REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT COMMERCIAL DIVISION MILIMANI COURTS

Civil Suit 59 of 2005

MUGOYA CONSTRUCTION & ENGINEERING LTD……..PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES (N.S.S.F)…..……1ST DEFENDANT

SYMBION INTERNATIONAL LTD. ……..……..….2ND DEFENDANT

RULING

This application is brought by an amended chamber summons dated 17th February, 2005. It is made under S. 6 of the Arbitration Act, No. 4 of 1995, Rules 2 and 11 of the Arbitration Rules and all other enabling provisions of the law. It seeks the following orders from the court –

1. That this application be certified as urgent and be heard ex parte in the first instance

2. That the application herein be heard in priority of that of the plaintiff dated 31st January, 2005 and filed in court on 1st February, 2005.

These two prayers are already spent, having been granted at the early stages of the life of this application. The remaining two orders which the applicant prays for are –

3. That this suit and all proceedings arising therefrom save for the hearing of this application be stayed and the parties hereto be referred to arbitration

4. That the costs of this application and the suit be awarded in any event to the 1st defendant.

The application is supported by the annexed affidavits of SAID JUMA CHITEMBWE sworn on 10th February, 2005 and filed herein on the same date, the further affidavit in support also annexed thereto, and is based on the following grounds –

(a) The contracts between the plaintiff and the first defendant forming the subject matter of the dispute and generally the suit herein provides in express and unambiguous terms for arbitration in the event of a dispute.

(b) A default notice was issued by the 2nd defendant to the plaintiff on 27th October, 2004 and the plaintiff's contract of employment with the 1st defendant was determined on 18th November, 2004.

(c) That pursuant to (b) above, the 1st defendant took possession of the site on L.R. No. 9042/179

in early December, 2004; the plaintiff withdrew its security and the inventory taking process commenced in December, has been going on and is nearing completion.

(d) The plaintiff has at all times been invited to participate in the process of inventory taking, has never been stopped from participating and indeed has been requested and encouraged to do so but has refused to cooperate at all.

(e) The plaintiff has been overpaid by the 1st defendant; the plaintiff is in gross breaches of its contractual obligations with the 1st defendant and a dispute having arisen the parties should accordingly be referred to arbitration.

(f) That in view of the matters aforesaid there is no basis whatsoever for the plaintiff's application for injunction and/or the suit in its entirety.

The application is opposed. On 2nd March, 2005, Engineer Harrison Omari, the Chief Engineer and General Manager – Operations in the plaintiff company swore and filed a replying affidavit. He also swore and filed a further affidavit on 10th March, 2005. At the hearing of the application, Mr. Macharia Njeru appeared with Mr. Wamalwa for the 1st defendant/applicant, while Mr. King'ara appeared for the plaintiff/respondent and Mr. Michuki appeared for the 2nd defendant. Each counsel submitted at length. After considering the application and the submissions of respective counsel, I note that after prayers for orders 1 and 2 had been spent as observed at the beginning, the only substantive prayer still outstanding is for an order that this suit be stayed and the parties hereto be referred to arbitration. In order to determine that issue, it is imperative to consider whether there is a dispute between the parties; whether there is an agreement for reference of disputes to arbitration; and if so, whether such arbitration agreement is null and void, inoperative or incapable of being performed.

Certain facts are not in dispute. In making this ruling, I wish to steer clear of making any comments on those matters in dispute where such comments are likely to embarrass whoever will handle the matter hereafter. The undisputed facts are that sometime in 1995, the plaintiff and the first defendant entered into some three contracts for the construction of an agreed number of housing units for an agreed consideration, and within an agreed time frame. In a nutshell, the crux of the plaintiff's case is that in flagrant breach of the contract, the 1st defendant failed and/or refused to make payment at the agreed dates and made the same at its own convenience, thereby throwing the entire project into confusion and causing various breaches and disruptions in the implementation and construction and development of the project. On its part, the 1st defendant blames it all on the plaintiff. Its case is that it diligently and conscientiously paid the plaintiff throughout the contract of employment. It is also its position that the plaintiff was paid numerous amounts not only pursuant to interim certificates issued, but also in form of advance payments without certificates. Indeed, the 1st defendant contends that even the retention sum was also paid to the plaintiff at its requests, when such sum should have been withheld pending the conclusion of the contract. Finally, the 1st defendant takes the position that the plaintiff breached the terms of the agreement by failing to proceed regularly and diligently with the works, and failing to complete and hand over the housing units. This prompted the 2nd defendant to issue a default notice on 27th October, 2004, and the 1st defendant thereafter determined the plaintiff's employment on 18th November, 2004.

It seems to me that there is clearly a dispute between the parties. The question here is – who is responsible for the events that led to the termination of the contract between the plaintiff and the 1st defendant? Each party is quick to point an accusing finger at the other, and this gives rise to a dispute that calls for resolution.

