Strabag International GMBH v National Irrigation Authority (Formerly the National Irrigation Board) (Commercial Case E219 of 2023) [2024] KEHC 3744 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3744 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E219 OF 2023

A MABEYA, J

APRIL 19, 2024

BETWEEN

STRABAG INTERNATIONAL GMBH ..... PLAINTIFF

AND

THE NATIONAL IRRIGATION AUTHORITY (FORMERLY THE NATIONAL IRRIGATION BOARD) ..... DEFENDANT

RULING

1. Before court is an application dated 5/6/2023. It was brought under Order 36 Rule 1 of the Civil Procedure Rules. It sought orders that summary judgment be entered for the plaintiff against the defendant as prayed in the plaint dated 19/5/2023.

2. The grounds of the application set out on the face of it and in the supporting affidavit of JAMES KARANJA sworn on 5/6/2023. It was contended that the parties entered into a construction contract at the contract price of Kshs. 8,221,083,893.09.

3. That they later jointly appointed a Dispute Board pursuant to the contract on 7/5/2019 which rendered 5 decisions that were binding on both parties. That these decisions ought to have been effected promptly unless a decision was revised by amicable settlement or by an arbitral award. That however, none of the 5 decisions had been revised and the defendant was promptly to give effect to the decisions pursuant to sub-clause 20.4 of the contract whether the decision was binding, or final and binding.

4. It was further contended that the plaintiff's claim was liquidated based on the 5 compelling decisions and could thus be determined summarily as the defendant lacked any reasonable or triable defence for the non-payment of the sums awarded by the decisions of the dispute board.

5. The defendant opposed the application vide the replying affidavit sworn by Eng. Stephen Mutinda on 4/8/2023. It was contended that he was an employee of the defendant and was the project manager of the construction contract. That the application was pre-mature for failure to exhaust the internal dispute mechanisms as per clause 20.5 of the FIDIC contract which required parties to submit to amicable resolution of the dispute followed by arbitration before moving to court.

6. It was also contended that the defendant had lodged a notice of dissatisfaction dated 4/10/2021 against the dispute board decision in DB Referral No.6 and invited the plaintiff to jointly proceed with negotiations to settle the matter amicably. That it was mandatory for parties to submit to amicable settlement of disputes and the plaintiff had to date not responded to the invitation. That the decision of the board was thus not final and binding as alleged.

7. It was further contended that the defendant had also lodged a notice of dissatisfaction dated 9/12/2021 against the board's decision in DB Referral No. 7. That the matter ought to have proceeded to amicable resolution followed by arbitration before filing the instant suit. That the decision in DB No. 8 was purely based on the finding in DB No. 6 in which the defendant had invited the plaintiff to submit to the process of amicable resolution. The defendant further averred that it had lodged a notice of dissatisfaction against the board's decision in DB Referral No.s 9 & 10 wherein the plaintiff was also obligated to submit to the internal dispute resolution mechanism under Clause 20.5 of FIDIC before initiating court action.

8. It was therefore contended that in view of the notices of dissatisfaction lodged by the defendant, the decisions of the board could not be termed as final and binding as alleged, and that this court lacked jurisdiction to hear and determine the dispute by virtue of Clause 20.5 of FIDIC.

9. That the defendant had disputed the claim and the plaintiff had filed a reply to defence which constituted a joinder of issues which bared any application for summary judgment at this early stage. It was averred that the defendant had a good defence to the claim as captured in the amended defence and deserved a chance to prosecute the defence on merit.

10. The plaintiff filed two sets of submissions dated 8/9/2023 and 14/12/2023, respectively. The defendant's submissions were dated 13/9/2023. This Court has considered those submissions alongside the pleadings and evidence before it. The main issue for determination is whether the plaintiff has made out a case for entry of summary judgment.

11. Order 36 of the Civil Procedure Rules provides as follows: -

> " In all suits where a plaintiff seeks judgment for—
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> (a) a liquidated demand with or without interest; or
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> (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

12. In ICDC vs Daber Enterprises Ltd (2000) Eklr, the court held that: -

> " The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify

summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination."

