REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 464 of 2012

CHINA SICHUAN CORPORATION FOR INTERNATIONAL

TECHNO-ECONOMIC CO-OPERATIVE (SIETCO).....PLAINTIFF

VERSUS

KIGWE COMPLEX LIMITED.....DEFENDANT

R U L I N G

1. This is another one of those cases in which the Defendant has applied for a stay of all proceedings before court pending reference of the dispute between the parties to arbitration. Such follows an Application by way of Notice of Motion by the Plaintiff dated 16 August 2012 seeking summary judgement as against the Defendant Shs.25,560,150.90. That aside, the Defendant's Application is by way of Chamber Summons dated 27 August 2012. It is brought under the provisions of Article 159 (2) (c) of the Constitution of Kenya as well as **section 6** of the *Arbitration Act (Cap 49, Laws of Kenya)* and **Rule 2** of the Arbitration Rules, 1997. The Defendant's Application is brought on the following grounds:

"a) The Plaintiff and Defendant entered into an agreement dated 31st March 2011 (hereinafter called "the Agreement"), in which the Plaintiff as Contractor, agreed to construct and complete a commercial cum residential block on behalf of the Defendant, on Land Reference Number 209/15297, at an agreed consideration more particularly set out in the Agreement.

b) Clause 45 of the said Agreement provides for resolution of all disputes by arbitration.

c) The Plaintiff's invoices are disputed by the Defendant, on ground that the Plaintiff, in breach of the Agreement, sub-contracted the work agreed to be done, leading to poor workmanship and therefore the Plaintiff does not deserve to be paid the amount it demanded.

d) This suit has therefore been instituted by the Plaintiff in violation and total disregard of Clause 45 of the said Agreement.

e) Section 6 of the Arbitration Act (No.4) of 1995 (hereinafter called "the Act") empowers the court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay the proceedings and refer the parties to arbitration.

f) Section 6 (1) of the Act further provides that the Court shall grant a stay of legal proceedings subject to the exceptions set out therein. None of those exceptions apply to this suit.

g) The Defendant is ready and willing to, without delay, proceed to arbitration, for determination

of the issues raised in the Plaintiff's suit herein.

h) It is in the interest of justice that the orders sought by the Applicant herein be granted as prayed".

2. The Application is supported by the Affidavit of **David Waiganjo Kigwe** who described himself therein as the Managing Director and the Chief Executive Officer of the Defendant Company. He deponed to the fact that there had been an Agreement as between the Plaintiff and the Defendant dated 31st of March 2011 (hereinafter "the Agreement") for the construction of a commercial/residential block on the Defendant's piece of land more particularly known as L. R. No. 209/15297, Nairobi. He attached a copy of the Agreement to his said Affidavit. The deponent went on to say that the dispute between the parties related to an ill-advised claim made by the Plaintiff Shs.25,899,301.60 for construction work allegedly carried out by the Plaintiff for which the Defendant has not paid for the reason that it disputed the Plaintiff's claim. The deponent stated that he had raised with the Plaintiff the fact that there were a number of substantial defects in relation to the building, including an inaccessible basement. He had raised the details in regard thereto on numerous occasions as recorded in the various minutes of meetings held between the parties involved in the construction. Again, he attached copies of minutes in that regard to his Affidavit in support of the Application. The deponent stated that he had been advised that the proper forum for the airing of disputes as between parties was by reference of the matter to arbitration, hence the Application before court.

3. The Application is opposed and the manager of the Plaintiff's Construction Department one **Zhang Shifei** swore a Replying Affidavit on 12 September 2012. He confirmed that the parties had entered into the Agreement which he had executed on behalf of the Plaintiff. He had been advised by the Plaintiff's advocates on record that despite clause 45 of the Agreement providing for resolution of all disputes by arbitration, the Defendant could not invoke the clause for the following reasons:

"a) Clause 45.3 of the agreement provides that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.

b) The Defendant/applicant has had from the 4th January 2012 to give the Plaintiff/Respondent notice of a dispute or difference and the ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute have expired hence cannot rely on Clause 45 of the contract.

c) The Defendant/Applicant cannot invoke the Clause 45 vide Section 6 (1) of the Arbitration Act as no dispute as regards the amounts due and owing from the Defendant/Applicant to the Plaintiff/Respondent exists hence the matter cannot be stayed and referred to arbitration as envisage in Section 6 as is illustrated below.

d) Section 6 of the Arbitration Act envisages that a party who seeks to take advantage of an arbitration agreement must apply to the court not later than the time of entering appearances or filing any pleadings or taking any other step in the suit. The Defendant/Applicant should have applied for reference to Arbitration not later than 13th August 2012 when it filed an appearance. Record shows that they did not do so and for that reason the Defendant/Applicant is disentitled from invoking Section 6 (1) of the Arbitration Act to refer the matter to Arbitration. Further, the Defendant/Applicant cannot therefore turn round to the detriment of the Plaintiff/Respondent, if it so applies later than the time when that party entered appearance and files pleadings to stay the proceedings and refer the parties to arbitration".

