



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 609 of 1999

LITELINE ENTERPRISES PLAINTIFF

VERSUS

PAN AFRICAN BUILDERS AND

CONTRACTORS LTD DEFENDANT

RULING

(1) Liteline Enterprises Ltd. (“**the Plaintiff**”) instituted this suit on the 17th May, 1999 against Pan African Builders and Contractors Ltd. (“**the Defendant**”). In the Plaintiff, the Plaintiff says it was engaged by the Defendant to undertake certain electrical works in a new housing development in Kitisuru, Nairobi; that pursuant to that agreement the Plaintiff carried out part of the work and that in breach of the express terms and conditions of the contract between the parties, the Defendant wrongfully withheld payments due to the Plaintiff for works executed and accepted by the Defendant. The Plaintiff therefore prays for judgment for Kshs.11,555,902.80 (being the value of the work done), among other orders.

(2) The trial commenced before Mbaluto, J on the 21st June, 2000 and continued intermittently before him until the 30th April, 2002 when the following order was made **by consent** –

“By consent the parties to agree on an electrical consultant who will evaluate the work done on the site by the plaintiff and come up with a figure of the sum of money payable to the plaintiff for the work done between November 97 and May 1998. Parties allowed up to 31.5.2001 [sic] to come up with a joint name on which date the case will be mentioned to record the name of the nominated consultant/expert.”

As the parties had not agreed on an electrical consultant by the 31st May 2002 as envisaged, a further order **by consent** was made in these terms –

“By consent matter stood over to 12.6.2002 for mention. If there is no agreement regarding the electrical expert to do the judgment, the Chairman of Kenya Branch of Chartered Arbitrators to appoint one from the list of five nominated by the plaintiff.”

(3) There is no other record in the court proceedings of who and when the electrical consultant was appointed but it would appear that the parties agreed on the consulting firm of electrical and mechanical engineers of Norkun Intakes whose **Report Submission** dated the 11th August 2003 was duly filed in

court on the 13th August 2003 by R. Billing & Co., Advocates, then acting for the Plaintiff. Subsequently, Mbaluto, J made an order on the 1st October 2003 that the parties take fresh dates for further hearing of the suit. Though such dates were indeed fixed for January and March 2004, the matter did not proceed for further hearing.

(4) As Mbaluto, J was no longer available to hear the suit, the matter was mentioned before Waweru, J on the 28th March, 2007 when learned counsel for the Plaintiff informed the court as follows:

“The suit was part-heard before Mbaluto, J. Consent Judgment was entered on liability on 30/04/02. On the issue of quantum the parties agreed for the matter to go to arbitration. It was indeed referred to arbitration; and the arbitrator’s award dated 11/08/03 was filed on 13/08/03.”

whereupon an order was made that the court be appropriately moved with regard to the arbitral award – hence the application now before me.

(5) In the Chamber Summons filed on the 24th July, 2007, stated to be brought under section 36 of the Arbitration Act, 1995 and rules 6 and 9 of the Arbitration Rules, 1997, the Plaintiff asks the court to enter judgment for the Plaintiff in terms of the Arbitral Award made on the 11th August, 2003 and filed in court on the 13th August, 2003. The supporting affidavit was sworn by Parminder Panesar, a director of the Plaintiff, on the 24th July, 2007 and in paragraphs 3, 4 and 5 thereof he depones –

“3. THAT, following a dispute between the

parties with respect to the provisions of a construction contract this matter was referred to arbitration by consent of the parties herein on the 30th of April 2002;

4. THAT, the Chairperson of the Kenya Branch of Chartered Arbitrators appointed Engineer Muhoro of Norkun Intakes as the Arbitrator;

5. THAT, the Arbitration proceeded on various dates and an award was made on the 11th day of August 2003 and was filed in this Honourable Court on the 13th of August 2003.”

(6) The question I have to decide is whether or not the consent order made on the 30th April 2002 is at law an **order of reference** for the purposes of Order XLV of the Civil Procedure Rules, rules 1, 2 and 3 whereof read as follows:-

“1. Where in any suit all the parties interested who

are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

3. (1) The court shall, by order, refer to the

arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order. [Emphasis added].

(2) Where a matter is referred to arbitration,

the court shall not, save in the manner and to the extent provided in this Order, deal with such matter in the suit.”

By the April 2002 consent order, the parties were to **agree on a consultant who was to evaluate the work done and come up with a figure of the sum of money payable to the Plaintiff.** The Report Submission compiled by Norkun Intakes and filed on the 13th August 2003 was clearly intended for use in evidence at the further hearing of the suit. I find and hold that the consent order made on the 30th April 2002 did not refer any matter in difference between the parties to any arbitrator. Consequently, there is no Arbitral Award on the basis of which the order sought by the Plaintiff can be granted.

(7) For the reasons I have given, the Chamber Summons filed on the 24th July 2007 fails and it is hereby dismissed with costs to the Defendant.

So ordered.

Dated and delivered at Nairobi this sixteenth day of May 2008.

P. Kihara Kariuki

Judge.