REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL SUIT NO. 1624 OF 2002

TECTURA-INTERNATIONAL LIMITED ……....PLAINTIFF

V E R S U S

KENYATTA NATIONAL HOSPITAL……..… DEFENDANT

R U L I N G

This application poses the issues which are not ordinary.

The applicant has filed the suit seeking to force the Respondent to refer the disputes raised by it to an Arbitrator and also for a permanent injunction restraining the Respondent from appointing another consultant and from interfering with the project in any manner pending the determination of the suit. I do see that the second prayer definitely is not an appropriate to fit in the list of final orders.

Any way, the applicant has along with the suit has filed this application for interim order. It is dated 25th October, 2002 and interalia seeks prayer (b) of the plaint by way of a temporary injunction. I shall however quote it.

> ***"(2) That an order of temporary injunction do issue restraining the defendant from appointing the d efendant from appointing any other consultant in place of the plaintiff with regard to the contract dated 21 st February, 1997 and/or interfering with the contract project in any manner whatsoever pending the hearing and determination of this suit."***

If this court would choose to be very pedantic the application could have been dismissed on the ground that the prayer made in the plaint in respect of injunction is not competent. But I shall not do so. I also remind myself that the plaintiff can always amend the prayer during the course of the future proceedings. Similarly I am also not giving much heed to the wrong description of the Respondent.

Only facts which are not disputed are that there was a contract entered between the parties as a client and consultants. It is averred to have been executed on 21st February, 1997. In June, 2002 several issues were raised by the Respondent to be clarified by the Applicant. There was a response. However, the Respondent issued a Notice of termination under clause 2.7.1 and 2.7.1 (d) of the contract.

The Notice was in short due to the failure of the Applicant to take actions towards prudent deployment of finances and timeous completion of the project, with other grounds. The Applicant thereupon declared technical dispute under Clause 2.7.6 pursuant to clause 8 of the contract. It also named two Quantity Surveyors one of whom to be chosen by the Respondent as a sole Arbitrator.

The Respondent however did not agree that it was a technical dispute and terminated the services of the Applicant citing Architects and Quantity Surveyors Act (Cap 525).

Thereafter by a letter of 30th September, 2002 the termination of the Applicant's consultancy was

confirmed. The Applicant did not accept the termination and reiterated its intention to file arbitration proceedings.

In the backdrop of these facts the present plaint and application have been filed by the Applicant.

It shall be appropriate to quote the relevant clauses of the contract of consultancy, which was executed by the parties. " 2.7.1 Termination

27.1 By the Client

The Client may, by not less that thirty (30) days' Written notice of termination to the Consultants (except in the event listed in paragraph (f) below, for which there shall be a written notice of not less than sixty (60) days), such notice to be given after the occurrence of any of the events specified in paragraphs (a) through (f) of this Clause 2.7.1 terminate this Contract.

(a) If the Consultants fail to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to Clause 2.6 herein above, within thirty (30) days of receipt of such notice of suspension or within such further period as the Client may have subsequently approved in writing;

(b) If the Consultants, or any of their members, become insolvent or bankrupt or enter into any agreements with their creditors for relief of debt or take advantage of any law for the benefit of debtors or go into liquidation of receivership whether compulsory or voluntary;

(c) If the Consultants fail to comply with any final decision reached as a result of arbitration proceedings pursuant to Clause 8 hereof;

(d) If the Consultants submit to the Client a statement which has a material effect on the rights, obligations or interests of the Client and which the Consultants know to be false;

(e) If, as the result of Force Majeure, the Consultants are unable to perform a material portion of the services for a period of not less than sixty (60) days; or

(f) If the Client, in its sole discretion and for any reason whatsoever, decides to terminate this Contract.

