

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 295 of 2008

MOHAWK LIMITED PLAINTIFF

VERSUS

LEO INVESTMENT LTD.DEFENDANT

R U L I N G

Application dated the 30/10/08 brought under the provisions of **Civil Procedure Rules, Order XLV rule 5** with **Civil Procedure Code** and **Section 3A of Civil Procedure Act, Cap.21**.

The prayer outstanding is numbered 2 seeking order to compel the Chairman of the Architectural Association of Kenya to appoint an arbitrator pursuant to Clause 45 of the Building Contract between the parties herein for the purpose of determining and resolving dispute and difference between the parties herein.

On the ground that the parties have failed to agree within a reasonable time with respect to the appointment of arbitrator and the Chairman of Architectural Association has declined to make appointment without a court order. Clause 45 of the Building agreement specifies that:

“In case of any dispute or difference shall arise between the employer or the architect on his behalf and the contractor Such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration. And no arbitration proceedings shall be commenced on any dispute or difference where notice 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.”

The applicant confirms that by consent in the court, the dispute was referred to arbitrator on 11/6/2008. Therefore arbitral proceedings have commenced. Under **Order 50 rule 12, Civil Procedure Code** it is provided that technicalities shall not be raised to block a hearing of a matter.

The applicant then applied for the court to make the order sought. I have perused the record. The matter of arbitration proceedings has already commenced and the hearing of this suit is no longer within the court jurisdiction. I also note that the issues outstanding is appointment of an arbitrator. Clause 45.1 states that failing agreement of appointment of arbitrator the appointment “arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya.

It is also to be noted that **Arbitration Act, Section 12** provides that if no agreement on appointment, the matter will be resolved by High Court. It is not disclosed why the Chairman mentioned above has declined to act. However, in order to comply with the terms of Arbitration Clause, it is hereby ordered that the Chairman or his Vice Chairman shall proceed to appoint an arbitrator as provided in Arbitration Clause within the next 30 days from today.

This application is allowed. The respondent has strongly opposed the application without reasonable ground. It is ordered that the costs of this application shall be paid by respondent.

Orders granted accordingly.

DATED and **DELIVERED** this 15th day of January 2009.

JOYCE N. KHAMINWA

JUDGE