



**Devis Solutions Ltd v Craft Silicon Ltd (Civil Miscellaneous Application E613 of 2022) [2023] KEHC 4090 (KLR) (Civ) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL MISCELLANEOUS APPLICATION E613 OF 2022**

**AN ONGERI, J**

**MAY 8, 2023**

**BETWEEN**

**DEVIRIS SOLUTIONS LTD ..... APPLICANT**

**AND**

**CRAFT SILICON LTD ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 12/10/2022 seeking the following orders;
  - i. Spent.
  - ii. That this court be pleased to appoint an arbitrator to facilitate the arbitration between the applicant and the respondent as per their agreement dated 14<sup>th</sup> November, 2020.
  - iii. That in the alternative to prayer 2 above, this court be pleased to issue an order vesting authority on the chairman of the Chartered Institute of Arbitrators as the appointing authority;
  - iv. That this court be pleased to make further or other orders as it may deem necessary in the interest of justice;
  - v. That costs of this application be provided for.
  
2. The application is based on the grounds on the face which are as follows; the applicant and the respondent entered into a value a value added partner agreement dated the 14<sup>th</sup> November, 2020. The respondent breached the said agreement thus necessitating the applicant to invoke the dispute



resolution clause of the agreement which provided arbitration as the executive mode of dispute resolution.

3. The application is supported by the affidavit of Ali Mithagata sworn on 12/10/2022 in which it is deponed that the respondent breached the Value-Added Partner Agreement when it neglected to pay what was owed to the applicant for work done.
4. This invoked the dispute resolution clause of the agreement that provided arbitration as the executive mode of dispute resolution. That its advocates wrote an email to the respondent's advocates seeking their approval to have the Chartered Institute of Arbitrators be allowed as the appointing authority. The respondents advocate replied and indicated that they were awaiting instructions from the respondents on how to proceed.
5. The advocates have been exchanging emails for over three months and the respondent remained uncertain about settling the dispute through arbitration. That the delays and silence of the respondent is well orchestrated and malicious scheme to scuttle the arbitration process despite having accepted the same by executing the Value-Added Partner Agreement.
6. The respondent filed a replying affidavit by Nancy Wachera dated 2/3/2023 in which it is deponed that it did enter into a Value-Added Agreement with the applicant, however the applicant began engaging in miscreant conduct frustrating the respondent's relationship with its clients in the CEMAC region and leading to loss of business opportunities as well as termination of contracts by clients.
7. As a result of the applicant's contractual breaches on 31/3/2022 the respondent invoked Clause 10 of the agreement by issuing a one month termination notice to the applicant and proceeded to settle all its pending dues that it had rightfully accrued with the applicant. She deponed therefore that the application herein is therefore misconceived as there was no outstanding amount.
8. The parties filed written submissions as follows; the respondent in its submissions argued that the application herein will require the court to substantially rewrite the contract to render it operable as it would have to amend the clause to donate to itself appointing authority or amend the clause to have the Chartered Institute of arbitrators as an appointing authority.
9. The sole issue for determination in this ruling is whether this case should be referred to arbitration.
10. In determining this issues, Section 6(1) of the *Arbitration Act* No. 4 of 1995 is key. It provides:-
  - “(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 files any pleadings or takes any other step in the proceedings, 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.”
11. The above provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is “null and void, in operative or incapable of being performed,”



12. The Applicant annexed the value-added agreement dated 14<sup>th</sup> November 2020 and it contains an arbitration clause in the following terms;

“ All disputes and differences arising out of or in connection with this Agreement or in respect of the breach of any of the terms of this Agreement which cannot be settled amicably by the parties hereto shall be settled by arbitration. The arbitration shall be governed by the provisions of the Kenya Arbitration and Conciliation Act, Kenya in Nairobi.”

13. I find that it has not been shown that the Agreement herein is null and void, in operative or incapable of being performed.

14. The clear intentions of the parties was to oust the jurisdiction of the court if any dispute arises and have preference to have the dispute settled through arbitration

15. This in line with Judicial Authority, under Article 159(2)(c) of the Constitution which states as follows;

“In exercising Judicial authority courts and Tribunals shall be guided by the following principles –

“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”

16. The court will therefore promote other forms of dispute resolution where the circumstances of the case so allow and the parties have agreed to an alternative mode of dispute resolution other than the court.

17. The value-added agreement dated 14<sup>th</sup> November 2020 also talks about a dispute which “cannot be settled amicably by the parties” and this makes allowance for amicable resolution of disputes.

18. I accordingly recommend that the parties try to resolve their dispute amicably first.

19. Failure to reach an amicable solution I order that the chairman of the Chartered Institute of Arbitrators to be approached by the Applicant to appoint an Arbitrator.

20. The Respondent to pay the costs of this Application.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY, 2023.**

**A.N. ONGERI**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent

