A to Z Textile Mills Limited v East Africa Portland Cement Company PLC (Civil Case E002 of 2023) [2024] KEHC 4697 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4697 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E002 OF 2023

FR OLEL, J

MAY 6, 2024

BETWEEN

A TO Z TEXTILE MILLS LIMITED ..... PLAINTIFF

AND

EAST AFRICA PORTLAND CEMENT COMPANY PLC ..... DEFENDANT

RULING

A. Introduction

1. The Application for determination, before this court is the Notice of Motion application dated 17.04.2023 brought pursuant to the provisions of Article 159 (2), (c) & (d) of the *Constitution* of Kenya, Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 (1) of the Civil Procedure Rules and Section 6 (1) and(2) of the *Arbitration Act* No 4 of 1995 and the applicant seeks the following orders;

    a. This Honourable Court be pleased to refer the parties hereto to arbitration.

    b. This Honourable court be pleased to stay all proceedings in the suit herein pending arbitration of the dispute between the parties.

    c. The costs of the instant application be awarded to the Applicant against the Plaintiff/ Respondent.

2. The Application is supported by the Supporting Affidavit of one Simon Peter, the legal officer of the Defendant/Applicant, deposed on 17.04.2023, wherein he contends that the parties herein did enter into an agreement dated 11.04.2016, pursuant to which the Plaintiff/respondent was contracted to supply and deliver a total of 15,000,000 WPP cement bags to the Defendant/Applicant and further it was clearly provided for under clause 13.2 of the said agreement, that any dispute that arose as between the parties therein, in respect of any matter contained in the said agreement, would first be negotiated

between the parties and , where the negotiations were unsuccessful, the parties would refer the dispute to an Arbitrator, whose determination would be final, conclusive and binding upon the parties.

3. On 20.03.2023, the Defendant/Applicant was served with Summons, Plaint and the accompanying documents filed by the Plaintiff/Respondent seeking recovery of a sum of Kshs.31,110,000.00/= allegedly owned by the Applicant in connection with WPP cement bags purportedly supplied and delivered by the respondent on various dates between 21st May 2018 to 10th September 2018. It was the applicant's contention, that the issues raised herein arose from said contract signed by the parties, and therefore this suit had been file prematurely contrary to the clearly provided mechanism of resolving any dispute which arose under the said contract. The applicant therefore prayed that this suit be stayed and the matter be referred to the dispute resolution forum which was deliberately agreed upon by the parties hereto.

4. The Plaintiff/Respondent did oppose this Application and relied on the replying affidavit dated 26th May 2023, sworn by one Kalpesh Shah, a director of the Plaintiff/respondent Company. He did depone that they had indeed entered into a contract with the Defendant/Applicant to supply them with one million, seven hundred and ten thousand (Kshs.1,710,000/=) pieces of woven polypropylene cement bags on diverse days between 21st May 2018 and 10th September 2018 and in consideration, the Applicant had agreed to settle the purchase price within 45 days of delivery.

5. As contracted, they did supply goods, which were received/accepted by the Applicant and being satisfied with the quality supplied, they did make a partial payment of Ksh.1,000,000/= leaving a balance of Ksh.31,110,000/= which remind due and owning dispute strenuous attempts to have them settle the same. He had discussed the debt repayment plan with the head of procurement of the Applicant firm and he had demonstrated willingness to engaged in a payment plan but so far had provided no such plan. The plaintiff/Applicant had also not disputed the debt and therefore there was no dispute to referred to the Arbitrator. He thus prayed for the said application to be dismissed.

6. The matter was canvassed by way of written submissions.

B. Submissions

I. Defendant/Applicants Submissions.

7. The Defendant/Applicant filed submissions on 16.10.2023 and raised three issues for determination. As to whether the instant suit was subject of an arbitration agreement, it was submitted that the same was expressly provided. While reiterating the contents of the supporting affidavit, it was further submitted that subject to clause 13 of the agreement provided that, Any dispute arising between the parties in respect of any matter contained in the subject agreement shall be subjected to a negotiated settlement and where negotiations are unsuccessful, be referred to arbitration, the determination whereof, to the extent permitted by law, shall be final , conclusive and binding upon the parties.

8. It was submitted that the subject dispute fell within the agreement for the following reasons;

    a. At paragraph 3 of the plaint, the Respondent pleads that on diverse dated between 21.5.2018 and 10.9.2018, it supplied the defendant with 1,710,000 pieces of woven polypropylene cement bags and the Applicant agreed to pay in under 45 days.

    b. The Respondent pleads that the Applicant made partial payments in the sum of Kshs.1,000,000/= leaving a balance of Kshs.31,110,000/=

c. Clause 3 of the agreement stipulates that ' in consideration of the payments to be made by the company to the supplier as hereinafter mentioned, the supplier hereby covenants with the company to supply the goods in accordance with the terms and conditions of this agreement.

d. Clause 4 of the agreement indicated that the company covenants to pay the supplier in consideration of the provisions of the goods and remedying of defects therein, the contract price or such other sum as may become payable under the provisions of the contract at the times and in the manner prescribed by the contract.'

