



Esteem Surveyors & Associates Limited v Tysons Limited & another (Civil Case E002 of 2024) [2025] KEHC 23 (KLR) (10 January 2025) (Ruling)

Neutral citation: [2025] KEHC 23 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E002 OF 2024
FR OLEL, J
JANUARY 10, 2025**

BETWEEN

ESTEEM SURVEYORS & ASSOCIATES LIMITED PLAINTIFF

AND

TYSONS LIMITED 1ST DEFENDANT

KCB BANK LIMITED 2ND DEFENDANT

RULING

A. Introduction

1. The Application for determination, before this court is a Notice of Motion application dated 15.05.2024 brought pursuant to the provisions of Article 159 of the *Constitution of Kenya*, Section 6 of the *Arbitration Act*, Section 1A, 1B, 3A of the *Civil Procedure Act*, & Order 51 (1) of the *Civil Procedure Rules* and seeks the following orders;
 - a. That this suit be stayed.
 - b. That the dispute herein be referred to negotiations in terms of clause 3.5 and 16.1 of the agreement dated 05.07.2021 between the parties.
 - c. That in default of Agreement after 15 days from the order to negotiate, the dispute be referred to Arbitration.
 - d. The costs be awarded to the Defendants in any event.
2. The Application is supported by the grounds stated on the face of the said Application and the Supporting Affidavit of one Stephen Omengo a director of the 1st Defendant/Applicant who deponed that acting on instructions of the 2nd defendant, they did enter into an agreement dated 5th July 2021, with the plaintiff and at clause 3.5 thereof, it was expressly agreed that if any dispute arose as to the



- payment of the surveyors fee, the same would be referred to the 2nd defendants Auditors for settlement and their decision, save in the case of manifest error, would be final and binding on both parties.
3. Further the said agreement at clause 16 did provide/reiterate that any dispute arising between the parties, would at the 1st instance be referred to negotiations and if the parties failed to agree, then the said issue would be referred to Arbitration. Based on these two clear provisions in the said contract, these proceedings needed to be stayed and the same be referred to internal dispute resolution mechanism as provided for under the aforestated contract.
 4. This Application was opposed by the plaintiff, who filed their grounds of opposition dated 3rd June 2024. It was their contention that they rendered professional services (survey work) to the 1st and 2nd defendants over property known as LR . no 8786 Athi River, Machakos County for which they were entitled to be paid Ksh.120,000,000/= for work done. This fact was not denied by the applicant and a such the issue of refusal to pay for work done did not amount to a dispute warranting referral to Arbitral process. This court was therefore properly sized of this matter and they urged the court to dismiss the said application.
 5. The 2nd defendant did not file any response to this application, but their counsel submitted in court that they supported the same and urged the court to grant the orders sought.
 6. The matter was canvassed by way of written submissions.

B. Submissions

(i). 1st Defendant/Applicant's Submissions.

7. The 1st Defendant/Applicant filed submissions on 16.10.2024 where they submitted that the associate themselves with the length submissions filed by the 2nd defendant and reiterated that it was trite and established law that in any matter arising out of a contract, which had an arbitration clause, a defendant was estopped from filing its defence and is only required to enter appearance and simultaneously apply for stay and referral of the suit to the alternative dispute resolution mechanism as provided in the contract.
8. The 2nd defendant too filed their submissions dated 07.10.2024, where they too reiterated that clause 3.3 and 16 of the contract dated 05.07.2021 provided that the parties deploy alternative dispute mechanism provided in the agreement to amicable resolve the arising dispute. The mere fact that the parties were before court pointed to the existence of a dispute over the plaintiff profession fee for work done and the same ought to have been referred for determination by the 2nd defendants Auditors and/or for arbitration, if they failed to resolve the said dispute.
9. Section 6 of the Arbitration Act, provided that if a dispute, which was subject to Arbitration agreement was filed in court, the respondents had a right upon filing the memorandum of Appearance to simultaneously apply for stay of proceedings. The 1st defendant having complied with this provision was therefore perfectly entitled to the orders sought as they had not acknowledged the claim as filed. Reliance was placed in the case of A to Z Textile Mills Limited Vrs East African Portland cement company Plc (Civil case no E002 of 2023),(2024) KEHC 4697 (KLR), Burn Manufacturing USA LLC Vrs Sage South Africa (PTY) Limited (2020) eKlr & Abwoga Vrs Checkups Medical Centre Ltd & another (Cause E802 of 2023) (2024) KEELR 123(KLR).
10. The 2nd respondent thus urged the court to find that the parties had ousted the court's jurisdiction by their own agreement to use alternative dispute mechanism to resolve their dispute. Further reliance was placed on Alison Jean Louis Vrs Rama Homes limited (Misc Application E235 of 2019),(2020) KEHC



6370 (KLR), where the court downed its tools and allowed the parties therein to peruse alternative dispute resolution mechanism's.

