**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 81 of 2011**

**CHINA YOUNG ENGINEERING COMPANY…………….......…. PLAINTIFF**

**VERSUS**

**L.G. MWACHARO T/A MWACHARO ASSOCIATES…..1ST DEFENDANT**

**RAVASAM DEVELOPMENT COMPANY LIMITED….…2ND DEFENDANT**

**RULING**

**1.** Before me for consideration are two (2) applications and a Preliminary Objection. These are:-

a) The Plaintiff's application dated 07/03/2011 and amended on 04/07/2011 seeking to stay the suit and refer the same to arbitration. The application also seeks an injunction order under Section 7 of the Arbitration Act.

b) An application by the 2nd Defendant seeking to strike out the Plaintiff's application in No.1 above, and

c) A Preliminary Objection by the 1st Defendant dated 15/05/2012 objecting to the Plaintiff's application in No.1 above.

I propose to consider the Preliminary Objection first.

**2.** The preliminary Objection by the 1st Defendant is dated 15th May, 2012. The grounds of objection are that there was no competent suit as the Plaint did not comply with Order 4 Rule 1(1) (f) of the Civil Procedure Rules, that the suit was in breach of Order 3 Rule 3 of the Civil Procedure Rules, that the Verifying Affidavit was in breach of Order 4 rule 1 (2) of the Rules, that in the absence of the authority in terms of Order 4 Rule 1(4) of the Rules the Verifying Affidavit was defective and that the application dated 4th July, 2011 was in breach of the Arbitration Act and should therefore be struck out. The 1st Defendant therefore urged that the suit and the application were fatally defective and should be struck out.

**3.** Mr. Kariuki, learned Counsel for the 1st Defendant ably highlighted written submissions filed on 10th December, 2012. In a nutshell, it was Mr. Kariuki's submission that the suit was filed in breach of Order 3 Rule 2(d) which requires the filing of witness statements and documents to be relied on, that the Verifying Affidavit did not produce the authority to swear or file suit in breach of the law. Mr. Kariuki also submitted that the application was in breach of Section 6 of the Arbitration Act which requires that all applications for reference to arbitration be filed before any pleading is delivered and that the application was in conflict with the Plaint.

**4.** Mr. Muturi for the Defendant supported the 1st Defendant's Preliminary Objection. He submitted that the Plaint was field without any mention to any reference to arbitration in that the suit had sought final orders. He concluded that since the Plaintiff had taken steps between the date of the filing of the suit and the making of the application, the order of stay and reference of the matter to arbitration cannot be raised at this stage. Counsel urged that the application be struck out.

**5.** Mr. Mukele, learned Counsel for the Plaintiff relying on the written submissions on record opposed the objection. He submitted that the issues submitted on by Mr. Kariuki were different from those contained in the Notice of Preliminary Objection. That the Plaintiff could not seek an order of stay of the suit in the Plaint because that would have defeated the suit from the beginning. That the orders sought in the application seeks to preserve the arbitral process that had already began under Section 22 of the Arbitration Act. Counsel urged that the objection be dismissed.

**6.** I have carefully considered the Affidavits on record and submissions of Counsel. I have noted from the record that these proceedings were commenced on 7th March, 2011 by a Plaint dated 7th March, 2011. Together with that Plaint was filed a bundle of documents entituled "Plaintiff's list of Documents". To my mind that satisfied the provisions of order 4 Rule 1(1) of the Civil Procedure Rules. Even if the documents had not been filed as aforesaid, I will still not have upheld ground Nos. 1,2,3 and 4 of the Preliminary Objection for the reasons that, firstly, such objections should be raised at the earliest opportunity not when a matter has been substantially dealt with. Secondly, by being raised at such a late stage of the proceedings, the objection does not further the overriding objective of the Civil Procedure Act in terms of Sections 1A and 1B thereof. It acts contrary to those provisions of the law. Thirdly, although couched in mandatory terms, the requirements therein are only procedural. An order for the Plaintiff to comply within a specified period would be a sufficient remedy. This is so because, in my view, this is a technical objection which goes contra Article 159 2(d) of the Constitution of Kenya, and which can be rectified under Section 3A of the Civil Procedure Act. On these grounds, I decline grounds 1, 2, 3 and 4 of the Preliminary Objection.

**7.** As regards grounds 5 and 6 of the Preliminary Objection, it was contended that the application is in breach of Section 6 of the Arbitration Act which requires that such applications for stay be filed immediately after a party has entered appearance. It was also argued that the Plaint did not deal with the issue of arbitration as it had sought final prayers. Section 6(1) of the Arbitration Act provides:-

***"6.(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, <u>if a party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought</u>, 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." (emphasis mine)***

**8.** It would seem that the use of the words ***"if a party so applies not later than the time when <u>that party enters appearance</u> or otherwise acknowledges the claim....."*** is meant to refer to a Defendant. A Plaintiff does not enter appearance or acknowledge a claim in a proceeding commenced by himself, it is a defendant in this regard, my take of it is that the time limitation set in Section 6(1) of the Arbitration Act is in respect of an application by a Defendant and not a claimant or Plaintiff. I have looked at the Plaint. In paragraph 14 thereof, it is pleaded that:-