9. It therefore followed that the respondents claim, is for recovery of monies purportedly owed by the Applicant in connection with (purported) supply of woven polypropylene cement bag. It was therefore indisputable that the matters raised for determination were with respect of the subject agreement, consequently, any dispute relating to the respondent claim as framed was subject to the "Arbitration clause 13" of the General conditions of contract. The burden therefore shifted on the respondent to show otherwise. Respectfully the said burden of proof had not been discharged.

10. In response to the respondents contention that there was no dispute as between the parties, namely, the allegations that; the applicant issued purchase orders for the subject goods, accepted delivery of the subject goods, accepted the invoices raised by the respondent, made partial payment towards the settlement of the invoiced amount and engaged the respondent in discussion on a payment plan during which it never disputed the respondents claim, were unfounded in both law and fact and no credible evidence had been provided in support of those assertions.

11. It was submitted that inconclusive discussions between parties or prevarication or even silence implied the existence of a dispute referable to arbitration under section 6(1)(b) of the *Arbitration Act*. To buttress this point, the cases of Ellerine Bros (Pty) Arnd another vs Klinger EWCA [1982] 2 All ER, Marc Rich Agriculture Trading SA vs Agrimex Limited [2000] EWHC, Ummi Properties (pty) Limited vs knight Street Proerties (PTY) Limited, Tjong Very Summito and others vs Antig Ibvestments Pte Limited [2009]SGCA 41, Lau Lan Ying Hill Company and another [2021] HKCFI 20, where relied on to affirm that there was a dispute until the defendant admitted that the sum is due and payable.

12. It was submitted that there is no legal basis for the Respondent to unilaterally re write the agreement and they had to be held to the original bargain. The respondents claim therefore had to be referred to the Arbitral tribunal for determination. The court was urged to grant the orders sought.

(ii) Plaintiff/Respondents Submissions

13. The Plaintiff/Respondent filed submissions on 12.01.2024 wherein it was submitted that there were exceptions to section 6 of the *Arbitration Act* that is; where the agreement is found to be null and void and where the court finds that there is no dispute between the parties with regard to the matters to be referred for arbitration.

14. It was submitted that there is no dispute between the parties regarding the outstanding amount. That the Defendant/ Applicant did not at any time contest the debts due or its validity. Further the Defendant/Applicant had accepted the invoices as evidenced by its official stamp and signatures appended thereon, which lead to incontrovertible proof that each of the invoice was accepted. They were simply seeking to enforce payment of the contractual balance of Kshs.31,000,000/=. Which balance remained due and owning.

15. Reliance was placed on various cases; Saimon Ntasikoi Noonkanas vs Resolution Insurance Limited [2021] e KLR, Total Kenya Limited formerly Caltex Oil Kenya limited vs Janevams Limited (2015) e

KLR, Wer Gmbh vs Kenya Airports Authority [2020] e KLR, Choitram vs Nazari [1984] KLR 237, Al Sabah vs East African Fitness Limited [2021] KEHC, S.C. Johnson Limited vs Jaykay Enterprises Limited [2021] e KLR, Nanchana Foreign Engineering Company (k) Limited vs Easy Properties (K) Limited [2014] e KLR and Diocese of Marsabit Registered Trustees bs Technotrade Pavilion Limited [2014] e KLR , to support the contention that mere difference of opinion or minor disagreement did not constitute a dispute for purposes of arbitration and/or that a defendant cannot succeed to obtain a stay of proceedings by relying on an arbitration clause unless there was a dispute.

C. Determination

16. I have considered the Notice of Motion Application, the affidavits made in support and in opposition thereto, the submissions on record and find that the issue for determination is whether this suit should be referred to the Arbitral tribunal and proceeding herein be stayed. Section 6 of the *Arbitration Act*, Cap 49 of the Laws of Kenya provides that;

> Stay of legal proceedings
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> (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—
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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.
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> (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
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> (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.

17. 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"

18. In this case, there is an agreement dated 11th April 2016 for supply and delivery of 15,000,000 WPP cement bags duly signed between the parties herein. The contract price is Kenya Shillings Three Hundred and Twelve Million (Kshs.312,000,000) (Exclusive of VAT). Clause 7.5 of the schedule 1 provides that; General conditions of contract to the agreement provides that;

> Payment will be made on 30th day from Invoice date. Any delays in payment shall cause both parties having a meeting and resolving the pending issues in relation to payments amicably.

19. The same agreement under clause 13 provides as follows;

1. 1 in the event of a dispute arising between the parties in respect of any matter contained in this agreement the aggrieved party shall notify the other party in writing about the existence of the dispute within seven (7) days of the complaint arising and thereafter the parties shall negotiate in good faith to settle the dispute in question as expeditiously as possible but in any event within a period of thirty (30) days of the matter being referred.

