



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 645 of 2012

TRISHCON CONSTRUCTION CO. LTD. PLAINTIFF

VERSUS

LEO INVESTMENTS LTD. DEFENDANT

RULING

1. The Defendant has put before this Court a Notice of Motion dated 17 November 2012 but filed herein on 26 November 2012. The Application seeks an Order to refer this matter to an Arbitrator, to be mutually agreed upon by the parties hereto, for the purposes of determining the dispute between the parties. The subsidiary prayer to the Application seeks that time be limited within which the parties hereto are to agree on the name of an Arbitrator. The grounds upon which the Application is brought are that there exists a valid Arbitration Agreement as between the parties and that a dispute has arisen out of a contract for building works between the Plaintiff and the Defendant which forms the basis of these proceedings. Accordingly, the dispute should be determined by way of arbitration and not litigation and this court has no jurisdiction over the dispute between the parties hereto. To this end, the Defendant referred this court to clause 42 of the Agreement and Conditions for Building Works dated 2 May 2012 (hereinafter “the Contract”) which appeared in the Plaintiff’s List of Documents dated 10 October 2012 being document no. 1 thereof.

2. The Application was opposed by the Replying Affidavit of the Managing Director of the Plaintiff company one **Dhanji Velji** sworn on 3 December 2012. The Plaintiff also filed Grounds of Opposition dated 3 December 2012. Those grounds detailed that the Application was incurably defective in law, an abuse of the court process and that the Applicant was guilty of laches. The deponent of the Replying Affidavit at paragraph 4 thereof stated that the issue in dispute as between the parties arose from a Payment Certificate issued by the Defendant’s Architect on 14 June 2009 following an agreement to terminate the Contract as between the Plaintiff and the Defendant. The deponent further attached to the Replying Affidavit, copies of correspondence in relation to the fact that the Defendant, in his words, had ignored the said Certificate and/or correspondence going way back to June 2009. The said Certificate had never been settled, despite the clear provisions of the Contract, to this end. The deponent also drew the attention of the court to the provisions of Clause 45.3 of the Contract which provided that no arbitration proceedings would be commenced unless a notice of dispute or difference had been given by the applying party within 90 days of the occurrence or discovery of the matter or issue giving rise to the dispute. No notice had been given by the Defendant in that regard. Further, with reference to the provisions of Clause

45.4 of the Contract no attempt had been made at first instance to settle the dispute as between the parties amicably with or without the assistance of a mediator. Mr. Velji went on to say that he had been advised by the advocates on record for the Plaintiff that there had been inordinate delay as regards the Application to refer the disputes between the parties to arbitration. The Plaintiff's advocates had issued a demand letter in that regard on the 27 September 2012 with which the Defendant had not complied hence these proceedings had been filed. Similarly, the Defence herein should have been filed on or before 19th November 2012 whereas the Defendant had delayed until 26 November 2012 to file the current Application.

3. The Application was argued before this court by Mr. Luseno for the Defendant/Applicant and by Mr. Muoka for the Agent/Respondent on 30 January 2013. In his submissions, Mr. Luseno informed the court that the Application was brought under **section 6** of the *Arbitration Act*. He pointed to the process agreed between the parties as per the Contract in terms of reference to arbitration being Clause 45 thereof. He maintained that the Replying Affidavit admitted the dispute, the Contract, as well as the arbitration clause therein. If the Applicant was able to satisfy the court as to the 3 requirements detailed under **section 6**, then it was a statutory duty for the matter to be referred to arbitration. With reference to what had been referred to in the Replying Affidavit in terms of notices, these were supposed to have been issued (and had not been) but counsel was of the view that there was a clear distinction as between seeking the appointment of an arbitrator and/or giving a notice to appoint an arbitrator. He referred this court to three cases relevant to the Application being **Z. S. Mohammed & Anor versus Insurance Company of East Africa Ltd HCCC No. 521 of 2008 (unreported)** as well as the Ruling of **Lady Justice Koome** (as she then was) in **Channel 2 Group Corporate (Channel 2) versus Kenya Broadcasting Corporation HCCC No. 60 of 2010 (O. S.) (Unreported)**. He also referred to the case before court by Mr. Muoke being **Lofty versus Bedouin Enterprises Ltd (2005) eKLR**. Mr. Luseno urged the court to intervene and allow the Application to have the matter in dispute referred to arbitration.

4. In his turn, Mr. Muoke submitted that the Application was bad in law as being brought under **section 6** of the *Arbitration Act* it had to be placed/filed before court not later than the time when the party enters an appearance. He noted that the Applicant had filed its Appearance on 5 of November 2012 and this Application on 26 November 2012, more than 20 days after the date of the Appearance. He referred to the **Lofty** case as per the finding of the **Court of Appeal** in adopting the earlier finding of **Githinji J** (as he then was) in that suit. The next point that counsel wished to emphasise was that under **section 6 (1) (b)** of the *Arbitration Act* the court should not order a stay of legal proceedings unless it found that there was not, in fact, a dispute between the parties with regard to the matters agreed to be referred to arbitration. He submitted that the Defendant's architect had issued the Payment Certificate under cover of his letter dated 14 June 2009 and that there was no dispute with regard to the figure that he had certified. Consequently, there was no dispute to be referred to arbitration. Counsel also noted that there had been no proper notice, to be issued under Clause 45.3 of the Contract, of referral to arbitration and indeed all notices issued by the Plaintiff to the Defendant under Clause 45.4 of the Contract had been ignored. Finally, counsel noted that the Plaintiff had now filed an application for default judgement dated 22 November 2012. In his opinion it was that application that had woken up the Defendant to file this Application before court.