Mr. Shifei further stated that the Plaintiff's claim for Kshs.25,899,301.60 for construction works done by the Plaintiff was not ill-advised as the claim was based on valuation statements issued by the Project Manager as per the Agreement. He detailed that the Defendant had failed to reveal to court that there had been a joint inspection and measurement exercise conducted on the construction site with all parties involved in attendance. Thereafter, the Project Manager issued a Final Valuation Statement certifying that

the amount due to the Plaintiff was Kenya shillings 17,339,150.70 and that coupled with the other Valuation Statements totalling Shs.8,560,150.90, brought the total amount claimed as above. Mr. Shifei stated that as there was no dispute as regards the amounts due and owing to the Plaintiff by the Defendant thus the latter could not refer the dispute to arbitration.

4. In response to this, Mr. Kigwe swore a Further Affidavit on 10 October 2012. He denied the supposition made by Mr. Shifei that there was no dispute as between the parties which was the position as at 14 June 2012. He referred to the minutes of the meetings which he had attached to his previous Affidavit. In his view, the parties had been pursuing mutual negotiations and less than a month after those negotiations broke down, the Plaintiff, in deliberate evasion of clause 45 of the Agreement, filed suit herein on 19 July 2012. The deponent stated that at those meetings, he had raised genuine concerns about the state of the construction project and the visible poor workmanship by the Plaintiff on site. He stated that the Defendant had admitted its inefficiencies and had promised to rectify the situation which, in the deponent's view, would cause tremendous financial loss to the Defendant. He maintained that in the circumstances, the Defendant's remedy could not lie in issuing a notice under Clause 45 as, in fact, this suit had already been filed. Thereafter, Mr. Kigwe went into considerable detail as regards the failure of the Plaintiff to carry out the works in a professional manner and listed 11 instances of poor workmanship as well as 11 instances of latent defects. He also recorded, that as regards the 4th floor of the project, Nairobi City Council approval had not been obtained as required under the Agreement. He also described that the Plaintiff had engaged the services of its advocates on record and one of the firm's partners had attended the meeting held on the 14 June 2012 in which attempts were made to amicably resolve the dispute between the parties. The Defendant had no such advocate in attendance. Mr. Kigwe wrapped up his Further Affidavit by denying that the Defendant wished to delay matters as between the parties and confirmed, in fact, that it was desirous of a speedy conclusion of this matter in the agreed forum where, as against the Plaintiff's claim, it intended to counterclaim for the losses that it continued to suffer due to the Plaintiff's substandard and deficient work.

5. On 19 December 2012, Mr. Owino appeared for the Defendant and Mr. Masika came before court for the Plaintiff. Mr. Owino, learned counsel for the Defendant submitted that he was relying upon the Affidavit in support of the Application as well as the Further Affidavit both sworn by Mr. Kigwe. He also referred to his firm's list of Authorities filed in court on 6 December 2012. He noted that the Agreement had been entered into between the parties and that clause 45 of the same provided that all disputes between the parties should be settled by arbitration. Although the Plaintiff's was claiming Shs.25,839,301/-as against his client, the contracted works were completed and certified but not accepted by the Defendant. It has raised genuine concerns, discussions were held and the minutes were taken of some of those discussions as between the parties. He noted that the meetings were minuted a copy of one set of minutes being attached to the Affidavit in support of the Application and marked "DWK 2" , the second set of minutes was attached to the Replying Affidavit of the Plaintiff and marked as "ZS 1". He urged the court to examine those minutes which detailed many of the disputes between the parties. After negotiations had collapsed, counsel stated that there was a preliminary report from a Quantity Surveyor commissioned by the Defendant. Such report was attached to the Further Affidavit of the Defendant and marked as "DWK 3". Counsel further reiterated the details of the Defects contained in the Replying Affidavit as well as the lack of Nairobi City Council approval to the construction of the 4th floor of the project.