2. 2 should the parties be unsuccessful in settling such disputes within the aforesaid period of such longer period as the parties may agree to such dispute shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement upon application of either party to the Chairman for the time being of the Kenya Branch of Chartered Institute of Arbitrators of the United Kingdom. Such arbitration shall be conducted in Nairobi in accordance with the rules of Arbitration of the said institute and subject to and in accordance with the provisions of the *Arbitration Act* 1995 or its successor legislation.

3. To the extent permissible by law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.

4. Nothing in this agreement shall prevent or delay a party seeking urgent injunctive or interlocutory relief in a court having jurisdiction.

20. 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."

21. The Court of Appeal in the case of Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR discussed the obligation of the court and stated as follows;

> "Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects;
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> First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section.
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> Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement.
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> Third, whether the suit indeed concerns a matter agreed to be referred.

22. The court in Mt. Kenya University v Step Up Holding (K) Ltd [2018] eKLR the court of Appeal stated as follows;

> "In Corporate Insurance Company versus Wachira (supra) the court held inter alia that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings.
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> In UAP Provincial Insurance Company Ltd versus Michael John Beckett (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the *Arbitration Act*. In the said case, the court had this to say:
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> "16. In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration.
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> Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part:
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> .....
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> 17. 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, and 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.
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> 18. 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 under an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.
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> 19. the provisions in section 6 (1) (b) of the *Arbitration Act* are similar to the provisions of Section 1(1) of the *Arbitration Act*,1975 of England before its

amendment by the *Arbitration Act*, 1996." In Adrec Limited versus Nation Media Group Limited [2017] eKLR, the court added that:

> Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration"

See also Eunice Soko Mlagui versus Suresh Parmar& 4 others [2017] eKLR, for similar reflections on this provision as follows;

> Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration. See also the ruling of the High Court, (Gikonyo, and J) in Dioceses of Marsabit Registered Trustee –vrs Techno trade Pavilion Ltd,HCCC No. 204 of 2013.
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> .....
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> The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009

> decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty versus Bedouin Enterprises ltd, CA No. 253 of 2003, this court considered section 6(1) and held that that even if the conditions set out in paragraphs (a) and (b) above are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after the filing of the defence. (See also Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12, Corporate Insurance Co. versus Loise Wanjiru Wachira, CA 151 of 1995 and Kenindia Assurance Co. Ltd versus Patrick Muturi, CA No. 87 of 1993)

23. In this case, the Applicant filed the present application after filing a memorandum of Appearance, and have taken no further procedural steps. It is the Plaintiff/ Respondents position that there is no dispute as the goods were delivered, acknowledged and partly paid for. It was just that the Defendant/ Applicant has declined to settle the balance due. This issue was addressed in the case of Naizons (K) (Supra) 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 London and North Western and Great Westerm Jointly Rly Cos vs J H Billington Ltd (1899) AC79 at 81 when he said:-
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> > 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 p 96. 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.

24. The Defendant/Applicant denies that any sum is due, nor has any evidence been provided to show they have admitted any such debt. The claim supporting documents provided, do not show when the applicant placed orders for the subject goods and/or when his invoices were accepted. The plaintiff's documents only show proof of acknowledged delivery notes. Finally, it should also be noted that, no proof has been provided to show payment of Kshs.1,000,000/=. In all probability it may turn out that

the respondent did supply the goods mentioned in his plaint to the Applicant and is genuinely owned money but in my view based on the documentation and pleadings filed there are gaps which the parties must explain in the forum they so chose to resolve their dispute. In short, a genuine dispute exists which falls within the ambit of clause 13 of the agreement dated 11th April 2024 for supply and delivery of 15,000,000/= WPP cement Bags and the parties must comply with alternative dispute resolution mechanism as provided therein.

25. It is therefore my finding that a dispute exists between the parties herein. The Applicant has complied with section 6 of the *Arbitration Act*, Cap 49 of the Laws of Kenya by not filing their statement of defence and/or taken any other steps to counter the claim of the Plaintiff/Respondent. Article 159(2), (c) of the *Constitution* of Kenya 2010 provides and promotes alternative resolution mechanism, which includes reconciliation, mediation Arbitration and traditional dispute resolution mechanism and this court will only enforce the parties agreement to use this alternative justice system to resolve their dispute.

D. Disposition.

26. The upshot and having arrived at the above finding I do make the following orders;

    a. This dispute is referred to the arbitral tribunal for hearing and determination.

    b. The proceeding herein will be stayed until conclusion of the said arbitral proceedings.

    c. Each party will bear its own costs

27. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF MAY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MAY, 2024.

In the presence of;

No appearance for Appellant

No appearance for Applicant

Sam Court Assistant