



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 190 OF 2013

ROOFSPEC & ALLIED WORKS CO LTD.....PLAINTIFF

VERSUS

GEORGE KAMAU THUGGE.....DEFENDANT

RULING

1. The Defendant's Chamber Summons application dated 18th July 2013 and filed on 19th July 2013 was brought under the provisions of Section 6 of the Arbitration Act, Rule 2 of the Arbitration Rules, 1997, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. He sought the following prayers:-
 1. THAT the honourable court be pleased to stay the instant proceedings and refer the dispute to arbitration in accordance with the terms of the building contract between the Plaintiff and the Defendant herein.
 2. THAT the costs of this application be provided for.

THE DEFENDANT'S CASE

2. On 18th July 2013, the Defendant swore an Affidavit that was filed on 19th July 2013. His Supplementary Affidavit was sworn on 7th March 2014 and filed on 11th March 2014. He explained that he had entered into an agreement with the Plaintiff on 29th March 2010 for the construction of flats on Land Reference No 23124/3 Ngong (hereinafter referred to as "the subject property"). The agreement adopted the Joint Building Council Kenya Agreement and Condition of Contract for Building Works (hereinafter referred to as "the Contract") in particular Clause 45 thereof, which expressly provided for reference of any dispute between the contracting parties to the Project Architect for arbitration.
3. Clause 45 of the Contract provided as follows:-

“In case any dispute or difference shall arise between the employer or the Architect on his behalf and the contractor, such dispute shall be referred to the Project Architect for arbitration.”

4. It was his contention that by instituting a suit demanding for Kshs 28,382,429.67 and further filing a Notice of Motion application dated 16th May 2013, the Plaintiff was in direct contravention of the dispute resolution mechanism that was provided by the arbitration clause in the building contract. He further averred that the failure by the Plaintiff to undertake the works in accordance with the contract necessitated the issuing of the notice of termination on 19th February 2013 and the taking possession of the site on 19th April 2013.
5. His written submissions were dated 7th March 2014 and filed on 11th March 2014.

THE PLAINTIFF'S CASE

6. The application was opposed by the Plaintiff who filed its Replying Affidavit that was sworn by Stafford Stephen Woodyard on 5th February 2014 and filed on even date. It was its contention that in as much as the building contract provided for arbitration, the same was inoperative and incapable of being performed.
7. It attributed this to the fact that the Project Architect had failed to conduct himself professionally by siding with the Plaintiff (sic) and had failing to impartially advise the Defendants and thereby compromising its interests. Further, it stated that the reference of the dispute to arbitration would not be in the interests of justice as the Defendant would influence the arbitrator who was his agent and employee and thus make a determination in his favour.
8. It filed its written submissions dated 9th May 2014 on the same date.

LEGAL ANALYSIS

9. The Plaintiff illustrated several instances in Paragraphs 6-11 of its Replying Affidavit which it felt that the Project Architect had acted in a manner indicating that he would be partial and discriminate against the Plaintiff. However, the Plaintiff's objection of the reference of the dispute to arbitration on the ground that the arbitrator would be partial and be influenced by the Defendant was neither here nor there. In as much as the Plaintiff's perception was that determination would be rendered against it, it did not demonstrate that the Project Architect was partial and biased as an arbitrator.
10. The above notwithstanding, this was an issue that would be dealt with under the provisions of Section 13 of the Arbitration Act Cap 49 (Laws of Kenya). Indeed, the issue of partiality and bias on the part of an arbitrator was not one that could be set up as a defence to convince the court not to refer a matter to arbitration if there was an arbitration agreement between the parties. The court will therefore not dwell on submissions in this respect.
11. Whilst the court noted the cases of **Kenya Pipeline Company Ltd v Datalogix Limited & Another (2008) 2 EA 192**, **Lofty v Bedovin Enterprises Ltd (2005) 2 EA 122** and **Mugihv Speedway Investment Ltd & Another (2010) 1 EA 259** that were relied upon by the Plaintiff, it was instructive to note that the facts of those cases were clearly distinguishable from the facts herein. This is because the arbitration agreement was not null and void, inoperative or incapable of being performed.
12. What was of concern to the court was whether or not the Defendant was entitled to the orders that he had sought as he was categorical that there was a dispute between him and the Plaintiff that was capable of being referred to arbitration and that he had brought the application timeously.
13. He submitted that the court could not re-write the contract between the parties as had been held in the case of **National Bank of Kenya v Pipelastik Samkolit (K) Ltd & Another [2001] KLR 112** and that a party could not seek a revision of terms after failing to abide by the terms of agreement and more so if the revision was founded on mere allegations as had been held in the case of **County Council of Malindi v Pisces Limited [2010] eKLR**.
14. He relied on the provisions of Section 6 of the said Arbitration Act that stipulate as follows:-
 1. **A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a 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 matter agreed to be referred to arbitration.**
15. The operative and key words are **“not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.....”**
 16. The essence of Section 6(1) of the Act is that the Defendant ought to have filed an application for stay of proceedings at the time it filed its Memorandum of Appearance on 19th July 2013 and before taking any other step in the proceedings herein.
 17. In the case of **Niazsons (K) Ltd vs China Road & Bridge Corp (2001) KLR 12** that was relied upon by the Defendant, the court held that before staying proceedings, it had to consider whether the applicant had taken any steps in the proceedings other than the steps allowed by Section 6 (1) of the Arbitration Act.
 18. The provisions of Clause 45 of the Joint Building Council, Kenya Agreement and Conditions of Contract Joint and Clause 3 of the building contract dated 29th March 2010 provided in express terms for the referral of any matters to arbitration. However, court intervention in such matters is limited to the provisions of Section 10 of the Arbitration Act.
 19. While rendering its determination with regard to the issue of reference of matters to arbitration under Section 6 of the Arbitration Act in this court stated as follows:-

“The Arbitration Act is a complete code for resolution and determination of disputes and the provisions of the Civil Procedure Act are limited in so far as they are appropriate as envisaged in Rule 11 of the Arbitration Rules 1997...Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function to ensure the administration of justice and it would therefore be in order for this court to interrogate the whole proceedings and evidence to ensure that justice was done. However, the court recognizes that it can only intervene in arbitral proceedings within the parameters envisaged by Section 10 of the Arbitration Act.”

20. The mere fact that the Defendant did not file its application at the time it filed its Memorandum of Appearance or as envisaged in Section 6 of the Arbitration Act brought this matter within the ambit of this court. The court became fully seized of this matter.
21. The only available or course open to both the Plaintiff and the Defendant would be for either of them to make the necessary application under Order 46 Rule 1 of the Civil Procedure Rules, 2010 in the event they would wish to have their dispute referred to arbitration. The said Order provides as follows:-

“1. Where in any suit all the parties interested(emphasis court) who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration they may, at any time before judgment is pronounced apply to the court for an order of reference.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.”

22. Accordingly, having carefully considered the pleadings, affidavit evidence and the written submissions relied upon by the parties, the court finds that unless both the Plaintiff and the Defendant opted to proceed under Order 46 Rule 1 of the Civil Procedure Rules, they were now firmly stuck in the court system.

DISPOSITION

23. For the aforesaid reasons, the upshot of this court’s ruling is that the Defendant’s Chamber Summons application dated 18th July 2013 and filed on 19th July 2013 was not merited and in the

circumstances, the same is hereby dismissed with costs to the Plaintiff herein.
24. It is so ordered.

DATED and DELIVERED at NAIROBI this 18TH day of DECEMBER, 2014

J. KAMAU

JUDGE