



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

**Civil Case 44 of 2006**

**MARU PILING & GEOTECHNICAL CONTRACTORS LTD.....PLAINTIFF**

**VERSUS**

**ZAKHEM CONSTRUCTION (K) LIMITED.....DEFENDANT**

**RULING**

The application before the court is a Chamber Summons dated 13<sup>th</sup> March 2006. It seeks a stay of the proceedings in this suit and a referral of the dispute to arbitration for final determination. It is expressed to be brought under Section 6(1) of the Arbitration Act and rule 2 of the Arbitration Rules, 1997 and all enabling provisions of the law.

Three grounds are cited on the face of the application in support of the application as follows:

- 1. THAT the sub-contract agreement forming the basis of the cause of action herein provides for settlement of disputes by arbitration only.**
- 2. THAT as such this court has no jurisdiction to try this matter.**
- 3. THAT it is therefore only fair and just that the orders sought be granted.**

There is also a supporting affidavit sworn by a Director of the Defendant Company. In that affidavit, the Director depones that the cause of action arises from a sub-contract agreement entered into between the Plaintiff and the Defendant. The agreement is annexure "AAI" in the supporting affidavit. The Director depones that it was a term of the sub-contract agreement, under clause 21.2 thereof, all disputes between the Plaintiff and the Defendant should be settled by arbitration. The Director deponed further that in view of the said clause, the parties to the suit were under an obligation to resolve the dispute in this suit through arbitration.

The application is opposed. The Plaintiff has, through a director **MANESH MANJI MARU**, sworn a replying affidavit. In that affidavit, the Director depones in effect that the Plaintiff's claim is not in dispute and since certificates of works provided to the Defendant by the Plaintiff were certified by it, then there is no dispute between the parties and that the provisions of clause 21.1 of the sub-contract agreement does not apply.

Mr. Mutua for the Applicant correctly interpreted section 6 of the Arbitration Act to mean that where a dispute has arisen between parties, which dispute is subject to an arbitration clause or agreement, and an

application is made to refer the matter to arbitration, the court has no option but to grant the application unless:

- i) The Arbitration clause is null and void or inoperable, or
- ii) No dispute exists between the parties.

Counsel urged the court to find that the Applicant made the application timeously, as it has not taken any step in the proceedings, after filing a memorandum of appearance.

In regard to the averment that the Plaintiff's claim is not disputed, since certificates of works had been issued, Mr. Mutua submitted that the foundation of the claim in the plaint was incorrect as the Plaintiff was bringing itself within the **FIDIC** conditions of civil work whereas the relationship between the two parties was governed by the sub-contract agreement annexed in Applicant's affidavit as "**AAI**". Learned Counsel submitted further that there is no proof that any certificates were ever issued, since none were annexed to the replying affidavit to support the averment. Counsel submitted that the absence of the certificates was proof that there was a dispute between the parties. Counsel relied on the supplementary affidavit of the Defendant's Director dated 31<sup>st</sup> July 2007. In paragraph 7, the Defendant annexes "**AA3**" a correspondence to show that before the suit was filed, the Defendant requested the Plaintiff to provide clarification and additional documentation to help resolve the dispute. Counsel also relied on various annexures in the same affidavit, to show that each item of the Plaintiff's claim was disputed, and urged the court to find the case should be referred to arbitration under Section 6 of the Arbitration Act as provided for in the agreement between the parties.

The application is opposed. Mr. Raikudalia urged the Plaintiff/Respondent's case, and relied on the replying affidavit sworn by the Plaintiff's Director. Learned Counsel submitted that there was no dispute between the parties to the suit, and that Section 6 of the Arbitration Act did not apply. Counsel urged that the works had been carried out and certificates issued, and that the claim in the suit was based on the certificates. Counsel submitted further that the claim in paragraph 6(b),(c) and (d) of the Replying Affidavit was calculated in accordance with the agreement entered between the parties prior to commencement of the works. Learned counsel for the Plaintiff urged the court to find that the application had no merit and that it was meant to deny the Plaintiff the fruits of it's labour.

I have carefully considered this application together with the affidavits sworn by both parties, and submissions by both counsels. With due respect to Ms. Raikudalia, there is a dispute between the parties to this suit and that is how this case has landed in court. The Plaintiff's claim is highly contested, as to the averments in the Defendant's affidavit herein demonstrates. It cannot be correct to say that the plaintiff's claim is not in dispute.

The Plaintiff basis its claim on the **FIDIC** contract which the Defendant, in its affidavit, depones does not apply to the two parties. That in itself is a fundamental issue which goes to the very root of the Plaintiff's claim. The Defendant depones further that the relationship between itself and the Plaintiff was wholly governed by sub-contract agreement. That Agreement is annexure "**AAI**" to the Defendant's affidavit. The Plaintiff has admitted that such an agreement existed and infact the Plaintiff has, just as the Defendant Company signed the contract. The Defendant depones provides that clause 21 of the said sub-contract agreement provides that all disputes between them were to be resolved in accordance to the provisions of that clause.

Clause 21.1 provides:

***"If any arises between ZCK and the subcontractor in connection with or arising out of this sub-contract or the carrying out of the Subcontract Works, it shall, subject to the provisions of this Clause be finally settled by arbitration in accordance with the Arbitration Act, cap 49, of the Laws of Kenya***

**r paragraph 4 of the plaint, the Plaintiff avers that the defendant awarded it a sub-contract for pile supports for pipeline. Under paragraph 6 of the plaint, the Plaintiff avers further thus:**

**“6. Pursuant to the same the Plaintiff duly commenced its works and obligations under the said sub-contract and issued the Defendant with the interim certificates at monthly intervals and with the final certificate upon completion of the said works but the Defendant has failed, refused and/or neglected to pay part of the sums due there under being the sum of Kshs.8,008,074.43 and US \$ 71,588.33”.**

**The Plaintiff lays the basis for the claim in this paragraph of the plaint, by establishing that it carried out the works agreed upon under the Sub-contract. The entire claim is grounded on the performance of the sub-contract. Clearly in my humble view, there is a dispute which has arisen between the parties; which dispute arises out of the Sub-contract entered into between the parties and, which Sub-contract Agreement specifically provides that all disputes arising there under should be resolved through arbitration. I am satisfied that the dispute between the parties is subject to arbitration as agreed by the parties in their Sub-contract agreement.**

The Defendant has exercised its right under Section 6(1) of the Arbitration Act which provides:

**“Section 6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds:**

**(a) that the arbitration agreement is null and void, inoperative or incapable of being performed: or**

**(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”**

The Defendant has not filed any defence nor taken any step in the proceedings. It has not waived its right to arbitration and in the circumstances deserves to be given the leave it has sought. The Plaintiff has not alleged that the Sub-contract agreement is null and void, or that it is inoperative or incapable of being performed. No evidence has been placed before the court to suggest so. There is then no reason why the dispute between the parties should not be referred for arbitration.

I will grant the orders prayed, order a stay of these proceedings and refer the matter to Arbitration for determination. Costs be met by the Respondent.

**Dated at Nairobi this 26<sup>th</sup> day of October, 2007.**

**LESIIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Mrs. Njoroge holding brief Mutua for Applicant

N/A for Respondent

**LESIIT, J.**

JUDGE