>
> ***2. That the dispute between the parties herein be referred to a Sole Arbitrator in accordance with the terms of the Arbitration Agreement in the Building Works Contract entered into by the parties.***
>
> ***3. That the costs of this application be awarded to the Defendant/Applicant against the Plaintiff/Respondent.***
>
> ***4. That such further or other Orders be made as may be just and expedient in the circumstances.***

2. The application is premised on several the grounds named therein and is supported by an affidavit of **David Kuria** dated **17th June 2013**.

3. The brief history of the application as told by the Defendant/Applicant is that the Plaintiff vide a Plaint filed herein on 15th May 2013 claims a sum of Kshs.89,953,086.63 from the Defendant on account of the contractual constructive works rendered by the Plaintiff pursuant to a Memorandum of Agreement dated 22nd March, 2006 through which Triad Consortium was established and both the Plaintiff and Defendant signed up as members. The purpose of the Consortium was to submit a bid jointly to the Kenya Ports Authority Staff pension scheme with specific reference to tender number KCHS/02/2005CE and KCHS/03/2005/CE. To effectively carry out this purpose the Defendant Company was established as “a special purpose vehicle” for the purpose of carrying out the functions required under the said Tender documents on behalf of the Consortium. In this regard the Plaintiff and Defendant herein entered into a Building Works

Agreement dated 6th February, 2007 where-under the Plaintiff/Respondent was contracted by the Defendant/Applicant to *inter alia* construct 135 4 bed roomed maisonettes including associated infrastructural services on L.R No. 209/12742/12744 South C for a contract sum of Kshs. 575,000,000/= as per specifications and conditions contained in the contract. Under the said agreement the project was to be undertaken in 78 weeks starting 1st November, 2006 and ending 29th April, 2008. There was however a Two (2) year delay occasioned by the Plaintiff/Respondent as a result of which the Defendant/Applicant allegedly suffered losses of upto **Kshs. 15, 626,666.67/=**.

4. Under the Contract the Plaintiff/Respondent is liable to pay to the Applicant the sum of **Kshs. 15, 626,666.67/=** as set out in the Certificate of Loss, which is annexed at page 54 of the application. Upon completion of Phase 3 of the project and despite Basement Water Proofing Guarantees given by the Plaintiff/Respondent, Ten (10) of the newly constructed houses developed serious leakages in the basements which leakages have been undergoing rectification by the Plaintiff/Respondent since 2011 without success and/or resolution. The Defendant/Applicant now contends that the aggregate costs of rectification of the aforementioned defects must be determined and/or quantified by an expert as this will substantively impact the sum claimed by the Plaintiff in the suit herein.

5. The Defendant/Applicant relies on the provisions of Arbitration Act. Section 6 of the Arbitration Act provides inter alia that where an Application such as the present one is made, the Court ***"shall stay and refer the parties to arbitration unless it finds that:-***

a) That the Arbitration Clause is null void, inoperative or incapable of being performed.

b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration".

The Applicant also relies on Article 159 (2) (c) of the Constitution which promote the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution. The Applicant submits that pursuant to the provisions of Section 6 (1) (b) of the Arbitration Act the court is required to undertake an enquiry as to whether there is a dispute between the parties and if so, whether such a dispute is with regard to matters agreed to be referred to arbitration. The Applicant cited the case of **Halki Shopping Corp - Vs - Sopex Oils (1997) 3 All ER 833** in which the court held *inter-a-lia* that

> ***"where the parties to a contract agreed to refer any dispute arising therefrom to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refused to admit or did not pay, <u>was a relevant dispute which the claimant was both entitled and bound to refer to arbitration</u>…."***

The Applicant also cited the decision in **Century Oil Trading Company vs Kenya Shell Limited High Court Misc Application No. 1561 of 2007 (unreported)** where the Court held as follows ***"I think it is trite that where parties have agreed to resolve a dispute arising out of a commercial agreement by arbitration, the courts are required to give effect to the wishes of such parties by enabling the parties to conclude with finality the determination of the dispute by arbitration."***

6. The application is opposed by the Plaintiff/Respondent vide a replying affidavit by Ramji Devji Varsani filed in court on 12th July 2013. Mr. Vardani describes himself as the Managing Director of the Plaintiff's Company and competent to swear the replying affidavit. The Plaintiff/Respondent story is that this suit is for the recovery of monies due under the Final Account of the Project executed by the Project Manager and the Plaintiff on the 31st May 2012, the Quantity Surveyor on 4th June 2012, the Defendant on 6th June 2012 and the Project Architect on 6th June 2012. In the Final Account above stated the Defendant admitted and accepted the certified amounts as due to the Plaintiff. It was executed and issued under clause 34 of the

Contract Agreement. The Project Architect, issued on the 11th October 2012 the Final Certificate No. No. Serial No. 962238 for payment. The Final Certificate was issued in accordance with Clause 34 of the Contract. By a letter dated **11th October 2012** the Project Architects certified the interest due on the delayed payments in accordance with the Contract.

