



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 1 of 2004

.....PLAINTIFF

CLEARSPAN CONSTRUCTION (A) LIMITED

VERSUS

EAST AFRICAN GAS CO. LTD.....DEFENDANT

R U L I N G

East African Gas Company Ltd, the defendant herein, took out a summons dated 16th March 2006 pursuant to the provisions of Section 6 of the Arbitration Act, 1995, Act No. 4 of 1995 and Rule 2 of the Arbitration Rules 1997 in which it prayed for interalia for these proceedings to be stayed pending and referred to arbitration. The application is supported by the affidavit of Elijah Omolo Ongere and the supplementary affidavit of Prakash Bhundia.

When served with the application, Clearspan Construction (A) Ltd, the plaintiff herein, filed the replying affidavit of Anthony Dickinson to oppose the same. The defendant and the plaintiff each filed their skeleton arguments and learned advocates presented their oral submissions.

It is the submission of Mr. Katwa learned advocate for the defendant that this dispute should be stayed and referred to arbitration in terms of the agreement entered between the plaintiff and the defendant. The plaintiff is of the view that the dispute should not be referred to arbitration because there is no dispute. It is said that the claim is admitted.

I have considered both the written and the oral submissions. I have also taken into account the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the summons. I have further considered the pleadings and the case law cited. The plaintiff claim is a sum of Kshs.49,914,552.00 in respect of works delivered in carrying out earth works. The defendant denied the plaintiff's claim. The contract executed as between the plaintiff and the defendant provided that parties are to proceed to arbitration in the event of any dispute or difference howsoever arising. The defendant claims that it does not admit the plaintiff's claim that it is entitled to the amounts under the heads of amounts of certificates, damages, interest and V.A.T. and hence in the circumstances there is a dispute and difference as to opinion. Determination, certificates and valuation as contemplated by the contract executed between the plaintiff and the defendant.

I have considered the two divergent views taken by the parties to this dispute. What is not disputed is that interim payment certificates issued by the defendant's appointed engineer were to be paid within 28 days of delivery of the said certificates. The plaintiff presented the certificates. Some were settled and others remained unpaid. This is a delicate matter which is yet to go to trial hence I will not make

conclusive opinions lest I encroach into the arena of the trial court. The defendant is yet to file a defence because it is said the same is withheld until the matter is referred to arbitration.

The fact remains that the defendant made part payment thus indirectly admitting the claim. There is even a proposal made by the defendant to settle the debt by monthly installments. Three payments were made and 3 were stopped. In a ruling delivered on 15.7.2005, Justice Maraga observed obiter that the outstanding sum was admitted hence due and owing. It is well settled that a defendant cannot succeed to obtain a stay by relying on an arbitration clause unless there is a dispute. I am convinced that a refusal to pay an outstanding debt cannot by any stretch of imagination amount to a dispute. It is not also in dispute that the defendant has not filed a defence to resist the plaintiff's claim. I refer to The Law and Practice of Commercial Arbitration in England, by Sir Michael Mustill, London Butterworths 1982 pages 90-91 which discussed the effect of an undisputed claim as follows:-

“Undisputed Claims

First, an action can properly be brought in the High Court in respect of an admitted claim, even though the contract contains an arbitration clause. The claimant may apply for summary judgment, under RSC Ord. 14²⁰, and the defendant cannot either fend off judgment or obtain a stay simply by relying on the arbitration clause for unless there is a dispute, there is nothing to be referred to arbitration. The same principle applies to a claim which is partly admitted: the claimant is entitled to judgment on the admitted portion, and a stay will be granted as to the remainder.

Where the defendant has not actively admitted the claim, but has so far failed to deny it, it would seem that there is no ;dispute; then in existence, and the claimant not only can but must prosecute his claim by action, rather than by arbitration. Moreover, if he really believes that the defendant is saying nothing because he has nothing to say, he can apply for summary judgment.”

It would appear this claim is either admitted or Uncontested.

ˆ In Russel on the Law of Arbitration it is stated as follows:

“Mere failure to pay

Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a “dispute” calling an arbitration clause into operation. “It does not follow that the courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying.”

From the material placed before me, it would appear the defendant has intentionally refused to settle the claim. In the end I am convinced that this is not a case fit to be referred to arbitration. I dismiss the summons dated 16th March with costs to the plaintiff. Let the matter be fixed for hearing expeditiously to avoid the matter procrastinating further.

Dated and delivered at Mombasa this 6th day of October 2008.

J.K. SERGON

J U D G E

In open court in the presence of the plaintiff.

N/A Katwa for the defendant.