6. Counsel maintained that these were real issues between the parties which require resolution by arbitration as provided for in the Agreement. He commented on various provisions of the same and stated that whether or not the Certificates were issued by the professional consultants did not mean that the Defendant was bound to pay even for work which had not been carried out. So that on the 14 June 2012 when the parties were in negotiations, it had been admitted by the Defendant that there was nowhere in the Agreement where it detailed time constraints as regards the determination of disputes. The Plaint had been filed on 19 July 2012 and the Notice of Motion seeking summary judgement had been filed on 16 August 2012. Once those two documents had been filed and served, the Defendant could do no more than file the current application before court. He referred to the Defendant's List of Authorities filed on 6 December 2012 more particularly cases nos. 4, 5 and 6 stating that they had been decided after the promulgation of the new Constitution. Counsel also sought to distinguish the Plaintiff's List of

Authorities filed on 19 October 2012 stating that all three of the Plaintiff's authorities had been decided prior to the promulgation of the Constitution and could thus be easily distinguished.

7. In his turn, Mr. Masika noted that the Application invoked section 6 of the Arbitration Act where if any party desires for a stay of proceedings pending reference to arbitration, it was mandatory that the party should make such application not later than the time when the party enters an Appearance. He stated that meant that the Application should be filed on the same day as the Memorandum of Appearance. He referred the court to the authority of **Lofty versus Bedouin Enterprises Ltd (2005) 2 EA 122** in which it was found by the Court of Appeal that:

"The court is entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so was not made at the time of entering appearance, or if no appearance is entered, at the time of filing any pleadings or the time of taking any steps in the proceedings."

Counsel maintained that the Defendant filed its Memorandum of Appearance on the 13 August 2012 thereafter it was served with the application for summary judgement filed on 17th of August 2012. It was only after that, on 28 August 2012, that the Defendant filed this Application to refer the matter to arbitration, which was an afterthought. He then referred to his second authority being **Rintari versus Madison Insurance Co Ltd (2005) e KLR**. **Mutungi J** as regards **section 6** of the *Arbitration Act* borrowed of the words of the **Mbaluto J** in **Victoria Furnitures Ltd versus African Heritage Ltd HCCC No. 904 of 2001** in which he stated:

"If the section were to be interpreted to mean that a party could file an appearance or take the two other steps mentioned above and then wait for some time before applying for Stay of proceedings, the phrase not later than the time he entered appearance or etc, etc. would be not only superfluous but also meaningless."

8. Mr.Masika continued with his submissions by referring the court to his last authority being **McLeod & Company (E.A.) Ltd versus Kenya Aerotech Ltd HCCC No. 91 of 2010 (unreported)** a decision of **Kihara Kariuki J** (as he then was) in which he referred to **section 6 (1)** of the *Arbitration Act* and concluded:

"If the Defendant wished to take the benefit of the arbitration clause in the agreements, it was obliged to apply for an order of stay of proceedings simultaneously with its entering appearance. Having failed to do so, the Defendant lost its right to rely on the clause. It cannot have been the intention of Parliament to grant the Defendant a *carte blanche* to make his application at any time."

Counsel was of the view that if you regard such decisions as above amounted to mere technical objections, the same did not hold water. **Section 6** is a substantive section of the *Arbitration Act.* In his view, a pleading which fails to uphold a mandatory provision of the law is *ipso facto* defective and cannot be cured by Article 159 (2) of the Constitution. It was for that reason that the Plaintiff had included the authority of **Wilson Evans Otieno versus the Law Society of Kenya & 2 ors (2011)e KLR** in which my learned brother **Musinga J.** (as he then was) had concluded:

"what should the court do in light of the submissions made by the petitioner that the court is obliged to disregard procedural technicalities in dispensation of justice? I do not agree with the petitioner that the issue of competence of pleadings, and particularly where such incompetence arises from circumstances as in this case, can be termed as procedural technicality. This is a substantive question of law which goes to the root of the matter. The provisions of Article 159 (2) (d) of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The Petition and Chamber Summons dated 8th March 2011 must therefore be struck out with costs to the respondents, which I hereby do."