7. The Plaintiff states that the Defendant has purported to raise, at its exhibit No. 53 a claim under for Certificate Loss. This the Plaintiff alleges, is a phantom claim without any basis at all for it is alleged to have been issued by the Project Architects and Project Director on 23rd December 2010 whereas it was dated 21st December 2011 namely one year later. At no time has the Defendant demanded any payment under this Certificate but more importantly. this Certificate has never been communicated to the Plaintiffs. The Final Accounts were settled in June 2012 and the Final Certificate of payment No. 962238 was issued by the same Project Architects on 11th October 2012 and received by the Plaintiff on the 13th October 2012. That Final Certificate took account of and superseded all previous interim and other certificates. The Plaintiff further states that the Defendant under the contract employed the Project Architects as his Agent, and by a letter dated 15th April 2013 addressed to the Plaintiff's Advocates admitted the claim and was due to submit a payment proposal. By the documents pleaded above the Plaintiff's claim was fully admitted in fact and law and there is no dispute in that respect, and that indeed in fact there is no any dispute between the parties with regard to the matters agreed to be referred to Arbitration as contemplated by Section 6(1) (b) of the Arbitration Act. The Defendant has made admissions as to the sum claimed and the Plaintiff is entitled to judgment as prayed on admission under Rule 2 of the Civil Procedure Rules. The Plaintiff further states that since Final Account was issued on 31st May 2012 and Final Architects Certificate of Payment on 11th October 2012 the Defendant has never demanded any monies from the Plaintiff nor Invoked the Arbitration Clause. This application cannot therefore lie and is an abuse of the process of the court, and is made purely to further delay payments to the Plaintiff.

8. With the leave of the court, parties filed written submissions for the applications. The Defendant/Applicant filed their submission on 1st October 2014, while the Plaintiff/Respondent did that on 12th June 2014.

9. The Defendant's/Applicant's submission, when summarised, amount to allegations *inter-a-alia* that there was a certificate of loss (*annexed at page 54 of the Application*) of Kshs.15,626,666.67 which the Plaintiff/Respondent is liable to pay to the Applicant. The Plaintiff has not accepted this Certificate, which non-acceptance is a dispute admissible under Clause 45 of the contract. The Defendant/Applicant further submitted that upon completion of Phase 3 of the project and despite Basement Water Proofing Guarantees given by the Plaintiff/Respondent, ten (10) of the newly constructed houses developed serious leakage in the basements which leakages have been undergoing rectification by the Plaintiff/Respondent since 2011 without success. There is a copy of the Guarantee and e-mail correspondences on the leakages annexed at pages 57 to 73 of the application. It is the Defendant's contention that the aggregate costs of the rectification of the above mentioned defects must be determined and/or quantified by an expert as this will substantially impact the sums claimed by the Plaintiff herein. The Defendant/Applicant submitted that Section 6 of the Arbitration Act provides *inter-a-alia* that where an application such as this is made the court "***shall stay and refer the parties to arbitration unless the court finds that the arbitration clause is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration.***" The Defendant cited the case of **Halki Shopping Corporation – Vs Sopex Oils [1997] 3 ALL ER 833** where the court held that;-

> ***"where the parties to a contract agreed to refer any dispute arising therefrom to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refused to admit or did not pay, was a relevant dispute which the claimant was both entitled and bound to refer to arbitration . . ."***

The Defendant/Applicant also submitted that the Plaintiff's claim is mainly composed of a sum of Kshs.62,131,182.563 being interest on delayed payment, and that it was not agreed which commercial bank rates would be applied, or which particular bank base lending rate would be used. Therefore, it was submitted that there was a dispute as to the interest rates to be applied.

