



**End to End Limited v Chief Officer, Roads & Public Works, Kwale County & 3 others (Civil Case 104 of 2021) [2023] KEHC 9 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 9 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 104 OF 2021  
OA SEWE, J  
JANUARY 5, 2023**

**BETWEEN**

**END TO END LIMITED ..... PLAINTIFF**

**AND**

**CHIEF OFFICER, ROADS & PUBLIC WORKS, KWALE  
COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ENGINEER, ROADS & PUBLIC WORKS, KWALE  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KWALE COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**CREDIT BANK PLC LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

[1] The Chamber Summons dated November 25, 2021 was filed by the defendants under Section 6(1), (2) and (3) of the *Arbitration Act*, 1995, Rule 2 of the Arbitration Rules, 1997 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* for the following orders:

- [a] Spent
- [b] That the Court be pleased to stay the entire suit and refer this matter to arbitration for final hearing and determination;
- [c] That the Court be pleased to vacate the interim orders issued on October 18, 2021 against the defendants;
- [d] That the costs of the application be in the cause.



- [2] The application was premised on the grounds that the plaintiff and the 3<sup>rd</sup> defendant entered into a Service Contract Agreement dated April 15, 2020 for the tarmacking of Kona Ya Musa Mabokoni-Kona Ya Masai Road in Ukunda Ward (hereinafter referred to as “the road”); and that it was a term of the said Agreement that in the event of any dispute, the same be referred to arbitration. It was further the averment of the defendants that, contrary to the express terms and conditions of the said Agreement, and contrary to the provisions of Section 6 of the *Arbitration Act*, the plaintiff illegally and unlawfully filed this suit and obtained interim orders against the defendants without making a full and material disclosure to the Court regarding the existence of an Arbitration Clause in their contract.
- [3] Thus, it was the assertion of the defendants that, unless the orders sought by them are granted; and specifically by staying this suit and referring the dispute to arbitration, they shall be subjected to an illegal and irregular process to their detriment and to the detriment of the people of Kwale County.
- [4] The application was supported by the affidavit sworn by Eng. Ali Joto on November 25, 2021 in which it was averred, inter alia, that the County Government of Kwale entered into a contract for the purposes of tarmacking the road aforementioned. The contract duration was 365 days with a commencement date of April 15, 2020. Eng. Joto averred further that, after the second milestone, and the payment of Kshs 104,000,000/= to the plaintiff, the plaintiff completely abandoned the site. Thereafter, the plaintiff proceeded to make a claim for extensions of time vide a letter dated 15<sup>th</sup> March 2021 (marked Annexure “AJ-3”).
- [5] Upon receipt of the letter, Eng Joto made an analysis of the request, after which he wrote to the 3<sup>rd</sup> defendant on April 8, 2021 recommending an extension of 5.56 months. He annexed the said letter to his Supporting Affidavit as Annexure “AJ-4”). At paragraphs 14, 15 and 16 of the Supporting Affidavit, Eng Joto explained that, his proposal was allowed and the plaintiff was granted 6 months’ extension to complete the works; and that, in reciprocation, the plaintiff was to do the following, which the company utterly failed to do:
- [a] Submit a revised work programme in accordance with the 6 months’ extension;
  - [b] Take into account and submit a resource programme of works clearly setting out the equipment, labour and cash flow to be utilized;
  - [c] Renew the performance bond since the same had expired on April 30, 2021.
- [6] At paragraphs 23 to 26 of the Supporting Affidavit, Eng. Joto deposed that, in view of the fundamental breach by the plaintiff, he called for a site meeting for September 30, 2021, vide the Notice dated September 23, 2021 (marked Annexure “AJ-7”); and that instead of attending the meeting, the plaintiff opted to file the instant suit and obtained temporary injunction against the defendants. He added that, as matters stand, the 3<sup>rd</sup> defendant has terminated the contract with the plaintiff for fundamental breach of contract and recalled the Advance Payment Guarantee from the Bank.
- [7] Mr. Joto further deposed that, this suit is wrongly before the Court due to the fact that Clause 67 of the subject contract specifically provides that disputes arising therefrom be referred to arbitration.
- [8] In response to the application, the plaintiff filed a Replying Affidavit on December 10, 2021, sworn by one of its directors, Abdirahman Mohamud Abdow. In its view, the defendants’ application is frivolous and vexatious, and an abuse of the process of the Court. Mr Abdow averred that, despite the defendants having knowledge of the injunctive orders of the Court, they proceeded to issue a termination notice to the plaintiff dated November 12, 2021, which they served on November 19, 2021; and therefore are in contempt of court. Mr Abdow averred that the application be put on hold until the defendants purge their contempt; and pointed out that the plaintiff has already filed an application for contempt



which ought to be prioritized. I hasten to add that the Court has had occasion to rule on which of the two applications ought to be prioritized, vide its ruling dated November 29, 2021.