(ii) Plaintiff/Respondent's Submissions

11. The Plaintiff/Respondent filed submissions dated 23.10.2024 wherein it was submitted that there was no dispute between the parties capable of being referred to arbitration and that mere a difference of opinion over professional fee payable could not constitute a dispute for purposes of arbitration as the work done and fee due was not contested. Reliance was placed on the case of Ellis Mechanical Services Limited Vrs Wates Construction Limited, Adcock Ingram East Africa limited Vrs Surgilinks Limited, TM AM Construction Group (Africa) Vrs Attorney General (2001)1 EA 282 (CAU), UAP Provincial Insurance Company Ltd Vrs Micheal John Beckett (2013) eklr, Halki shipping Corp Vrs Sopex Oils Ltd & Ellis Mechanical Services Limited Vrs Wates Construction Limited.
12. The applicant had failed to demonstrate that there was indeed a dispute capable of being referred to arbitration, and thus it was not in the interest of justice to stay proceedings herein. The respondent thus urged this court to find that the application as filed was an abuse of the court process and be pleased to dismiss the same.

C. Determination

13. I have considered the Notice of Motion Application dated 15/5/2024, the affidavits made in support and in opposition thereto, the submissions on record and find that the only issue for determination is whether this suit should be referred to the Arbitral tribunal. Section 6 of the Arbitration Act, Cap 49 of the Laws of Kenya provides that;

Stay of legal proceedings

- (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 otherwise acknowledges the claim against which the stay of proceedings is sought, 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
 - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
 - (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 - (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
14. An arbitration agreement is defined under section 2 of the Arbitration Act as;

“an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”
 15. It is not in dispute, that there is an agreement entered between the 1st defendant as agent of the 2nd defendant and the plaintiff, where the parties agreed that the plaintiff would carry out sub division of



LR no 8786. The fee agreed for this undertaking totaled to Kshs 235,269,440.00/= (inclusive of VAT and disbursements) for the 3,339 sub divided plots.

16. Clause 3.5 of the said Contract Agreement provided that;

“If any dispute arises as to payment of the surveyor’s fee, the same shall be referred to KCB’s auditors for settlement and their decision, save in the case of manifest error, shall be final and binding on both parties.”

17. Further the same agreement under clause 16 provided that ;

16.1 Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or implementation of any or more of the provisions of this agreement, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiation’s or any other alternative dispute resolution mechanism (save for Arbitration as set out below).

16.2 should such negotiations fail to achieve a resolution within 15 days, either party may declare a dispute by written notification to the other, where upon such dispute shall be referred to arbitration under the following terms:

18. First and foremost, it is trite law that courts only interpret and enforce contracts signed by the parties. In *Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999*, it was held that:

“...Courts are not forum where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”

19. The plaintiff claim is premised on payment of his profession fee for surveyor work done for and on behalf of the 2nd defendant, in sub dividing LR no 8786 as per the approved sub division scheme. At paragraph 11 of the plaint filed, the plaintiff further avered that before they could obtain all the deed plans and/or amend registry index map (RIM) and extensively finalize on its scope which was 95% done, the 1st defendant terminated the Agency agreement without having paid for work done.

20. The plaintiff further did contend the Defendant’s action was in breach of the binding agreement signed and despite quantifying the works completed and holding several deliberations, the defendant had deliberately failed to certify and pay the amounts owned, hence necessitating filing of this suit.

21. While the plaintiff aver that the sums claimed are not disputed, that cannot be so as the mere fact that they have had to file this claim confirms the fact that indeed a dispute has arisen. The agreement dated 29th April 2021 provides for a two-tier process in resolving disputes that arise. Specifically, clause 3.5 provides that “if any dispute arose as to payment of the surveyor’s fee, the same shall be referred to KCB’s auditors for settlement and their decision save in the case of manifest error, shall be final and binding on both parties.”