10. On their part the Plaintiff/Respondent submitted that there was a indeed no dispute to be referred to arbitration and that the Final Certificate of Costs was issued under Clause 34.22 which was final. Clause 34.22 provided as follows:-

> "***Unless a written request to concur in the appointment of an Arbitrator shall have been given under clause 45.0 of these conditions by either party before the final certificate has been issued, or within thirty days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under clause 45.0 of these conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this contract and that any necessary effect has been given to all the terms of this contract which require an adjustment to be made to the contract price, except and in so far as any sum mentioned in the said certificate is erroneous by reason of;***"

11. Pursuant to the said Clause 34.22 of the Agreement, the Quantity Surveyors Mathu Gichuiri Associates prepared the Final Valuation Statement dated 6th December, 2011 (document number 57 attached to the Plaint) and the Final Account was agreed to in signing by all the parties namely, the Defendant/Applicant, the Project Managers, the Architect, the Quantity Surveyors and the Plaintiff/Respondent and evidenced by document number 58 attached to the Plaint the Architect issued on the 11th October, 2012, the Final Certificate of Payment number 962238 (*document number 61 for Kshs. 679,624,897.00/=*). The Architect's letter of 11th October, 2012, conveying the revised Final Certificate of Payment for payment by the Defendant/Applicant for Kshs. 679,624,897.00/=. By a letter dated 11th October, 2012 and copied to all other parties, the Architect certified that the interest for delayed payment due to the Plaintiff was Kshs. 60,755,204.00/= (*document number 59*). The Plaintiff's Advocates after repeated reminders by registered post made a formal final demand by a letter dated 19th March, 2013 (*document number 70*). The Defendant by a letter dated 15th April, 2013 (document number 72) acknowledged the letter of demand, unequivocally admitted the Plaintiff's debt and undertook to make a payment proposal. The Plaint herein was filed on 15th May, 2013, having not received any payment proposal. Up and till filing of the Plaint, the Defendant had neither;

(i) Challenged any Interim Certificates or Final Certificates or raised any alleged dispute for resolution.

(ii) Under Clause 34.22 of the Building Contract raised any dispute nor had written a request to concur in the appointment of an Arbitrator.

(iii) Nor at any time, and as required by clause 45.1 of the Contract (document number 48) ever in writing, notified the Plaintiff of any dispute for submission to Arbitration.

The Plaintiff submitted that pursuant to Clause 34.22 (*document number 34*) the said Final Certificate had become conclusive evidence in any proceedings arising out of this contract.

12. The Plaintiff submitted that under Clause 2.6 the Defendant appointed the Architect, Quantity Surveyor and other Consultants pursuant to Clause 2.13 of the Contract. They are the Defendant's agents. The Defendant must accept the final contract and any attempt to refer this matter to arbitration is merely a delaying tactic.

13. I have carefully considered the application and opposing submissions. It is clear that both parties agree on the validity of the Arbitration Clause (45), with the Plaintiff/Respondent

only saying that there is no dispute to file under that Clause. The Plaintiff also emphatically states the finality of Clause 34.22. Therefore, I will raise only 2 issues in order to determining the application, and these are:-

> ***i. The effect of Clause 34.22 to this application,***
>
> ***ii. Whether there exists a dispute to be referred to arbitration.***

14. On the first issue, we need to examine Clause 34.22 of the contract, not in isolation, but together with its exceptions.

> ***34.22 Unless a written request to concur in the appointment of an Arbitrator shall have been given under Clause 45.0 of these conditions by either party before the final certificate has been issued, or within thirty days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under Clause 45.0 of these conditions or others) that the Works have been properly carried out and completed in accordance with the terms of this contract and that any necessary effect has been given to all the terms of this contract which require an adjustment to be made to the contract price, except and in so far as any sums mentioned in the said certificate is erroneous by reason of:-***
>
> ***34.22.1 Fraud, dishonesty or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate or***
>
> ***34.22.2. Any defect including any omission in the Works or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the Works or before the issue or the said certificate would not have disclosed, or***
>
> ***34.22.3 Any accidently inclusion or exclusion of any works, materials, goods or figure in any computation or any arithmetical error in any computation.***

15. In my view, while I agree with the Plaintiff that Clause 34.22 makes any Certificate filed thereunder final and unchangeable, the exception found under Clause 34:22.2 opens up the said Certificate to challenge issues of any defect including any omission in the works or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the works or before the issue of the said certificate would not have disclosed. It is therefore my finding on issue number one above that the said certificate and any other notices issued under Clause 34.22, and particularly the alleged final certificate for payment issued to the Plaintiff by the Architects on 11th October 2012 and any subsequent variations and communications, if any or at all, are not final and are challengeable under the exception found at Clause 34.22.2 of the Contract.