The second reason advanced by Mr Masika that the stay Application does fail was the fact that there was

no dispute between the parties. The Plaintiff's claim was based on certificates issued by the Defendant's Project Manager and the project Architects. The amount as claimed by the Plaintiff was certified for it by the Defendant's consultant, who was the agent of the Defendant which is why the Application for Summary Judgement was filed. Counsel maintained that the letter dated 29 March 2012 addressed to the Plaintiff by Mburu Consultants clearly detailed that there was no dispute. The agent of the Defendant was the one saying that there was no dispute. Under the Agreement, the Defendant was obliged to give notice of dispute within 90 days of discovering the item which was disputed. In counsel's opinion the Defendant all along had been aware of the defects and should have issued a notice of dispute with regard thereto a long time ago. Counsel drew the attention of the court to the minutes of the meeting of the 14th of June 2012 which were not disputed by the Defendant. Under the heading "The Way Forward" it had been generally agreed that the outstanding amount due to the Plaintiff was Shs. 25,899,301/60. Those minutes had not been denied by the Defendant.

9. Mr. Owino, in a brief reply, pointed the court to the provisions of Article 159 (2) of the Kenya Constitution more particularly sub-clause (d) in relation to the fact that justice shall be administered without undue regard to procedural technicalities. He noted the fact that section 6 of the Arbitration Act only provides timelines for procedure not the substantive issues of a case. He noted that the minutes to which Mr. Masika had referred were neither signed nor confirmed and the meeting was held "without prejudice". He wrapped up his submissions by urging the court to order that both parties be taken to arbitration where their disputes can be resolved.

10. Most developers are lay people. That is why they employ consultants experienced in the building industry to assist them in construction projects. It is those consultants who are their agents and are employed to ensure that their interests are looked after and that they are not exploited by unscrupulous contractors. The Agreement and Conditions of Contract for Building Works utilised for the Defendant's Project (more commonly known as the **JBC** Conditions of Contract) forming the Agreement between the parties is in common use in Kenya. Such envisages payments being made to the contractor (the Plaintiff) under clause 34 thereof, for work carried out on the project which have been certified as satisfactory and performed by the Architect. Such payments are normally made as against interim payment certificates but once the Works being carried out have been completed, clause 34.17 provides for the measurement and evaluation thereof and a final account is computed before the issuance of the final payment certificate. As I understand it from the Replying Affidavit of the Plaintiff (paragraph 8), the final certificate has been issued in the amount of Shs.17,339,150.70 and prior Valuation Statements have been issued by the Project Manager (also the agent of the Defendant) totalling Shs.8,560,150.90. The above comes to a total of Shs.25,899,301.60 whereas the sum prayed for by way of the Plaintiff's Summary Judgement Application is Shs.25,560,150.90. No doubt when it comes to pursuing its said Application, the Plaintiff will have an explanation as to the discrepancy which seems, however, to be in the Defendant's favour. I detail all this because the Defendant's Application for stay pending arbitration comes as somewhat of a surprise in the face of certification from its professional consultants. To my mind, I agree with the second point as raised by learned counsel for the Plaintiff when he says that there is no dispute between the parties which can be referred to arbitration. Such comes within the parameters of **section 6 (1) (b)** of the *Arbitration Act* and consequently, on that ground alone, I am not inclined to stay these proceedings and refer the parties to arbitration.

11. What of the timing of the Defendant's Application before court? Here again I do not find myself in sympathy with the submissions of the learned counsel for the Defendant. I do not agree that **section 6** of the Arbitration Act merely provides for timelines as regards procedure for filing applications for stay of legal proceedings. I find myself on all fours with the decisions in the **Lofty Bedouin**, **Timothy Rintari** and **McLeod and Company** cases (supra). I think it is mandatory that, when filing an application for stay of legal proceedings for a matter to be referred to arbitration, the same must be filed at the time when the party enters an Appearance to the suit brought against it. I do not think that the provisions of Article 159 (2) (d) of the *Constitution, 2010* helps the Defendant herein in any way. I concur with the finding of my learned brother **Musinga J** in the **Willis Evans Otieno** case that Article 159 (2) (d) of the Constitution cannot be relied upon in the face of the specific provision of **section 6 (1)** the Arbitration Act expressed in mandatory terms viz:

"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 an appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration…….". (Underlining mine).

The conclusion to all the above is that I dismiss the Defendant's Chamber Summons dated 27 August 2012 with costs to the Plaintiff. Parties may now set the Plaintiff's Application for Summary Judgement down for hearing at the Registry, on a priority basis.

DATED and delivered at Nairobi this 24th day of January, 2013.

J. B.HAVELOCK
JUDGE