



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 524 of 2005

KARIRANA ESTATES LIMITEDPLAINTIFF

VERSUS

QUECONSULT LIMITED1ST DEFENDANT

ENGINEER AUSTIN S. KITOLOLO2ND DEFENDANT

RULING

By its Chamber Summons of the 22.9.2005 the Applicant seeks the following injunctive relief:-

- “1. The application be certified as urgent and be heard exparte in the first instance.**
- 2. Pending the hearing and determination of this suit or until further orders of this Honourable Court, an injunction do issue to restrain the 2nd Defendant from acting as a Conciliator or Arbitrator or in any other capacity howsoever in the dispute between the Plaintiff and the 1st Defendant herein.**
- 3. All proceedings before the 2nd Defendant in connection with the dispute between the Plaintiff and the 1st Defendant be stayed pending the hearing and determination of the suit or until further orders of this Honourable Court.**
- 4. The Defendants do pay costs of this Application.”**

The application was opposed by the 1st Respondent but the second Respondent did not appear although

served.

The Applicant and 1st Respondent entered into an agreement annexed to the Applicant's supporting affidavit called "**Conditions of Engagement**".

Clause 4 thereof dealt with settlement of disputes and provided initially for differences to be submitted to a conciliator appointed by the Engineers Registration Board for conciliation and if not settled by the conciliator by arbitration.

The Applicants complain that firstly, it was not involved in the process of the appointment of conciliator and secondly the conciliator appointed is not acceptable to the Applicant for good reasons.

It is the Respondent's contention that the Conciliator was properly appointed and should be allowed to conciliate.

The terms of Clause 4 are as follows: _

"The following steps should be taken if any dispute or difference arises:-

(a) Any dispute or difference arising from this Agreement shall first be confirmed by the issuing of a statement of difference detailing out the areas and extent of the differences. This statement shall be accepted by both parties. This stage should be completed within 21 days of notice of difference by either party.

(b) The statement of difference should be submitted to a Consulting Engineer of good standing elected by the Engineers Registration Board as a conciliator for conciliation. The parties will undertake to accept his judgement.

(c) Any dispute or difference not settled by conciliation shall be referred to the Arbitration of a person to be agreed upon between the Client and the Consulting Engineer or, failing agreement within 28 calendar days, or within such extended time as may be agreed between the two parties after either party has given the other a written request to concur in the appointment of an arbitrator, to a person to be appointed by the Chairman for the time being of the Association of Consulting Engineers of Kenya."

The agreement does not provide for a situation where either or both of the parties object to the conciliator.

The question arises as to whether the parties are bound to accept the appointment of the conciliator as elected by the Engineers Registration Board or can either one or both objects.

The prerequisite to the election of the conciliator is that there is a dispute between the parties and the issuing of a statement of difference.

Annexed to the supporting affidavit of Michael M. Gakungu, the General Manager of the Applicant is a letter marked JN – 3 from the Respondent's advocates to the Applicant dated 27.8.2003 giving the Applicant formal notice of a Difference. Enclosed is their Statement of Difference dated the 21.8.2003 and signed by the Respondent's advocates.

Thereafter the Applicant's advocates were appointed to act and wrote three letters to the Respondent's advocates in connection with the Statement of Difference asking for an extension of time to file their Statement of Difference and enclosing a Statement of Difference which is different in terms to the Statement of Difference prepared by the Respondent's advocates.

The parties have themselves detailed the manner in which disputes between them should be resolved.

This matter seems to have got off on the wrong foot as the Statement of Difference was not an agreed

document.

In this matter I am asked to make restraining orders.

I make the following orders:-

That the Dispute proceedings be stayed pending the parties agreeing upon an agreed Statement of Differences.

Further in view of the Applicant's reservations about Mr. Kitololo I order that the dispute proceedings be further stayed pending the Engineers Registration Board electing another person to act in place of Mr. Kitololo as a conciliator pursuant to the provisions of Clause 4(b) of the Conditions of Engagement.

Costs will be in the cause and subject to further orders.

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

P. J. RANSLEY

JUDGE