- [9] Thus, the application dated November 25, 2021 was canvassed by way of written submissions pursuant to the directions given herein on December 20, 2021. On behalf of the defendants, Mr Kibara filed his written submissions on February 23, 2022 in which he proposed the following issues for determination:
- [a] Whether the suit herein should be stayed;
  - [b] What are the parameters of the Court's jurisdiction under Section 7 of the *Arbitration Act*?
  - [c] Whether the arbitral tribunal can issue interim orders, and
  - [d] Whether this dispute should be referred to arbitration.
- [10] On whether the suit should be stayed, Mr Kibara relied on Section 6 of the *Arbitration Act* and the decision of the Court of Appeal in *Niazons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR; *Adrec Limited v Nation Media Group Limited* [2017] eKLR as well as *Bedouin Enterprises Limited v Charles Njogu Lofty & Another* [2008] eKLR to underscore the key requirement that an application for stay pending arbitration be brought promptly. Counsel then pointed out that the instant application was filed by the defendants at the earliest opportunity possible and therefore full compliance with Section 6 has been demonstrated. Further, counsel pointed out that there is in place a valid arbitration agreement as per Clause 67.3 of the Agreement; and therefore since the dispute relates to termination of the contract, the matter is such as ought to be referred to arbitration.
- [11] As to the parameters of Section 7(1) of the *Arbitration Act*, Mr Kibara submitted that the Court's power to issue interim protective orders is not absolute; and that the Court must therefore exercise such authority in a judicious manner, taking into consideration the circumstances of the case before it. In addition, the applicant must demonstrate that there is no other remedy in law and that an irreparable injury will result unless the relief is granted. Thus, Mr Kibara concluded his submissions by stating that, having proven the existence of a valid Arbitration Clause, and having proven that this dispute is capable of being referred to arbitration, then, by dint of Section 10 of the *Arbitration Act*, this suit ought to be stayed pending arbitration as sought by the defendants.
- [12] On his part, Mr Abdiaziz for the plaintiff relied on his written submissions dated April 28, 2022 in which he proposed two issues for determination, namely:
- [a] Whether a non-party to the arbitral agreement can be a party to the arbitration; and,
  - [b] Whether there is a dispute capable of being referred to arbitration.
- [13] Mr Abdiaziz pointed out that the 4<sup>th</sup> defendant only provided the Bank Guarantee and is therefore not a party to the Arbitral Agreement. In those circumstances, he was of the view that the 4<sup>th</sup> defendant cannot be compelled to submit itself to the arbitral process. He relied on *Damaris Wanjiru Nganga v Loise Naisaie Leiyen and Another* [2015] eKLR; *Martin Njuguna Ngugi v Ahmed Noor Sheikh & Sheikh Development Management Company Limited* [2018] eKLR; *Eunice Soko Mlagui v Suresh Parmar* [2018] eKLR in urging the Court to find that this dispute is not arbitrable. Thus, Mr Abdiaziz prayed that the defendant's application dated November 25, 2021 be dismissed.
- [14] From the foregoing, it is common ground that the plaintiff successfully bid for and was awarded a contract for the tarmacking of Kona Ya Musa Mabokoni-Kona Ya Masai Road in Ukunda Ward pursuant to the Service Agreement dated April 15, 2020. The parties appear to be in agreement that it was a term of the said Agreement that in the event of any dispute, the same be referred to arbitration;



and that their Arbitral Agreement is to be found in Clause 67 of the Service Agreement annexed to the Supporting Affidavit as Annexure “AJ-1”).

- [15] Needless to say that arbitration is a constitutional imperative, by dint of Article 159(2)(c) of the Constitution. Accordingly, where the parties, of their own free will opt for arbitration vide an unequivocal agreement in that regard, the Court is obliged to accord the process the necessary deference. Indeed, in Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, the Court of Appeal expressed the viewpoint that:

“Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about.”

- [16] It is also apparent that instead of declaring a dispute and seeking interim relief under Section 7 of the Arbitration Act pending arbitration, the plaintiff filed a full-fledged suit against the defendants, including the 4<sup>th</sup> defendant; a party that is admittedly not privy to the alleged Arbitral Agreement. That being the case, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were at liberty to bring this fact to the attention of the Court as they did vide their application dated November 25, 2021, for Section 6 of the Arbitration Act is explicit that:

- (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.

- [17] Thus, in Niazons (K) Ltd v China Road & Bridge Corporation Kenya (supra), the Court of Appeal held that:

“All that an applicant for a stay of proceedings under section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The Court will then be obligated to consider the threshold things:

- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
- (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and



(c) Whether the suit intended concerned a matter agreed to be referred to arbitration.

[18] A perusal of the file confirms that the filing of the instant application was the first step taken in the matter by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants; and therefore that the defendants complied with the requirements of Section 6(1) in that regard. However, upon perusing Clause 67 of the Agreement, I note that sub-clause (3) thereof headed “Arbitration” incomprehensible; and therefore it is not clear what the exact terms of the Arbitral Agreement were.

[19] In the premises, I am unable to find any basis for either stay of these proceedings or referral to arbitration. I am accordingly constrained to strike out the application dated November 25, 2021 with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 5<sup>TH</sup> DAY OF JANUARY, 2023.**

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**OLGA SEWE**

**JUDGE**

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