There being a dispute between the parties, the next issue is whether such dispute should be referred to arbitration. Clause 36 (1) of the Articles of agreement between the parties is in the following words –

"Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of

whatsoever nature arising thereunder or connected therewith … then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointed of an Arbitrator, a person to be appointed on the request of either party by the Chairman or a Vice Chairman for the time being of the East Africa Institute of Architects who will, when appropriate, delegate such appointment to be made by the Chairman or Vice Chairman of the local (National) society of Architects."

In an earlier ruling, I observed that there was nothing amiss with this clause. It does not oust or purport to oust the jurisdiction of the court. It is therefore valid as it is not contrary to public policy. By this clause, the parties have agreed between themselves that any dispute or difference between them shall be referred to arbitration. Counsel for the plaintiff argued that the process for the appointment of the arbitrator as per this article is incomplete inasmuch as The East African Institute of Architects is non-existent. That argument, however, cannot withstand the force of the agreement between the parties. Page 1 of that agreement incorporates what seems to be a standard from of

"AGREEMENT AND SCHEDULE OF CONDITIONS OF BUILDING CONTRACT (WITH QUANTITIES), 1991 Edition. This was Reprinted in 1996 and published with the sanction of, inter alia, The East Africa Institute of Architects. If the institute was non-existent as suggested by counsel, then I don't see how it would at the same time have been privy to sanctioning the publication of that form. On the contrary, the very fact that it sanctioned the publication suggests that it was, and is, existent. If indeed it is non existent, the parties have the freedom to resort to the relevant provisions of the Arbitration Act, 1995.

Another issue raised by counsel for the plaintiff is that it is a condition precedent before the court can exercise its discretion to make an order staying proceedings that the applicant must satisfy the court that he is and was at all times willing to do everything necessary for the proper conduct of the arbitration. He cited **ES MAILJI v. MISTRY SHAMJI LALJI & CO**., [1984] KLR 150. That case dealt with S. 6(1) of the Arbitration Act, the then Chapter 49 of the Laws of Kenya. That section gave the court a discretion to make an order staying court proceedings where there was an arbitration agreement. It was perfectly competent for the court in that case to spell out the circumstances under which the court's discretion was to be exercised under S. 6(1). Similarly, the case of **CONSTRUCTION ENGINEERING & BUILDERS (KENYA) LTD. v. MUNICIPAL COUNSEL OF KISUMU** [1982] KLR 399 dealt with matters under the said S. 6 which were agreed to be referred to arbitration. The old section 6 is different from section 6 (1) which was enacted in the Arbitration Act, No. 4 of 1995, in some material respects. In particular, whereas S. 6(1) of the old Act gave the court some discretion at to whether to refer a matter to arbitration or not, the present Act does not confer a similar discretion. It reads –

> **"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 …, stay the proceedings and refer the parties to arbitration unless it finds –**
>
> **(a) that the arbitration award 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."**

I have already expressed an opinion that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration. I also find no ground upon which the arbitration agreement may be declared null and void, inoperative or incapable of being performed.

Learned counsel for the plaintiff pressed the issue of the defendants' conduct and argued strongly that they are not genuinely willing to have the matter go to arbitration. His sentiments are echoed in paragraph 3 of Engineer Omari's affidavit sworn on 10th March, 2005 wherein he says –

> **"The defendant has not at any time taken steps to refer our dispute to arbitration and has no intention of doing so …"**

This is not borne out by the reality on the ground. It is the 1st defendant who has applied for reference of this matter to arbitration. Indeed, it is the plaintiff who has entertained a change of mind, and this sudden change came about after they had already filed their plaint in this matter. Referring to the agreement between the parties, the plaintiff states as follows in paragraph 5 (f) of the plaint –

> **"Disputes relating to the original contract were to be resolved by arbitration …"**

The same sentiment is expressed in prayer (e) of the plaint wherein the plaintiff prays for –

> **"An order that pending arbitral proceedings, the determination of the contract be stayed and the site do remain in the hand of the plaintiff."**

This does confirm that the plaintiff was initially for arbitration but somewhere midstream decided to change course. Its commitment to arbitration was demonstrated as early as December 1st, 2004, vide a letter addressed to the 2nd defendant on that date. In the very last sentence of the letter, the plaintiff cautions –

"However, failing all this we shall have no alternative but to invoke Clause 36 (1) of the Contract."

Given the above instances, it is difficult to fathom the sudden change of heart by the plaintiff.

Finally, as I observed in my previous ruling, the matter under dispute falls within the four corners of the Arbitration Act, No. 4 of 1995. Section 42 (1) thereof put it beyond controversy. Since the arbitral proceedings had not been commenced before the coming into operation of the present Act, it follows that such proceedings have to be governed by the provisions of the present Act.

In sum, I find that my hands are tied by S. 6 (1) which makes it mandatory that I refer this matter to arbitration. I accordingly make the following orders –

1. This suit and all proceedings arising therefrom be and are hereby stayed and the parties hereto referred to arbitration.

2. Parties be at liberty to apply.

3. Costs of this application be in the cause.

Dated and delivered at Nairobi this 27th day of July 2005.

L. NJAGI

JUDGE