



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1562 OF 2000**

**ERNIE CABELL & COMPANY LTD. .... PLAINTIFF**

**VERSUS**

**GITHUNGURI DAIRY PLANT COMPANY LTD.**  
**..... DEFENDANT**

**R U L I N G**

Plaintiff sued the Defendant claiming K.shs 9,711,792/30 being the payment in respect of work done under a building contract between the two of them and work for which three certificates (two interim certificates and one final certificate) had been issued by the Architect in charge of the works. Upon being served, the Applicant herein applied under Section 5 of the Arbitration Act and Rule 2 of the Arbitration Rules seeking one main order and an alternative order plus costs. The order the Applicant/Respondent sought is that the dispute herein be referred to arbitration. The alternative order is that the Defendant be exempted from filing defence until the hearing and determination of this application.

The application is supported by two affidavits both sworn by Njoroge Baiya, Defendant's chairman. The first Supporting Affidavit is short and mainly contends that the issues in dispute in this suit are subject to an arbitration agreement dated 31st January 1997, a copy of which was annexed to the same affidavit; and that as the same arbitration agreement is still operative and is not null and void or incapable of performance, the matter should be referred to arbitration. After prompting by the Respondents allegations in the Respondent's affidavit to which I will refer to hereinafter, the Applicant swore another affidavit in which its Chairman did set out the contentious issues which he maintains warrants this matter being referred to arbitration.

The Respondent/Plaintiff opposed the application maintaining that the claim, the subject matter of the suit is for money due and payable by the Defendant to the Plaintiff and has been certified as so due and payable by the Defendant's own architect, acting as the Defendant's agent and thus as there is no dispute between the parties regarding the claim, it should proceed to hearing.

I have considered this application anxiously. I have perused the agreement annexed and the Project Report prepared by S.M. Richu, Quantity Surveyor. I have also considered the able submissions by the learned counsels. I have also perused the authorities I was referred to.

The Plaintiff seeks an amount which includes payment due under two Interim Certificates and payment under Final Certificate of 8.5.2000. I have not been told whether the project has been handed over to the Respondent or not. The Applicant says this payment cannot be due even though certified because a number of issues have to be sorted out between the parties and that the same issues would affect the total payment to be made to the Respondent/Plaintiff. These issues have been itemised in details in the Project Report prepared by S.M. Richu, Quantity Surveyor and are deponed to in the Further Affidavit sworn by Njoroge Baiya.

This in effect means that the question as to the amount due to the Plaintiff is still subject to those issues being sorted out. My understanding of the matter is that although the Architect has certified that according to the work done the amount due is as claimed, the actual amount to be paid is still subject to these issues being agreed upon and the solution of the same issues may very well affect the amount to be paid as the architect proceeded on the basis that the variations done to the various orders were proper. That is now being challenged and so the certificates may very well have to be reissued depending on whether the variations are confirmed proper or not.

***Section 6(1) states as follows; “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 not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the 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***

***(a) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration”.***

The Respondent/Plaintiff has not claimed that the arbitration agreement is null and void, inoperative or incapable of being performed. All the Plaintiff claims is that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration. Clause 36(1) of the agreement states interalia as follows:

***36(1) 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 whatever nature arising thereunder or in connection therewith (including any matter or thing left by the contract to the discretion of the Architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5) (a) of these conditions) or the rights and liabilities of the parties under clauses 25, 26, 33, or 34 of these conditions, then such dispute or differences 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 appointment 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 .....***”.

This clause states to my mind that any matter or thing left by the contractor to the discretion of the Architect and matters of measurement and valuation mentioned in clause 30(5)(a) of the agreement are matters that are to be referred to arbitration. Clause 30(5)(a) states as follows:

***“(5)(a) The measurement and valuation of the Works shall be completed within the period of Final Measurement and Valuation stated in the appendix to those conditions calculated from the date of Practical Completion and the Contractor shall be supplied with a copy of the summary of the priced Bills of Variation not later than the end of the said period and before the issue of the Final Certificate under Sales clause (6) of this condition”.***

The Applicant says that the claim has not crystallised into a simple debt because it still intends to raise complaints about bills variations and these may affect the validity otherwise of the certificate including final certificates. As I have stated above there is a difference between what is still in dispute and what is no longer in dispute. Lakha J.A. in the case of KEA BARUA & Another on TOWN CONSTRUCTION

COMPANY Ltd, Kenya Court of Appeal Civil Application No. NAI 325 of 1998 makes this very clear. He says inter alia as follows:

***“In the present case, the construction of the flats was completed in July, 1997 and possession handed over to the employers. A sum of K.shs 25 million was paid to the contractor. The employers entered into an agreement of sale on April 16, 1998 for the sale of the property at a sum of shs. 51 million and the purchasers there under are in possession. Up to the date the contractor filed the suit the employers had made no complaint about the construction work. All the above facts show that the employers had no dispute with the contractor arising from the Building Contract or in connection therewith. Furthermore, in terms of clause 30(6) of the Building Contract the sum due had become a civil debt payable by the employers and admitted to be payable”.***

and in the case of London & North Western & Great Western Joint Railway Cos. vs. J.H. Billington Ltd (1899) A.C. 79 at page 81 His Lordship quoted it and emphasized that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen, and I think that must mean a difference of opinion before the action is launched either by formal Plaintiff or in County Court or by writ in the superior court.

This authority is completely distinguishable from the case before me. In this case a look at the Project Report annexed to the further affidavit shows that the differences as to variations and measurements were there quite sometimes before this suit was filed and these differences of opinion were directly on the amount to be paid to the Plaintiff. This is then clearly distinguishable from the case of Kea N. Barma, & Another vs Town Construction Co. Ltd above.

In my humble opinion, this dispute as I have stated above affects the matters in respect of which architect's discretion were to be exercised such as various variation and measurements.

I do allow this application. Let the dispute herein be referred to arbitration. Costs of this application to the Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of September 2001.

**ONYANGO OTIENO**

**JUDGE**