REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 547 of 2007

EPCO BUILDERS LIMITED……………………………PLAINTIFF

VERSUS

GEOMAPS AFRICA LIMITED………………………DEFENDANT

RULING

The Defendant in this case has, by Chamber Summons dated 14th December, 2007, brought under Section 6 of the Arbitration Rules and Rule 2 of the Arbitration Rules, applied for orders that:

"***1) This suit and all proceeds in the suit be stayed. The dispute between the Plaintiff and the Defendant be referred to arbitration***.

2) The costs of the application be borne by the Plaintiff.

The grounds for the application are the following:

i) Clause 45.0 of the Agreement and Conditions of Contract for Building Works ("the subject agreement") dated 17th July 2001 between the parties herein expressly provides for resolution of disputes by Arbitration;

ii) This suit has been instituted by the Plaintiff against the defendant in breach of the express provisions of the subject agreement between the parties and is an abuse of the process of this honourable Court in light of the express provision of the Arbitration Act 1995;

iii) Section 10 of the said Arbitration act, specifically prohibits this court from intervening in matters governed by the Arbitration Act, 1995.

The application is supported by an affidavit of LENNY KIVUTI, the Director of GEOMAPS AFRICA LIMITED the Defendant herein, of even date.

The gist of the affidavit is that the cause of action in the suit arises out of the Agreement and conditions of Contract for Building Works dated 17th July, 2001 entered into between the parties. The deponent invokes clause 45 of the Agreement and states that the dispute which has arisen between the parties should go for arbitration. The deponent confirms the Defendant's willingness to have the dispute resolved by arbitration.

The application is opposed. The Respondent has filed grounds of opposition to the application, dated

31st January, 2008, which are coined in the following terms:

1. There is no dispute on the Plaintiff's claim.

a) - See paragraph 6,7 and 8 of Replying Affidavit by Ramji

b) –See the relevant clauses of the Agreement – annexed to supporting affidavit of Defendant's application.

c) –See Arbitration Act Section 6(1)(b)

d) See also the case of (TM AM CONSTRUCTION GROUP AFRICA)

2. Defendant/Applicant is estopped and cannot invoke the Arbitration Clause – see paragraph 10,11 12 of Replying Affidavit by Ramji because it:-

- Failed to given notice as required under Clause 45.1

- By Clause 45.3 of Agreement

- Cannot dispute/and there is no dispute on the entitlement to payment of sums sued for.

The Respondent has also filed a replying affidavit dated 31st January, 2008. This affidavit is sworn by the Managing Director of the Plaintiff Company.

The gist of this affidavit is that the Defendant/Applicant had not complied with clause 45.1 of the Agreement first by notifying the Respondent in writing of the existence of a dispute and neither has the nature of the dispute been disclosed nor made request that the parties submit such dispute to Arbitration.

The parties were represented by Mr. Moya for the Applicant and Mr. Ouma for the Respondent. The issue before the court in this application is whether the matter of payment was a dispute contemplated under the Agreement entered between the parties and whether it could justify the matter being referred to Arbitration as envisaged under clause 45 of the Agreement. Clause 45.2 describes the matters that can be referred to arbitration as follows:

"***45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract".***

Mr. Moya contented that the cross-reference to clause 34 under clause 45.2 makes it clear that the issue of payment was a matter contemplated by the parties to the agreement as one of those that could be referred to Arbitration.

Mr. Ouma on the other hand maintained that there was no dispute between the parties and that the Applicant had only raised the issue after the Respondent had filed the suit. Counsel raised the issue of the requirements of Section 6 of the Arbitration Act and argued that the Applicant had not demonstrated that there was any dispute to go for Arbitration.

I have considered the submissions by Counsel, the pleadings and cases referred to.

In regard to the cross-reference of clause 34 under the provisions of clause 45.2 of the Agreement. I am of the view that Mr. Moya misapprehended the real application of this clause. Clause 34 provides for payments. However clause 45.2 stipulates that where a dispute may arise in regard to measurement and

valuation referred to in clause 34 of the Agreement, then the matter can be a subject of Arbitration. The application of Clause 34 is therefore restricted to the two matters identified, that is, the issue of measurement and of valuation. Clause 45.2 did not make the issue of payment, perse, a matter to be referred to arbitration. Even if it may be a matter for arbitration, which I think it is not, there are pre-conditions that the Applicant needed to meet before invoking the provisions of Clause 45 of their Agreement and Section 6 of the Arbitration Act. Mr. Ouma raised these issues very clearly and they form the basis of the "Opposition to Application" filed by the Respondent.

Clause 45.3 stipulates:

"***Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference 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 has avoided to state when the matter or issue giving rise to the dispute occurred and/or was discovered by it. The Applicant needed to answer that point in order to lay a basis for the evidence required to show that indeed there was a dispute that could be referred to arbitration.

From the facts placed before me, the Applicant was served with a demand letter on 6th July, 2007, in which the Plaintiff's advocate demanded payment for services rendered to the Defendant/Applicant. The demand letter was neither acknowledged nor replied. The Applicant failed to raise any issues or to pay the amounts demanded. Instead the Applicant filed the application seeking arbitration after this suit was filed against it on 22nd October 2007. It is in the application now under consideration, filed in court on 14th December, 2007 that the issue of a dispute was raised for the first time.

I do find that, as provided under clause 45.3 in the Agreement by the parties, the applicant had an opportunity to raise the issue of a dispute existing between the parties within 90 days from 6th July, 2007 when the demand for payment was made. That means the Applicant had upto mid September, 2007 to serve a notice of the dispute or difference raised. Having failed to do so, it is rather late in the day to request that the matter be referred to arbitration. In any event Clause 45.4 puts a further pre-condition that no arbitration can commence unless an attempt has been made by the parties to settle such dispute or difference. No such attempt has been made.

Having considered this application, I do find that the Applicant has failed to adduce any evidence to show that there is a dispute or difference between it and the Respondent which should be referred to arbitration.

I do find that the Applicant has failed to disclose when the difference or dispute occurred or was discovered by it.

The Applicant also failed to comply with pre-conditions set in the Agreement between the parties, of either serving a notice in writing to the Respondent notifying it of the nature of the dispute or difference. Further no attempt has been made to settle the dispute or difference if any.

I find that in the circumstances the Applicant is not entitled to the prayers sought. The application is dismissed with costs.

Dated at Nairobi this 5th day of May, 2007.

LESIIT, J

JUDGE

Delivered, read and signed in the presence of:

Mr. Moya for the Applicant

LESIIT, J

<u>JUDGE</u>