16. The second issue is whether there is a dispute to be referred to Arbitration. Under Section 6 (1) of the Arbitration Act this court is required to undertake an enquiry as to whether there is a dispute between the parties, and if so, whether the dispute is in regard to matters agreed to be referred to Arbitration. A close look at the dispute discloses at least three categories of disputes, between the parties as follows:

> **i)** At paragraphs 4, 5 and 6 of the Supporting Affidavit sworn by David Kuria the Applicant contends that as a result of the 2 year delay occasioned by the Respondent it suffered losses of upto Kshs. 15, 626,666.67/= as evidenced by the Certificate of Loss. The Respondent at paragraph 4 of its Replying Affidavit denies the validity and/or existence of the Certificate of Loss and states *inter-a-lia* that "**This is a phantom claim without any basis at all**". The Respondent goes ahead to raise issue with the date of the Certificate of

Loss and alleges that the same has never been communicated to them and that no demand has ever been made for the sum of Kshs.15,626,666.67/=. The Respondent further alleges that the Final Certificate took into account the said sum of Kshs.15,626,666.67/= a fact that is vehemently denied by the Applicant. The issue raised herein qualify as a dispute to be referred to arbitration.

ii) The Plaintiff/Respondent claims a sum of Kshs.62,131,182.63/= as interest on delayed payments. Clause 34.6 of the Contract provides inter alia that **"the Employer shall allow or pay to the Contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial bank lending rate in force during the period of delay"**. The parties herein did not agree on the commercial bank that would determine the base lending rate to be used in calculating the interest and the Respondent has at no point indicated the interest rate used (and from which bank) to arrive to the considerable figure of Kshs. 62,131,182.63/= . There is therefore a dispute as to the interest rate to be applied which dispute ought to be referred to arbitration pursuant to Section 6 of the Arbitration Act. In support of the position I cite the case of the decision of the **Court of Appeal in University of Nairobi vs N.K Brothers Limited (2009) eKLR** where it held *inter-a-lia* that;

"Furthermore, there is the question of interest which the Respondent claims in the Plaint as 32% per annum from 23rd November, 1998 when the last certificate was issued till payment in full. We cannot see that aspect covered in the contractual agreement and Mr. Hira referred us to none. In our view, it constitutes a dispute and it will if the Respondent succeeds in getting it awarded impact very heavily on the entire claim".

iii) Further there is a dispute as to which party is liable to pay the interest due (if any) to the Respondent. Clause 34.20 of the Contract provides inter alia that **"the Final Account shall be agreed between the Quantity Surveyor, the Contractor and Architect"**. With regard to Final Certificate No. 31 the project Architects (Triad Architects) in its letter dated 11th October, 2012 addressed to the Respondent stated *inter-a-lia* that;

"We refer to the revised final certificate no. 31 issued on 11th October, 2012.

Please note that the interest on delayed payment amounting to Kshs. 60,755,204/= will be paid separately by the client .

Also be informed that interest on delayed payment is not subjected to VAT hence should be considered separately."

The client referred to in the Architect's letter is the Kenya Ports Authority Staff Pension Scheme. Clearly, again, this is evidence of an issue where there is a dispute.

iv) At paragraphs 10 of the Application and paragraphs 7, 8 and 9 of the Supporting Affidavit sworn by David Kuria the Applicant has raised issue with the leakages in the Ten (10) basements and states that the aggregate cost of rectification of the material defects which is yet to be determined would substantively impact the sum claimed by the Plaintiff/Respondent. This issue has not been addressed by the Respondent in its affidavit and is deemed admitted. The effect of the foregoing is that once the arbitrator determines the aggregate cost of rectification, the Defendant/Applicant would be entitled to offset the same from what is ultimately determined to be due to the Respondent herein. In my view, this is another dispute which may be referred to arbitration.

17. Pursuant to the foregoing, I am satisfied that the Defendant's application is merited. I allow it as prayed with costs to the Defendant/Applicant.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

Oyugi holding brief for Otieno for the Defendant

Teresia – Court Clerk