



**Match Electricals Limited v China Railway No 10 Engineering
Group Company Limited (Commercial Suit E313 of 2024)
[2025] KEHC 4473 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E313 OF 2024**

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

MATCH ELECTRICALS LIMITED PLAINTIFF

AND

**CHINA RAILWAY NO 10 ENGINEERING GROUP COMPANY
LIMITED DEFENDANT**

RULING

1. The plaintiff filed this suit against the defendant claiming a total of Kshs 37,543,578.12 being sum due from the defendant for works done by the plaintiff pursuant to a subcontract for supply, installation, testing and commissioning of street lights from junction of Garsen-Lamu Road to New Lamu Port. The plaintiff completed the works as per the contract and claimed to have undertaken extra works which was not covered by the contract at a cost of Kshs 6,325,169.12.
2. The defendant entered appearance on 29-07-2024 but before filing defence, it filed notice motion dated 29-07-2024 praying that this court be pleased to stay the proceedings and refer the dispute for arbitration as provided for in the contract between the parties. This is the application which is subject of this ruling.
3. The application by two affidavits sworn by Victoriiah Mukiiri. One is the supporting affidavit sworn on 25th July 2024 and the other is a supplementary affidavit sworn on 28-10-2024. In the affidavits, the defendant contends that under the contract, the parties envisioned that any dispute arising from the performance of the contract should be referred to arbitration and that the intention of the parties which was clear should be respected. According to the defendant, since the issue in dispute is nonpayment of the contract price which is part of performance of the contract, the matter should be referred to arbitration and failure to do so would amount to rewriting the contract for the parties. The



defendant adds that the court lacks jurisdiction to entertain the matter by virtue of the arbitration agreement. It contends further that it has not admitted any debt as claimed by the plaintiff and this court should not interrogate the circumstances giving rise to the claim because doing so would be going into the merits of the suit which is not desirable at this stage.

4. The plaintiff has opposed the application through a replying affidavit sworn by its director one Christopher Theuri Maina on 17th September 2024. He depones that the defendant admitted the debt through signed performance certificates and recorded minutes of a meeting held on 18th July 2023 and refusal to pay the debt is not a dispute contemplated under the contract. According to the plaintiff, upon completion of the contracted works, the original scope was measured and certified by the defendant at Kshs 63,975,995.20 inclusive of VAT through three performance certificates and the site handed over to the defendant on 15-05-2023 where both parties signed a final performance certificate. It is averred that at the time of handing over, the defendant had paid a sum of Kshs 27 million out of the certified Kshs 63,975,995.20. The plaintiff adds that the defendant later made a further payment bringing the amount paid to Kshs 32,757,586.00. This left a balance of Kshs 31,218,409.00. This together with value of extra work of Kshs 6,325,169.12 is what the plaintiff is claiming in this suit.
5. The plaintiff avers further that when the defendant showed no signs of paying, it approached the employer Kenya National Highways Authority who organised a meeting on 18-07-2023 in which the defendant acknowledged the debt and undertook to pay the outstanding debt within one week from the date the plaintiff would supply an invoice. The plaintiff sent a final invoice as agreed but the defendant only paid the VAT element of the same which amounted to Kshs 3,224,249.00 and has since refused to pay the balance. The plaintiff maintains that the defendant has not pointed to the court the dispute or points of differences between the parties which would justify the matter being referred to arbitration.
6. It is not disputed that the contract between the parties had an arbitration clause. It is also indisputable that where there is a dispute and the contract between the parties provided for arbitration, the court should refer the dispute for arbitration. Section 6(1) of the Arbitration Act provides that;

‘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.’
7. Based on the facts presented by the parties, the only issue in this application is whether noting the circumstances of the case, there is a dispute suitable for reference to arbitration considering the provisions of Section 6 of the Arbitration Act. Subsection 6(1)(b) of the said Section allows the court to decline an application for reference to arbitration if there is no, in fact any dispute between the parties. In my view, before a court makes an order referring a matter to an arbitral tribunal, it must satisfy itself that there an issue or matters which an arbitrator would be rightly and justifiably required to decide on. In this matter, the only matter that is left for closure of the entire contract is payment of the balance of the contract price and for the alleged extra works. The arbitration clause provided as follows;