5. Mr. Luseno attempted to distinguish the **Lofty** case as there had been a Defence filed in that matter. He maintained that by filing a Defence, a party was submitting to the jurisdiction of the court. He assured the court that the Application before it was not a reaction to the Plaintiff's Application for default judgement. When Mr. Luseno came before the court ex parte, he had not been aware that the default judgement Application had been filed. As regards the Certificate issued by the Plaintiff's architect, the same necessarily had to be considered as conditional. One of the powers given to the Arbitrator under the Contract, was the ability to review any such Certificate and set it aside (see Clause 45.9 of the Contract). Counsel noted that having settled on a dispute resolution process, the Defendant could not issue notices under the Contract as the matter was now in court. He maintained that there would be no prejudice occasioned by placing the dispute before the right forum. He requested the court to sustain the proceedings but to have the dispute referred to an arbitrator.

6. It is easy to see just why the Defendant referred to the decision in the **Z. S. Mohammed** case (supra).

My learned brother **Kimaru J** had this to say at page 4 of his Ruling:

“It is evident that the respondent’s refusal to participate in the appointment of an arbitrator was influenced by its belief that there exists no dispute between itself and the applicants. In its attempt to prove that no such dispute exists, the respondent delved into the evidence that ideally is the province of the arbitrator to determine. This court in determining the application before it cannot enter the arena of considering the merits of the evidence unless such evidence supports the assertion by one of the parties that there exists no clause in the agreement that forms the basis of the relationship between the two disputing parties that provides for resolution of any dispute between them by arbitration”.

In my opinion, the learned Judge in his Ruling was dealing with the appointment of an arbitrator under **section 12** of the Arbitration Act rather than considering an application to stay proceedings, hence his reference to matters of evidence and his finding that an arbitrator should be appointed to resolve the dispute between the parties in that matter. Further, I did not receive much assistance as regards the matter before me from the case of **Channel 2** (supra). That was a case in which **Koome J** (as she then was) considered the arbitration clause in the contract between the parties and came to the conclusion that the interpretation and enforcement of rights and obligations of the parties should be resolved through arbitration. Again, no question of stay of proceedings was before the learned Judge.

7. The Court of Appeal in **Niazsons (K) Ltd versus China Road and Bridge Corporation (K) Ltd (2001) 2’s EA 502 (CAK)** detailed the general guidelines when considering an application for stay of legal proceedings and a reference to arbitration. The Court held (*inter-alia*) as follows:

“..... Under section 6 of the Arbitration Act, a court considering an application for stay must decide whether the party applying has taken a step in the proceedings, whether there are any impediments on the validity, operation or performance of the arbitration agreement, and whether the suit concerns a matter agreed to be referred.”

As to the matter of the taking a the step in the proceedings, I will come to that as below. However, having perused Clause 45 of the Contract, it seems quite clear to me that the no proper notice as regards referring the Certificate issued by the architect to arbitration was ever given by the Defendant to the Plaintiff. Further, I accept the contents of the Replying Affidavit that no attempt has been made by the Defendant herein to settle any dispute over the said Architect’s Certificate amicably with or without the assistance of a third party as per the provisions of Clause 45.4 of the Contract. I also take sight of the fact that the said Architect’s Certificate was issued in June 2009, nearly 4 years ago. To my mind, this is such an inordinate delay on the part of the Defendant to the extent that I consider the Plaintiff in bringing this suit before this court, to be totally justified in doing so.

8. The Court of Appeal in its judgement in the **Lofty** case commenced with setting out the provisions of **section 6 (1)** of the *Arbitration Act, 1995*. The section has been amended and taking into account the provisions of the *Arbitration (Amendment) Act 2009* which has now been embodied into the new *Arbitration Act (revised) (Cap. 49, Laws of Kenya)*. The section now reads:

“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”.

It is apparent that what has been deleted from **section 6 (1)** of the *Arbitration Act 1995* are the words:

“or files any pleading or takes any other step in the proceedings”.

Instead, we now have the words:

“or otherwise acknowledges the claim against which the stay of proceedings is sought”.

To my mind, that gives the Defendant the option of filing the application for stay of proceedings at the time when it enters an appearance or at the time when it acknowledges the claim of the Plaintiff. In my opinion, this latter provision is somewhat nebulous when one takes into account the process of litigation before court. It could mean that the application for stay must be filed at the same time as the Defence but then it is normal for Appearance to be filed first. It is difficult to determine how else the Defendant could acknowledge the claim against which the stay of proceedings is sought.

9. Faced with a similar problem **Githinji J** in the **Lofty** case held that:

“In my view, section 6 (1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6 (1) of the Arbitration Act, 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings. Section 6 (1) of the Arbitration Act, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6 (1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed”.

Githinji’s finding was amplified upon by **the Court of Appeal** in the very next sentence in the **Lofty** case:

“We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or the time of taking any steps in the proceedings.” (Underlining mine).

The point in the matter before me is that the Defendant filed its Memorandum of Appearance herein on 5th November 2012. Taking into account the finding in the **Lofty** case as above, it is my opinion that once having done that, the Defendant is precluded from filing the current Application before court. It should have been done so at the same time as the filing of the Memorandum of Appearance and it is now too late for it to come before court with its Application.

10. The conclusion to all the above is that I find no merit in the Defendant’s Notice of Motion dated 17 November 2012 but not filed until nine days later on the 26 November 2012. I dismiss the same both in terms of staying further proceedings in this court but also as regards referring this matter to arbitration. The Plaintiff will have the costs of the Application.

DATED and delivered at Nairobi this 28th day of March 2013.

J. B. HAVELOCK

JUDGE

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