



Sogea Satom Kenya Branch Limited v Firstmix Concrete Limited & 2 others (Civil Suit E109 of 2021) [2024] KEHC 2692 (KLR) (Commercial and Tax) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E109 OF 2021
FG MUGAMBI, J
MARCH 15, 2024**

BETWEEN

SOGEA SATOM KENYA BRANCH LIMITED PLAINTIFF

AND

FIRSTMIX CONCRETE LIMITED 1ST DEFENDANT

ALBERT KYALO WAIHAKA 2ND DEFENDANT

DIANA NZULA MAKAU 3RD DEFENDANT

JUDGMENT

Background

1. The plaintiff's claim arises out of an alleged breach of a sub contract dated 7th November, 2018 in which the 1st defendant was required to provide ready mix concrete for the development of project as particularized in the sub contract.
2. It was a further term of the sub contract that the plaintiff would advance the 1st defendant the sum of Kshs. 28,688,000/= on condition that the 1st defendant provides a suitable payment guarantee from a reputable bank. The 2nd defendant instructed the plaintiff to transfer the money to an account held with Equity Bank with a promise to avail a suitable bank guarantee with Equity Bank but failed to do so, thereby occasioning the present claim.
3. The plaintiff avers that the breach has occasioned it to suffer loss and damages which it holds the defendants wholly liable. The plaintiff further pleads that out of the money advanced, the defendant purchased concrete towards the project, which become the property of the plaintiff after the termination of the contract.



4. The plaintiff however claims that it has no access to the site and the plant and it is therefore apprehensive that the 1st defendant will proceed to sell the plant. The plaintiff contends this court is vested with the jurisdiction to issue preservation orders awaiting the determination of the matter through arbitration.
5. The plaintiff prays for judgment against the defendants jointly and severally for:
 - i. An order of permanent injunction to restrain the Defendants and/or their agents from disposing of, removing and/ or destroying the Plant Machinery known as Model ATP 45/60/75 and the weigh bridge at the Plaintiff's site within Mwea Irrigation project pending the referral of the dispute between the parties to arbitration.
 - ii. An Order of mandatory injunction compelling the Defendants to release and handover the plant known as Model ATP 46/60/75 to the Plaintiff by handing over the keys and the key operation manual to the plant to enable the plaintiff acquire and use the said plant as it deems fit.
 - iii. An order granting access and custody of the plaintiff's Plant Machinery to the Plaintiff pending the appointment of an arbitrator as Model ATP 45/60/75 contemplated in the contract between the parties herein dated 7th November 2018.
 - iv. An order granting access and custody of the plaintiff's Plant machinery known as model ATP/45/60/75 to the plaintiff pending the hearing and determination of the Arbitration proceedings.
 - v. An order directing the Defendants to account for the sum of Kshs.28,688,000 advanced to it by the Plaintiff pursuant to the provisions of the Contract dated 18th November, 2018.
 - vi. Damages for breach of contract.
 - vii. Any other relief that this honourable court may deem fit and just to grant in the unique circumstances of this case.
6. The plaint and summons to enter appearance were served on the defendant and by a Notice of Appointment dated 16th March 2021, the defendants herein appointed the firm of David Okoyo Ondieki & Associates Advocates. However, the said advocate did not file a defence to the plaint. The suit therefore proceeded for formal proof and the plaintiff filed written submissions dated 6th November 2023.

Analysis

7. The Court has carefully considered the plaint, the evidence tendered and the submissions filed by the plaintiff. It is imperative to note that the suit, which was filed together with an application dated 25th February 2021 seeking injunctive relief were both not contested. This notwithstanding, it is incumbent on this Court to still test the veracity of the plaintiff's claim in its entirety.
8. A cursory look at the record reveals the sub contract entered into and executed by both parties. Article 29 of the contract provides for Disputes and Litigation. Clause 29.2 of the sub contract provides that in the event of a dispute the parties will try to find an amicable settlement within a reasonable time not being more than 45 days. In the event the parties fail to amicably settle their dispute, the dispute is to be referred to arbitration in accordance with the rules of the chartered institute of Arbitrators of Kenya (CIArB).



9. This Court has emphasized time and again that where there is a clear intention by parties to have their dispute settled by arbitration, the options of intervention available before this Court are very limited. I refer to the case of Blue Limited V Jaribu Credit Traders Limited, Nairobi (Milimani) HCCS No. 157 of 2008 where Kimaru, J [as he then was] stated inter alia as follows:

“It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration.”

10. Likewise, in Kenya Pipeline Company Limited V Datalogix Limited and Another, Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193, Warsame, J (as he then was) held that:

“It is clear from the reading of section 6(1) that ... the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship... It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration...Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter.”

11. The point in all this discourse is that the parties by their mutual understanding ousted the jurisdiction of this Court to entertain the dispute between them. Clause 29.2 is very instructive on the fact that the determination of the arbitrator shall be final.

12. The doctrine of exhaustion is now of esteemed juridical lineage in Kenya. In Geoffrey Muthiga Kabiru & 2 Others V Samuel Munga Henry & 1756 Others, [2015] eKLR the Court of Appeal had this to say on this doctrine:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

13. This Court concurs fully with the finding of the Court of Appeal. Pursuant to Article 159, it is incumbent upon this Court to promote the use of Alternative Dispute Resolution, including arbitration, particularly in instances where such modes have been expressly selected by the disputing parties as their preferred means of resolving conflicts. Consequently, this Court ought to exercise restraint in intervening in the decisions of the parties, especially in the absence of evidence indicating the plaintiff's engagement with the agreed-upon dispute resolution processes.

14. In light of Clause 29.2 of the sub contract this Court finds that it lacks jurisdiction adjudicate the present matter, given that the dispute before this Court is premature and yet to crystalize.

Determination

15. For these reasons the suit is therefore struck out with no orders to costs.



DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