***"14. It is the Plaintiff's contention that the purported termination is unlawful and therefore wrongful as per the particulars herein below:-***

***PARTICULARS***

***a) The first Defendant is not signatory and therefore privy to the contract and cannot therefore terminate it. Termination is the pure preserve of the second Defendant.***

***b)The first Defendant has not issues notices for termination as is mandatory prior to any termination***

***c) The dispute between the Plaintiff and the second Defendant has been referred to arbitration and should not be interfered with by first Defendant who is not party to the arbitration.***

***d)Indeed should it be established during the arbitration that this purported termination was wrongful, it is impossible for the Plaintiff to get any remedies from the second Defendant since the action was not performed by them or from the first Defendant since they are not party to the contract.***

***e) While the works are currently contractually suspended, prior to the suspension the Plaintiff executed the works so diligently to the satisfaction of all those involved in the project. No ground exists for termination." (Emphasis supplied)***

**9.** It is clear from the allegations in the said paragraph that the Plaintiff did plead the issue of arbitration from the outset. Indeed, it is disturbing that the Defendants Counsel would boldly submit that the Plaintiff did not refer to the issue of arbitration in the Plaint whilst it is there in black and white. That in my view is being less than candid. On the prayers to the Plaint, I note that the Plaintiff only prayed for injunctive reliefs which, although are of a permanent nature, do not seek any substantive relief for the Plaintiff in its claim. My take of it is that the Plaint was drafted with the Arbitral proceedings in mind. It would seem that as at the time the Plaintiff came to court, the arbitral proceedings had already commenced. That is why there is reference to arbitral proceedings in paragraph 14 (c) and (d) of the plaint. Under Section 22 of the Arbitration Act, 1995, Arbitral proceedings commence on the date when the Respondent receives a request for the dispute to be referred to arbitration. For these reasons, I am not convinced that the Preliminary Objection has any merit and the same is hereby dismissed with costs.

**10.** On the issue of striking out the application dated $4^{th}$ July, 2011, Mr. Muturi, learned Counsel for the $2^{nd}$ Defendant relied on the provisions of Section 6(1) (b) of the Arbitration Act 1995 and submitted that there was no dispute capable of being referred to arbitration. That provision provides that a stay will not be granted if there is no dispute between the parties on a matter agreed to be referred to arbitration. I have looked at the Plaint. I have also seen the correspondence exchanged between the parties herein and the Hon. Arbitrator Mr. Mururu Esq. The Plaintiff alleges that its contract was wrongly terminated. In the arbitral proceedings, the issue would be whether or not the termination was complete and if so, if the same was lawful. Of course, issues regarding the damages payable would arise. Is that not a dispute? To my mind, I think it is. Accordingly, I decline to strike out the Plaintiff's application dated $4^{th}$ July, 2011.

**11.** As regards the application dated $4^{th}$ July, 2011, the same is brought under Order 40 Rule 2(1) of the Civil Procedure Act and Sections 6 and 7 of the Arbitration Act. The Plaintiff seeks certain injunctive orders to restrain the first Defendant from terminating the agreement between themselves on the construction or giving over possession of LR No.2/186 until the arbitral proceedings are determined. By way of amendment, the Plaintiff sought an order that the matter be referred to arbitration. Mr. Lubullellah leading Mr. Mukele submitted at length showing that there was a genuine dispute between the parties and that it was desirable to allow the application to preserve the subject matter of the dispute.

**12.** I have carefully considered the averments in the various Affidavits on record and the submissions of Counsel. What comes out is that after the $1^{st}$ Defendant terminated the contract of construction with the Plaintiff, another party took over and finalized the construction. Indeed it would seem that there may be no status quo to be maintained. That being the case, I do not think that the prayers for injunction can properly be made. They have been overtaken by events.

**13.** That leaves the prayer for reference to arbitration. As I have already stated, the correspondence on

record shows that the arbitral proceedings have already commenced before Mr. Mururu Esq. The Plaint herein does not seek any substantive reliefs. It is predicated upon some arbitral proceedings being proceeded with and reliefs being granted therein. Article 159(2) of the Constitution of Kenya provides that:-

***"159(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles -***

***(a). Justice shall be done to all, irrespective of status;***

***(b). justice shall not be delayed;***

***(c). alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)" (Emphasis supplied)***

To my mind, since the agreement between the parties had an arbitral clause and since the parties have already submitted to arbitral proceedings which have already commenced, this suit would serve no purpose in being proceeded with. This is so considering the reliefs sought. Further, this courts exercise of judicial authority has to be guided by the principles of the constitution which include the promotion of alternative forms of dispute resolution of which arbitration is one.

**14.** Accordingly, I am persuaded to hold that the prayer for reference of this mater to arbitration is well founded. I therefore allow the motion dated 4th July, 2011 in terms of prayer No. 4 only. The other prayers are dismissed. I will make no order as to costs.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 19th day of April, 2013.

**..............................................**
**A. MABEYA**
**JUDGE**