‘Any dispute arising from performance of this contract shall be first solved by negotiation, if negotiation fails, then such dispute shall be referred to an arbitrator of a Kenyan tribunal



under the jurisdiction of Kenya's applicable law and of which (exclusive) jurisdiction both parties submit to selected by the parties after negotiation for arbitration. If neither party accepts the arbitral award, then upon application filed by any party, an arbitrator nominated by the executive chairman of the current Kenya Arbitration Commission shall conduct a new arbitration.'

8. The defendant claims that the clause was wide and covered every aspect of the performance of the contract. That may appear so but the contract must be in conformity with the written law specifically the *Arbitration Act*. In my opinion, not every disagreement or misunderstanding or failure to act by a party to the contract qualifies as a dispute under the *Arbitration Act*. There must be a real issue in dispute which would require interrogation of the arbitrator or where the parties take different and irreconcilable stands which would require intervention of a third party. In *UAP Provincial Insurance Company Ltd v Michael John Beckett* (2013) KECA 205 (KLR), the Court of Appeal held that;

'It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.'

The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to undertake an evaluation of the merits or demerits of the dispute.'

9. The plaintiff has deponed that it performed its part of the contract and handed over the site to the defendant. I have seen certificates of performance produced as plaintiff's annexure 'CM-1' whose finality is captured in what is referred to as final performance certificate dated 27-07-2023 and produced by the plaintiff as annexure 'CM-2'. This certificate confirms that the contracted works were completed and shows the date of take over as 15-05-2023. As correctly averred by the plaintiff, the said performance certificate which is signed by both parties state as follows;

'Pursuant to clause 1 above under time of completion of the contract, it is hereby certified that the sub-contractor has completed the above contract to the satisfaction of the contractor with effect from 15-05-2023.'

10. The above certificate is followed by what has been referred to as the account sealing agreement which is also executed by both parties. This agreement confirms that the parties settled on account at Kshs 63,975,995.00. This is the final figure the plaintiff has pleaded which is inclusive of what it had been paid.
11. The defendant has not denied existence or that it executed the certificates and the account settlement agreement. It has also not denied that the site was properly and finally handed over to it neither is there suggestion that there are any factors which may vitiate the said documents. The defendant alleges that it could not reply to the facts as stated by the plaintiff because doing so would amount to it submitting to the jurisdiction of this court. I find that argument unmerited. Where a party to court proceedings



is faced with allegations of facts, it must respond to the same appropriately. It is for the court and not the parties to decide whether it has jurisdiction over the matter.

12. Failure by the defendant to reply to the stated facts must be taken as admission of the truth in the averments. In that case, the true position of the matter is that there is no dispute as to the completeness of the project on the part of the plaintiff and the only remaining thing is payment by the defendant. One would be justified to wonder what the parties would be telling the arbitrator other than that the defendant has not paid despite completion, performance and delivery by the plaintiff. In the circumstances, it is my considered finding that there is in fact no dispute which this court should refer to arbitration as far as the performance of the scope of the works as per the contract.
13. There is a part of Kshs 6,325,169.12 which is said to have been the value of works done beyond and outside the scope of the contract. It should therefore be considered that the extra works were not part of the written contract between the parties and in my view, it was not covered by the arbitration clause. An arbitration clause must be restricted to the matters covered by the contract unless the same is explicit that the clause extends to other matters beyond or outside the specified contract. Even if the matter herein were to be referred to arbitration, the arbitrator would not have jurisdiction over matters which were outside the contract between the parties.
14. The upshot of the above analysis is that I do not find any dispute within the contract between the parties which I should refer for arbitration. The prayer for reference to arbitration fails and that of stay of proceedings suffers the same fate.
15. The defendant's application dated 29th July 2024 is hereby dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Kimiti holding for Mr. Makambo for the plaintiff and Mr. Okulo holding for Mr. Mwachofi for the defendant.

