REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2227 OF 2000

TRISHUL CONSTRUCTION COMPANY LTD…… …. PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND ……. . DEFENDANT

R U L I N G

The Applicant in this case entered into a building contract with the Respondent which was for the carrying out of roof covering of the Applicants house. It is alleged that the contract sum was K.shs 9,713,000/- The contract agreement provides at clause 32 as follows inter alia:

> *"32. Provided always that in case any dispute or difference shall arise between the Employer or the D.R. on behalf of the Employer and the Contractor, either during the progress or after the completion or abandonment of the works as to th e construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this Contract to the discretion of the D.R. or the withholding by the D.R. of any certificate to which the Contract to the discretion of the D.R. or the withholding by the D.R. of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 13 of these conditions or the rights and liabil ities of the parties under clause 27 of these conditions, then either party shall forthwith give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decisi on of such person or persons as the parties may by agreement appoint to act between them or failing agreement then to the arbitration and final decision of a sole arbitrator to be appointed by the Chairman or vice-chairman of the Architectural Association of Kenya, for the time being, and the award of such arbitrator shall be final and binding on the parties.……..".*

The work is alleged to have been completed and to have been handed over to the Applicant. The Respondent thereafter filed this suit seeking K.shs 3,107,329/65 and interest thereon at the rate of 33.4% per annum from 30th November 1999 until payment in full being the amount certified by the architect as the payment due as at 29th October 1999 and interest due as further certified by the Applicants agents.

Upon its being served with the Plaint and summons to enter appearance, the Applicant, in compliance with Section 6(1) of the Arbitration Act 1995 and Rules 2 of the Arbitration Rules 1997 filed this application seeking the following orders:

> *"1 THAT the suit herein and all proceedings in relation thereto be stayed as they are the subject matter of an arbitration agreement. 1. THAT the dispute herein be referred to arbitration.*
>
> *2. IN THE ALTERNATIVE the suit herein be struck out as it refers to a non -existent Defendant.*

3. THAT the Plaintiff be condemned to pay the Costs of this application"

. Section 6(1) of the Arbitration Act 1995 states as follows:

> *"6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreeme nt shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other steps in the proceedings, stay these proceedings and refer the parties to arbitration unless it finds:*
>
> *(a) That the arbitration agreement 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".*

In this matter the Applicant has filed two affidavits, both sworn by Margaret Osure. In the first affidavit, the Applicant maintained that this matter was covered by the Contract Agreement which made it clear at paragraph 32 that any dispute would be referred to arbitration in accordance with Section 6(1) of the Arbitration Act 1995. However after the Respondents Replying affidavit, the Applicant filed a Supplementary Affidavit in which several letters were annexed showing that the Applicant was not happy with the use of a material called ALCAN instead of ALUCOBOND and in fact in their letter to Joel Nyaseme, the Project Architect, dated 16th September 1998, the Applicant was emphatic that they would not pay for the installed cladding which was neither Alucobond nor Alcan. From the exhibits annexed by the Applicant that complaint continued till the letter dated 23rd June 1999 in which the Respondent entered all technical information about Alcan specifications. That letter ends:

> *"Could you please be kind enough and now request the client to pay us our final due"* .

In a further letter to the Applicants dated 14th September 1999, the Respondent addressed to the Applicants, the Respondent revised their rate for the material used in lieu of Alcobond specified. That letter also ends as follows:

> *"By the authorisation o f this letter on the above issue, we are also requesting you to write to the Quantity Surveyor M/S Quants Consult to prepare the final account for the above project so that we can be paid our dues. We hope that the above is in order and we await for your e arly reply".*

The Applicants annextures end with that letter and one would thus think there was no reaction to that letter of 14th September 1999. Had that been so, it would have been clear that there was still a dispute to go to arbitration.

But was that the end of this matter? No. The Respondent filed a further Affidavit sworn by Dhanji Rabadia on 15th March 2001. In that Affidavit a letter dated 17th September 1999 (three days after the Respondents letter of 14th September 1999) from the Applicant to the Quantity Surveyor M/S Quantsconsult is annexed. It is from the Applicant. It states as follows:

> *"M/S Quantsconsult,*
>
> *P.O. Box 31728,*
>
> *Nairobi .*
>
> *Attn: Mr. Munene*
>
> *Dear Sir,*
>
> *SOCIAL SECURITY HOUSE NAIROBI RE-ROOFING TO COMPUTER CENTRE – BLOCK C*

As you ma y be aware by now, the contractor for the above job, M/S Trishul Construction Company Limited, completed the works with cladding that was not described in their tender documents and without proper authorisation and/or necessary instructions.

They have now agreed to be paid a lesser amount, commensurate with the quality of material fixed. This is therefore, to request you to work out the appropriate rate and hence cost of the spray painted metal sheets intalled by the contractor to enable us settle the fina l payments that may be due to them.

Please revert urgently.

Yours faithfully,

A.S.N. Ndwiga

FOR: MANAGING TRUSTEE

That letter was copied to Joel E.D. Nyaseme & Associates, the Project Architect and to the Respondent. It is clearly a withdrawal of the earlier complaints. Thereafter Quantsconsult issued the certificate for the amount being claimed i.e. K.shs 3,107,329/64 and the Project Architect also issued the certificate and calculated the interest rate. What then is to be taken to the arbitration? The payment being demanded is in line with the request made to the Quantity Surveyor by the Applicants themselves, and is certified by their own agents.

I do find that there is not in f act any dispute between the parties with regard to the matters agreed to be referred to the arbitration. This application cannot succeed. It is dismissed.

On the question of the prayer for striking out the suit on grounds that a wrong name of the Defendant has been used by the Respondent, I note first that application before me is only brought under Arbitration Act and not under Civil Procedure Rules as indeed no Civil Procedure Rules were cited in the application. Be that as it may the omission of the words “Board of Trustees” is in my opinion, a matter that can be cured by an amendment.

The Applicant has not suffered any prejudice and I do feel that Order 1 Rule 9 can apply here. I will not strike the suit out. The application dated 5th February 2000 is dismissed. As the Respondent used wrong name of the Defendant, each party will bear its own costs. Orders accordingly.

Dated at Nairobi this 6th day of June 2001.

ONYANGO OTIENO

JUDGE