13. The plaintiff's case was that the parties had referred their dispute to a dispute board pursuant to their contract. That the board rendered 5 decisions which were binding on the defendant and ought to have been effected immediately. That the claim was liquidated and the defendant had no reasonable or triable defence against the claim thus summary judgment ought to be entered.

14. I have seen the amended defence dated 4/8/2023. The defendant pleaded that under Clause 20.4 of the FIDIC conditions, upon a decision of the dispute board, any party dissatisfied with the decision was required to issue a notice of dissatisfaction and where such notice is issued, both parties have a mandatory obligation to attempt to settle the dispute amicably before commencement of an arbitration. That all disputes that are not resolved through the dispute board or amicable settlement are to be referred to arbitration as per clause 20.4 of FIDIC conditions.

15. The record shows that the defendant did issue notices against the board's decision in DB Referral Nos. 6, 7, 9 and 10. That the decision in DB Referral No. 8 was purely based on the decision in DB Referral No. 6 which the defendant had issued notice against and invited the plaintiff to an amicable settlement and the plaintiff had not responded. That the plaintiff was obligated to submit to amicable settlement of the disputes under the FIDIC conditions and if the dispute was not settled, it ought then to be referred to arbitration before institution of a suit.

16. It then follows that if the defendant intended to invoke the arbitration clause in the FIDIC conditions, it ought to have done so no later than the time of entering appearance pursuant to Section 6 of the *Arbitration Act* which provides: -

> "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-
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> (a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or
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> (b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

17. In Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party) [2021] eKLR, the court held that: -

> "The tenor and import of Article 159(2) (c) of *the Constitution* as read together with Section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance."

18. Having failed to invoke the arbitration agreement at the time of entering the appearance, it was futile for the defendant to purely ground its defence on the issue of referral to arbitration which was already stale. It would serve no purpose for this Court to entertain the entire claim only to find that the issue

of arbitration was already out of time. This would only expose the parties to unnecessary expenses and would be a waste of judicial time.

19. I note that the defendant did not raise any other triable defence but for the issue of arbitration as a means of settlement of the dispute, an issue which has already been found to be out of time. The defendant did not also deny that the dispute board rendered the 5 decisions as alleged. It indeed categorically admitted that the decisions were rendered.

20. I have seen the 5 board decisions. I have also considered the plaint dated 19/5/2023 and note that the claim purely streams from those decisions and is indeed a liquidated claim. I also note that the dispute board noted that DB Decision Referral No. 6, 7, 8, 9 and 10 were found to be binding on both parties who were to promptly give effect to the decisions unless the decisions were revised in an amicable settlement or an arbitral award.

21. None of the decisions have been revised under any of the two available options and though the defendant begun the process by issuing dissatisfaction notices, there was no effort to complete the dispute resolution mechanisms under the FIDIC conditions despite that clause 20.4, 20.5 and 20.6 of the conditions clearly provided for an elaborate system of dispute resolution including obtaining of a dispute board's decision, issuance of dissatisfaction notice and intention to commence arbitration, invitation to submit to amicable settlement and commencement of arbitral proceedings within 56 days of the notice of dissatisfaction even where no attempt of amicable settlement had been made.

22. Moreover, even when the plaintiff filed the present suit, the defendant still opted not to invoke the arbitration clause at the time it entered appearance thus its entire defence was overtaken by time and thus stale. The defence did not therefore raise any triable or reasonable defence to merit a full-blown trial.

23. In the contrary, the plaintiff's claim is quite clear and obvious in light of the liquidated decisions by a properly constituted dispute board. Decisions that are final and binding and have not been reviewed by either amicable settlement or arbitral award. There is no justification in denying the plaintiff the orders sought.

24. In the circumstances, I find that the application dated 5/6/2023 is merited and the same is allowed in terms of prayer a, b and c of the plaint dated 19/5/2023 as well as interest on the foregoing at court rate from the date of judgment till payment in full.

25. The plaintiff is also awarded costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE