



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 200 of 2007

MOHAMMED SALIM SHAMSUDIN.....PLAINTIFF

VERSUS

TRISCHON CONSTRUCTION COMPANY....DEFENDANT

RULING

On the 24th April, 2007, the parties to this suit entered into the following consent order:

- “1. That the Contract Agreement dated 2nd June, 2006 in regards to 32 Luxurious Apartments on L.R. No.330/274 between the Plaintiff and the Defendant herein be and is hereby terminated.***
- 2. That the Defendant had over keys, site office, architectural and structural drawings and all other receipts and any other document relating to the construction site on L.R.No.330/274 to the Plaintiff hereof and vacates the construction site forthwith.***
- 3. That a joint inspection and valuation of the project premises, materials, equipment on site be conducted by two qualified Quantity Surveyors appointed by Mr. Dhanji of Trischon Construction Company Limited and Mr. Mohammed Salim Shamsudin to determine the true and correct amount being claimed by Mr. Dhanji from Mr. Mohammed Salim Shamsudin within next FOURTEEN (14) DAYS from the date of filing this consent.***
- 4. That in the event of any dispute between Mr. Dhanji and Mr. Mohammed Salim Shamsudin on the inspection and valuation report the said dispute be solved by arbitration with the arbitrator being appointed through by the Advocates for both parties herein failure to which the arbitrator shall be nominated by the Chairman of the Association of Architects of Kenya.***
- 5. That the suit be marked as settled with no orders as to costs.”***

A difference arose between the plaintiff and the defendant over the inspection and valuation of the works undertaken by the defendant. On the 22nd June, 2007, the plaintiff filed the present application seeking orders of this court to stay further proceedings in this case pending the hearing and determination of the said dispute in arbitration proceedings. The said application was made under **Section 6** of the **Arbitration Act, 1995**, **Rule 22** of the **Arbitration Rules**, and **Section 3A** and **63 (e)** of the **Civil Procedure Act** and **Order 1 Rule 10 (2)** and **(4)** of the **Civil Procedure Rules**. The application was supported by the annexed affidavit of Mohamed Salim Shamsudin, the plaintiff. The grounds in support of the plaintiff’s application are stated on the face of the application. He states that after the consent

agreement was reached, a dispute arose between himself and the defendant. The plaintiff was of the view that the Arbitration clause in the said consent order ought to be brought into operation in order for the dispute between the parties be arbitrated upon and resolved.

The application is opposed. Dhanji Velji, a Director of the defendant company swore an affidavit in opposition to the application. He admitted the fact that a consent order was entered between the plaintiff and the defendant. He however deponed that contrary to the consent agreement, the plaintiff refused to abide by the terms of the said consent agreement. He deponed that whereas a joint inspection was carried out on 21st April, 2007, and an inventory taken, the plaintiff refused to participate in a joint valuation with a view to settling the value of the work undertaken by the defendant on the construction site. He deponed that the plaintiff further refused to release the defendant's equipment which had been were left on the site. He deponed that the plaintiff's conduct was consistent with that of a person who was no longer interested in having the matter determined by Arbitration; This was due to the fact that the plaintiff failed to participate in the joint inspection and valuation of the works undertaken by the defendant within fourteen (14) days of the filing of the said consent. He deponed that after the plaintiff had declined to participate in the joint valuation of the works undertaken, the defendant instructed a quantity surveyor who valued the amount owed to the defendant by the plaintiff at KShs.16,889,023/70. The defendant was of the view that the application brought by the plaintiff was in bad faith and was meant to frustrate the defendant from seeking an appropriate redress from this court.

At the hearing of the application, Mr. Wandabwa counsel for the plaintiff reiterated the contents of the application and the supporting affidavit. He submitted that the initial agreement between the plaintiff and the defendant contained an arbitration clause. When differences arose between the plaintiff and the defendant, the plaintiff filed the present suit in a bid to secure an interim protection from the court pending reference of the dispute to arbitration. Mr. Wandabwa submitted that after suit was filed, a consent order was entered whereby it was again agreed that in the event that a disagreement would arise as regard the implementation of the terms of the consent agreement, the dispute would be referred to arbitration. He submitted that a difference in the valuation of the work undertaken by the defendant at the construction site had arisen hence the plaintiff's decision to seek a stay of this proceeding pending reference of the dispute to arbitration. Mr. Wandabwa urged the court to stay the proceedings herein pending adjudication of the dispute by an arbitrator.

