REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 37 of 2005

MEHTA ELECTRICAL LIMITED ……..…….....…….1ST PLAINTIFF

TRIPPLE NINE ASSOCIATES LIMITED ……..…….....…….....2ND PLAINTIFF

ELECTRO WATTS LIMITED …….…….....….3RD PLAINTIFF

PETE AVIATION & ELECTRONICS LIMITED ……..…....……4TH PLAINTIFF

EZEMAK REFRIGERATION & CONTRACTORS LTD…...…...….5TH PLAINTIFF

VERSUS

N.K. BROTHERS LIMITED …….1ST DEFENDANT

NATIONAL HOSPITAL INSURANCE FUND……..….2ND DEFENDANT

RULING

The 2nd defendant has moved this court, by a Notice of Motion, brought under section 6 of the Arbitration Act, 1995. The 2nd defendant seeks to stay these proceedings pending Arbitration.

The supporting affidavit of Dr. Mohammed Adan Hassan, the Chief Executive Officer of the 2nd defendant states that; by a contract dated 18th September 1997 between the Government of the Republic of Kenya and the 1st defendant where the Government engaged the 1st defendant for the construction of a building, known as Medicare. That clause No. 32, of that contract, provides that all disputes between the 1st defendant and the relevant Ministries would be referred to arbitration. The 1st defendant entered into other sub contracts with the plaintiffs and that, those subcontracts have an arbitration clause. Then, the deponent stated in paragraph 13 of that affidavit: -

"That the 2nd defendant applicant herein was not a party to the sub contracts and cannot be held liable under the said sub-contracts."

Then in paragraph 15, the deponent stated: -

"That the 2nd defendant/applicant was not privy to the issuance of the certificate No. 56 subject of this claim or for any certificate under the aforesaid contract or subcontract and is therefore not liable there under."

In support of the application the 2nd defendant's counsel drew the court's attention to the sub contracts; annexed to the affidavit in support; and particularly to a paragraph that provided that the sub contracts were supplemental to the main contract, of 18th September 1997. Counsel also submitted that the plaintiff in respect of a certificate No. 57, had initiated arbitration, and therefore argued that if the present claim, represented by certificate No. 56, is not referred to arbitration it will amount to double litigation both in court and before an arbitrator. He said that, the plaintiff having initiated the referral to arbitrator it was proper that all disputes be heard by that arbitrator.

The 1st defendant did not oppose the application.

The plaintiff opposed the application. He submitted that the had made a demand on behalf of the plaintiff's for the amounts represented by certificate No. 56. He said that certificate No. 56 had been issued by a duly authorized agent of the defendants. He further submitted that the Ministry of Health, and of Finance had as their main contractor, the 1st defendant but the main recipient of services under that contract was Ministry of Health. That by certain legal notices the 2nd defendant became liable. The counsel concluded that there was no dispute to be referred to an arbitrator in view of the aforesaid submissions. In this regard counsel relied on the case of TM AM CONSTRUCTION GROUP AFRICA VERSUS A.G. HCCC NO. 236 OF 2001.

Counsel further submitted that the role of a final certificate was that once issued payment was supposed to be made in support of that argument, counsel relied on NAIROBI GOLF HOTELS (K) LTD – AND – LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS CIVIL APPEAL NO. 5 OF 1997.

I have considered the submission brought before me. I believe the pertinent issue that needs to be considered, is the 2nd defendants argument that the main contract of 18th September 1997, did not apply to this action until the notice of indemnity was issued by the 1st defendant. Consequently it was argued the arbitration clause, became alive and operative. It ought to be noted, that the plaintiffs are not signatories to that contract, even though in the sub contract it is stated that it is supplemental to the main contract. It is instructive, however to note, that the 2nd defendant, in submissions before me and in the affidavit in support clearly stated that they are not privy to that sub contract and therefore they are not liable to the plaintiffs claim. If they are not privy how can they seek to invoke it to refer this matter to an arbitrator, I would then, considering that submission by the 2nd defendant find and hold that the arbitration clause if any is not operative in favour of the 2nd defendant.

That indeed is my finding and accordingly the application dated 10th March 2005 must fail. Section 6 (1) (a) The Arbitration Act states that a stay will not be granted if the court finds; "That the Arbitration agreement is null and void, inoperative or incapable of being performed." I find that clause 32 of the main contract does not bind the plaintiffs for they are not signatories thereof; and the sub contract has been disowned by the 2nd defendant, and it therefore cannot shelter under it.

The order of the court is that the application dated 10th March 2005 is dismissed with costs to the plaintiff.

Dated and delivered this 16th August 2005.

MARY KASANGO

JUDGE