22. Further clause 16 of the said agreement enforces the fact that parties are to amicably resolve disputes arising by “amicable negotiation’s or any other alternative dispute resolution mechanism” but should



such negotiations fail to achieve resolution within 15 days, either party may declare a dispute by written notice and such dispute would be referred to an Arbitrator jointly appointed by the parties and such process under taken in accordance with Arbitration rules of the Chartered institute of Arbitrators (Kenya Chapter).

23. A straight forward interpretation of the above clauses point to unerring determination that after the plaintiff had forwarded his profession fee to the 1st plaintiff for approval, the same should have been settled, but if a dispute arose, then such a dispute over amounts payable would be referred to KCB's internal Auditors for settlement and their decision would be final, save for a case of manifest error, which then would be referred for Arbitration as provided for under clause 16 since such an issue involved enforcement of the parties rights, obligations and/or implementation under the said agreement.
24. From the correspondents filed accompany the pleading, especially the letter dated 18th August 2022, the plaintiff did lay a basis for which they were demanding the sum of Kshs.120,000,000/=, which was not settled and the defendants inaction imputes that they are disputing part or the entire claim. It would therefore be prudent to have the plaintiff proposed profession fee be subjected to audit assessment as provided for under clause 3.5 of the contract dated 5th July 2022, and in case of any error (dispute) on assessment on the part of the said auditors, the parties do further proceed to Arbitration as provided under clause 16 of the said contract.
25. Be that as it may, it is also important to clarify that what should go for Arbitration, if the parties do not agree is the "partially disputed professional fee" after assessment by the KCB's Auditors, as it is not disputed that the plaintiff partially undertook their assignment and was not paid. To take the Plaintiff through Arbitration for what is not disputed would be unjust and prejudicial, and constitute an abuse of the "Oxygen rules", which call for the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, at a cost affordable by the respective parties. Also see various court findings on this issue; Ellis Mechanical Services Limited Vrs Wates Construction Limited cited with Approval in the case of Civil Appeal no 26 of 2007 UAP Insurance Company Limited Vrs Michael John Beckett & Adcock Ingram East Africa Limited Vrs Surgilinks Limited (2012) KEHC 3633(KLR).
26. This issue was addressed in the case of Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] Eklr and the Court of Appeal stated that;

"The issue is what happens when there is no dispute between A and B, but B just declines to pay" This pertinent issue was adequately dealt with by the Earl of Halsbury LC in the House of Lords in the case of London and North Western and Great Western Jointly Rly Cos vs J H Billington Ltd (1899) AC 79 at 81 when he said:-

"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 plaint in the County Court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to be absolutely untenable." If a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a screaming claim does not constitute nor raise a dispute see The Law and Practice of Commercial



Arbitration in England, by Sir Mustill and Prof Boyd p96. It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a disputed calling an arbitration clause into operation. It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which an employer merely persists in not paying. As there was in my view no or any genuine dispute between the parties, a stay on the respondent's application ought to have been rejected by the learned judge.

D. Disposition

27. That having arrived at the above finding, I do find that the 1st defendants Application dated 15th May, 2024 is partially successful and order as follows;
- a. That the 1st Defendant will within fourteen (14) day of this ruling forward all the plaintiff profession fee claim documents and all the supporting documents supplied to them by the plaintiff to the 2nd Defendants Auditors for assessment and from the date of receipt of the said documents, the 2nd defendants Auditors will have 15 days to resolve the stalemate in line with clause 3.5 as read together with clause 16.1 and 16.2 of the contract agreement dated 5th July 2021.
 - b. That the 2nd defendants' auditors will engage the plaintiff's and 1st defendant's representative in line with provisions of Article 47, 50(1), (2) of the constitution of Kenya and Section 4(1) of the Fair administrative Action Act, no 4 of 2015 before making their assessment of what is due.
 - c. That if after the assessment carried out by the 2nd defendants Auditors, there still exist any dispute on the amounts payable, what is still disputed will be referred for arbitration as provided for under clause 16 of the contract agreement dated 5th July 2021 and there shall be stay of proceedings of this suit pending arbitration of the dispute sums between the parties herein.
 - d. That this matter be mention within the next 45 days for further directions.
 - e. That each party is at liberty to Apply.
 - f. That the costs of this Application be in the cause.
28. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH DAY OF JANUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 10TH DAY OF JANUARY, 2025.

In the presence of: -

no appearance for Plaintiff

no appearance for 1st Defendant

no appearance for 2nd Defendant

Sam/Susan Court Assistant