Mr. Osundwa for the defendant opposed the application. He reiterated the contents of the replying affidavit filed on behalf of the defendant in opposition to the application. He submitted that the plaintiff had frustrated the consent agreement by failing to avail himself when he was required to be present during for the joint inspection and valuation of the works undertaken by the defendant. He submitted that the joint inspection and valuation was required to have been undertaken within fourteen (14) days of execution of the said consent agreement. He maintained that the application made by the plaintiff was contrary to the provisions of **Section 6 (1) of the Arbitration Act**. He submitted that the plaintiff had taken steps by filing pleadings which precluded him from seeking to rely on the arbitration clause in the consent agreement. He argued that the time in which the plaintiff was required to have referred the dispute to arbitration had expired and therefore the dispute would not be referred to arbitration without the plaintiff seeking extension of time from the court. The defendant was of the view that the plaintiff's conduct was such that it could not be granted the order of stay of proceedings sought. He submitted that this court was *functus officio* and could not issue further orders regarding the consent order which the plaintiff had breached. Mr. Osundwa submitted that the plaintiff had no intention of referring the dispute to arbitration but was rather engaged in tactics meant to delay the just determination of the suit. The defendant relied on several decided cases in support of its submission.

I have carefully considered the rival submission made before me by counsel for the plaintiff and counsel for the defendant. I have also read the pleadings filed by the parties to this application in support of their opposing positions. The issue for determination by this court is whether the plaintiff established a case to entitle this court to grant him the orders sought in his application. **Section 6 (1) of the Arbitration Act** grants this court jurisdiction to stay legal proceedings where it is established that there exists a valid arbitration agreement. In the presence application, the plaintiff argued that by virtue of the consent agreement which was entered into between himself and the defendant, any dispute arising out of

inspection and valuation should be referred to arbitration. On the other hand, the defendant is of the view that the said section of the **Arbitration Act** was not available to the plaintiff since steps had been taken in the proceedings that disentitled the plaintiff from invoking any arbitration clause.

The consent which was entered between the plaintiff and the defendant was reproduced earlier in this ruling. The said consent is a valid agreement which is enforceable in law. The defendant does not dispute the validity of the said consent agreement. The defendant submitted that the said agreement could not be enforced because the period which it was supposed to have been given effect to had expired. It is clear to this court from the reading of the consent agreement that apart from clause 3, there was no period indicated beyond which no reference would be made to arbitration once a dispute had arisen. This court is bound to enforce the consent order which was entered between the plaintiff and the defendant. In **Brooke Bond Liebig (T) Ltd –vs- Mallya [1975] EA 266**, at page 269 Law Ag. P held that

*“The circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani –vs- Kassam [1952], 19 E.A.C.A. 131**, where the following passage from Seton on Judgments and Orders, 7th Edn., Vol. I, p. 124 was approved:*

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

The defendant have not put forward any grounds which would entitle this court either set aside the said consent order or interfere with its application. The defendant did not claim that there was fraud, misapprehension or ignorance of material facts when the said consent was entered into. It did not claim that the said consent order was entered in circumstances that would invalidate its enforcement. In the premises therefore, this court will enforce the arbitration clause in the said consent order. The proviso of **Section 6 (1) of the Arbitration Act, 1995** does not apply in this case because the said consent order was entered into after pleadings had been filed by the parties to this suit. The arbitration clause in the consent order is an enforceable agreement. I will therefore allow the application by the plaintiff to stay the proceedings in this case pending the hearing and determination of the dispute by arbitration.

This court however noted that the plaintiff had conducted himself in a manner that is unfair to the defendant. I will make further orders to prevent the plaintiff from frustrating the just determination of the pending dispute;

- (i) I hereby order the Chairman of the Association of Architect of Kenya to appoint an arbitrator to arbitrate on the dispute between the plaintiff and the defendant. The said appointment of the arbitrator should be made within fourteen (14) days of the said Chairman being served with the order of this court.
- (ii) In determining the dispute, the arbitrator shall be at liberty to appoint an independent quantity surveyor to conduct the valuation of the works undertaken by the defendant.
- (iii) The plaintiff is hereby ordered to forthwith release to the defendant the following equipment;
 - (a) 1 mixer machine
 - (b) 1 hoist with two buckets
 - (c) 1 poker vibrator
 - (d) Any equipment belonging to the defendant that the plaintiff is currently withholding.
- (iv) The arbitrator appointed by the Chairman of the Association of Architects of Kenya shall hear the dispute and file his award in this court within forty five (45) days of today’s date.

(v) So that the hearing of the arbitration proceedings may not be frustrated, the plaintiff and the defendant are ordered to each deposit in a joint account held by their respective advocates the sum of KShs.200,000/= within seven (7) days of today's date being the deposit of costs of the arbitration.

(vi) If the plaintiff defaults in abiding by any order of this court, the order staying proceedings herein shall stand automatically vacated.

(vii) The plaintiff shall pay the costs of this application to the defendant in any event.

DATED at NAIROBI this 20th day of FEBRUARY, 2008.

L. KIMARU

JUDGE