



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

AT NAIROBI

Civil Suit 291 of 2001

MEGDEV CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

PIONEER GENERAL ASSURANCE SOCIETY LIMITED.....DEFENDANT

RULING

The Applicant seeks orders that all proceedings in this suit be stayed pending Arbitration and that the matters in dispute in this suit be referred to and be determined by a single arbitrator under the provisions of the Arbitration (The Act.)

The suit filed arises out of a building contract and the Plaintiff/Respondent claims a sum of Kshs, 1,032,000/= being the sum certified as due to it in a final account payment certificate issued by the Architect appointed under the building contract.

The Applicant filed this application on the 14.3.2001. In the grounds in support the Applicant denies it owes the sums claimed and also alleges that it has a claim against the Respondent arising out of delays which it is alleged the Respondent caused. Apart from this application the Applicant filed a Memorandum of Appearance and a Defence (under Protest)

Two issues arise; -

- (1) Has the Applicant submitted to the jurisdiction of the court and
- (2) If there is in fact any dispute between the parties.

Mr. Sarvia relied on **Niazsons (K) Ltd Versus China Road and Bridge Corporation (K) (2001) 2 E.A** in which it was held that it was not open for a party to take out an application for stay of proceedings under section 6(1) of The Act and simultaneously file a written of defence. The Defence under protest had been filed and as Tunoi J.A in a dissenting Judgment took the view that as the Respondent in that case had neither applied for enlargement of time to file a defence nor applied to court for filing a defence without prejudice then in the event that the application for stay failed, Judgment could be entered. This however is not the majority decision of the court.

The question is, did the filing of a Defence under protest amount to the Applicant submitting to the jurisdiction of the court? Although it may seem like a catch 22 situation, nevertheless, the interlocutory Judgment in the **Niazsons case (supra)** is that it is not open to a party to take out an application for stay of proceedings under section 6(1) of the Act and simultaneously file a written statement of Defence. This is binding on this court and I must therefore hold that the Applicant has submitted to the jurisdiction of

the court. There is however another matter and that is whether a just dispute exists between the parties. In the dissenting Judgment of Mr. Justice Tunoi referred to above he said at page 513: -

“It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a dispute calling an arbitration clause into operation. It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which an employer merely persists in not paying”

The sum claimed by the Plaintiff herein is in respect of a final account certificate. Clause 30(7) of the Agreement between the parties, a copy of which is annexed to the Supporting Affidavit to this application, states inter alia:

“Unless a written request to concur in the appointment of an arbitrator shall have been given under Clause 36 of these Conditions by either party before the Final Certificate has been issued or by Contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under clause 36 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum, except and insofar as any sum mentioned in the said certificate is erroneous by reason of

- (a) fraud, dishonestly or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate; or
- (b) any defect (including any omission) in the Works, or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the works or before the issue of the said certificate would not have disclosed; or
- (c) any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error in any computation.

It is not alleged by the Applicant that there was any request to concur on the appointment of an Arbitrator under clause 36 of the Conditions before the certificate was issued or by the Contractor within 14 days after its issue.

Under clause 30(b) it is stated:-

“ the said balance as from the fourteen days after presentation of the Final Certificate by the Contractor to the Employer shall be a debt payable by the Employer to the Contractor”

As the sum claimed is a debt due in my view there is no dispute between the parties in respect of the sum claimed.

So far as the Applicant’s claim for damages for delay against the Plaintiff this it must pursue by separate proceedings.

In the result I dismiss this application with costs to the Respondent

Dated and delivered at Nairobi this 14th day of June, 2005

P.J. RANSLEY

JUDGE