2.7.6 Disputes About Events of Termination If either Party disputes whether an event specified in paragraphs (a) through (e) of Clause 2.7.1 or in Clause 2.7.2 hereof has occurred, such party may, within forty-five (45) days after receipt of notice of termination from the other party, refer the matter to arbitration pursuant to Clause 8 hereof, and this Contract shall not be terminated on account of such event except} in accordance with the terms of any resulting arbitral award.

8.1 Amicable Settlement

The parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or the interpretation thereof

. 8.2 Right of Arbitration

Any dispute between the parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such Amicable settlement may be submitted by either party to arbitration in accordance with the provisions of Clauses 8.3 through 8.6 hereinafter.

8.3 Each dispute submitted by a party to arbitration shall be heard by a sole arbitrator or an arbitration

panel composed of three arbitrators, in accordance with the following provisions:

> (a) Where the parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other party of the proposal of a name for such an appointment by the party who initiated the proceedings, either Party may apply to the relevant Board of Registration in Kenya for a list of not fewer than five nominees and, on receipt of such list, the parties shall alternatively strike names therefrom, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the relevant Board of Registration of Kenya shall appoint upon the request of either party and from such list or otherwise, a sole arbitrator for the matter in dispute. (b) Where the parties do not agree that the dispute concerns a technical matter, the Client and the Consultants shall each appoint the arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter or the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either party, be appointed by the Chief Justice of Kenya.
>
> (c) If, in a dispute subject to Clause 8.3 (b), one Party fails to appoint its arbitrator within thirty (30) days after the other party has appointed its arbitrator, the Party which has named an arbitrator may apply to the Chief Justice of Kenya to appoint a sole arbitrator for the matter in dispute and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.

8.3 Rules of Procedure

Except as stated herein arbitration proceedings shall be conducted in accordance with the provisions of Cap 49 of the Laws of Kenya.

The Applicant admittedly raised a dispute as per the procedure of clause 8 of the contract. However, it has failed to follow the procedure leading to arbitration, namely (a) notice for amicable settlement and (b) thereafter also provisions of selection of arbitrators as per clause 8.3. It has just rushed to this court without first following the agreed procedure to enable it to seek any redress.

That apart, it cannot be disputed that in effect the contract of consultancy executed between the parties is a contract of service between a client and the consultant. Even stretching all the relevant laws and Rules of contract of service, the remedy of reinstatement cannot be available to the Applicant. I am also fortified by the authority cited by learned counsel of the Applicant. On page 7 of the Law and Practice of Commercial Arbitration in England, under heading of 'Enforcing the arbitration agreement' it is stated and I quote:

> *"An order for the specific performance of the arbitration agreement cannot in practice be enforced. Damages are a possible remedy ……for technical reasons, an injunction is not the correct method of bringing an action in England to a halt.*"

The observations made by Lord Mcmillan in the case of Heyman V. Darwin Ltd, (1942) A.C. 356 at page 374 cannot be relevant to this case due to the fact that the said case was based on the claim by the applicant for declaration against the Respondent, on that has repudiated the contract on the basis of frustration and for damages.

The facts of this case are a bit unique wherein the Applicant is seeking an injunction so that the claim of specific performance or its reinstatement as a consultant can be brought before the Arbitration Tribunal. If, as on the other hand, as the learned counsel did state that the issue is the validity or otherwise of termination of the Applicant's services as a consultant, then the remedy is only in damages.

Furthermore, the project in question is a rehabilitation project of Kenyatta National Hospital. To stay the whole project shall result in the project of public interest being stalled, to the prejudice of general public. The balance of convenience thus, is also not in favour of the applicant.

It is also on record that the Respondent has already employed another consultant although it is submitted by the Applicant's counsel that it is not so. Considering all the aspects of the application, facts thereof and the submissions made, my humble view, is that the Applicant has not made out the case for the grant of temporary injunction as prayed.

The upshot is that the application is not allowed and stands dismissed. In view of the protracted fight between the parties, I shall not make any award on costs.

Dated and delivered at Nairobi this 12th day of March, 2003.

K. H. RAWAL

JUDGE.