



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

Civil Case 701 of 2005

**PAN AFRICA BUILDERS & CONTRACTORS
LTD.....PLAINTIFF/RESPONDENT**

VERSUS

**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES.....DEFENDANT/APPLICANT**

RULING

On the hearing of the Originating Summons herein the Respondent took a preliminary objection namely that there was no agreement in existence in respect of which an order could be granted appointing an arbitrator.

Mr. Kajwang referred to Section 12 of the Arbitration Act 1995 which empowers the court to appoint an arbitrator in the absence of agreement by the parties and Section 3 and the definition of arbitration agreement.

He also referred to page 44 of the annexures to the further affidavit of the Plaintiff, which is a copy of the conditions applying to the contract, which was prepared for signature by the parties and contains in Clause 36 an Arbitration Clause. As deponed to by Mohamed Ali for the Plaintiff in its supporting affidavit the contract documents were drawn up for execution but the Plaintiff executed the same but the Defendant failed to do so. There is thus an agreement signed by the Plaintiff only. If that were all I would uphold the preliminary objection as clearly unless there is an agreement duly signed to refer a matter to arbitration the court has no jurisdiction to make an order appointing an arbitrator.

However, the Plaintiff/Respondent relies on decision of Nyamu J in HCCC No.32 of 2002, between the parties herein in which the Plaintiff sought interim relief under Section 7 of the Act on the basis that there was a valid arbitration agreement between the parties. That is the same agreement which the Plaintiff now seeks relief in respect of.

In his ruling Mr. Justice Nyamu stated:-

“because the contract between the Applicant and the Defendant which has an arbitration clause 31 which in turn requires both the Plaintiff and Defendant/applicant to refer any dispute or difference to arbitrator. This is exhibit as MA 8” and later in his ruling at page 3 he stated:-

“I am satisfied that there is an arbitration agreement between the Plaintiff and Defendant to refer any dispute or difference to arbitration pursuant to clause 31. that Agreement has been exhibited and not

denied. It is in writing as require by the ‘Section 4 of the Arbitration Act’

No appeal has either been preferred or allowed against this ruling.

I have not been acquainted with the contents of MA 8 and have not seen clause 31.

However, it is clear that Nyamu J found that an arbitration clause in writing existed between the parties hereto in respect of dispute arising between them.

Mr. Owino submitted that the question of the existence of the Arbitration Agreement was res judicata.

Section 7 of the Civil Procedure Act states:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is clear that all the condition of Section 7 of the Civil Procedure Act exist and that the question of whether there is an arbitration agreement or not between the parties has been decided and as such am not at liberty to try that issue again.

In the result I dismiss the preliminary objection with costs.

Dated and delivered at Nairobi this 27th day of March 2006.

P. J. RANSLEY

JUDGE