



**Civicon Limited v Fuji Electric Co. Ltd & 2 others (Civil Case E359 of 2022)
[2023] KEHC 18492 (KLR) (Commercial and Tax) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E359 OF 2022
JWW MONG'ARE, J
JUNE 12, 2023**

BETWEEN

CIVICON LIMITED PLAINTIFF

AND

FUJI ELECTRIC CO. LTD 1ST DEFENDANT

MARUBENI CORPORATION 2ND DEFENDANT

EQUITY BANK (KENYA) LIMITED 3RD DEFENDANT

RULING

1. Before the court is the 1st Defendant's application dated 30/9/2022 brought pursuant to Section 6 of the Arbitration Act. The 1st Defendant sought a stay of further proceedings in the instant suit pending its reference to arbitration and an order to set aside the *status quo* order issued herein on 24/9/2022.
2. The grounds of the application were that the Plaintiff has by an application dated 22/9/2022 sought various injunction and declaratory reliefs to restrain the 3rd Respondent, Equity Bank (Kenya) Limited, (the Bank) from paying the 1st Defendant the proceeds of a Performance Bond issued in its favour on the alleged grounds that the Plaintiff decision to call up the Performance Bond was in breach of the relevant agreements signed by the parties and is fraudulent and unlawful.
3. That the Performance Bond was issued in favour of the 1st Defendant to secure the Plaintiff's due performance of its scope of works under the various agreements executed by the parties; that however, in breach of its obligations under the said agreements, the Plaintiff failed to perform its scope of work with the result that the 1st Defendant was compelled to take remedial action to mitigate the risk of liquidated damages for delay being imposed on the parties by the employer.



4. The 1st Defendant averred that it took over and performed the Plaintiff's scope of work under the various agreements between the parties and in the process of doing so incurred costs that were recoverable from the Plaintiff under the said agreement between the parties but the Plaintiff was unwilling to pay the same thereby necessitating the 1st Defendant's decision to call up the Performance Bond on 20/9/2022; that the issues raised in the instant suit and in the Plaintiff's application regarding the Plaintiff's right to call up the Performance Bond on account of the various claims it has against the 1st Defendant are all matters that ought to have been referred to arbitration as provided for under the various arbitration agreements executed by the parties.
5. The 1st Respondent opposed the instant application by filing a replying affidavit sworn on October 27, 2022 by Trevor Okoth. He averred that the said application is misconceived, frivolous and is a decoy to cloud the real issues raised in the suit before this Court; that contrary to the assertions of the 1st Defendant, the issue of calling up or not, of the performance bond, is not an arbitrable matter within the framework of the arbitral clause contained under the Consortium Agreement;
6. Further that the dispute in this matter also involves essential parties who are intricate to the dispute before the Court and who are not privy to the Consortium Agreement whose arbitral clause the 1st Defendant purports to invoke; that both the 2nd and 3rd Defendants are not privy to the Consortium Agreement between the Plaintiff and the 1st Defendant, whose arbitration clause the 1st Defendant has invoked yet that the arbitration clause being invoked by the 1st Defendant is applicable and binding only to the Plaintiff and 1st Defendant and therefore this dispute is beyond the scope of the arbitration.
7. The Plaintiff pleaded that referring the dispute as between the Plaintiff and the 1st Defendant only to arbitration while the rest of the parties pursue their case before this court, as suggested by the 1st Defendant, would create a scenario where there are parallel proceedings over the same subject matter in two different forums with a possibility of conflicting outcomes. The plaintiff urged the court to have the instant application dismissed with costs.
8. The 1st Defendant filed a further affidavit in response to the replying affidavit discussed above. It was sworn on 22/2/2023 by Kishi Kenichi, the manager of sales of the 1st Defendant. In the said affidavit, he averred that under Article 22 of the Consortium Agreement, all disputes arising out of the agreement are arbitrable and that there is no possibility of conflicting outcomes as the 1st Defendant has no locus standi to file a claim arising from the Performance Bond and the 2nd Defendant has applied to be stuck out from the proceedings as no cause of action has been sought against it.
9. I have considered the pleadings, affidavits and annexures filed in this matter. A brief background of this matter is that KenGen entered into an engineering procurement and construction contract with the 2nd Defendant for the construction of a power plant. The 2nd Defendant then subcontracted its scope of work under the main contract to the 1st Defendant and Plaintiff through a Coordination Agreement.
10. Further, the Plaintiff and 1st Defendant entered into a Consortium Agreement whereby they allocated each other clear and separate responsibilities for completing the project on behalf of the 2nd Defendant. Under Article 9 of the Consortium Agreement, the Plaintiff would provide and maintain with the 1st Defendant a Performance Bond to secure its due performance of its scope of works under the various agreements executed by the parties. The said Performance Bond is the subject matter of these proceedings.



11. Clause 22 of the Consortium Agreement (annexed as ‘KK-3’ in Kishi Kenichi’s Affidavit) states:

“In the event of any dispute of any kind whatsoever among or between the Parties, arising out of or in relation to, or in connection with the validity or invalidity, construction, execution, meaning, operation or effect of or breach of this Agreement and/or Coordination Agreement, the parties shall without prejudice to their rights, continue to respect all their obligation and to perform all their duties under this Agreement and the Coordination Agreement, provided that any dispute between the Parties shall be resolved by and between the Parties and the Parties shall hold MC harmless unless such dispute occurs due to the reason attributable to MC.

Any such dispute among or between the Parties shall be mutually resolved in good faith negotiations at successively higher levels of management in each Party’s respective organisations. If at any time a Party is of the opinion that such dispute cannot be settled amicably by negotiation, then such Party shall have the right, by giving written notice to the other Party(s), to refer the dispute or controversy to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce and the seat of the arbitration shall be London. The language of the arbitration shall be English. The award rendered therein shall be final and binding upon the Parties involved in such arbitration proceedings.”

12. Based on the provision above, the 1st Defendant argued that the Plaintiff’s suit which was based on the Performance Bond ought to be referred to arbitration.

13. My understanding of Clause 22 is that the Plaintiff and 1st Defendant intended to resolve disputes that arose from their contractual relationship through arbitration. This did not exclude matters relating to calling up of the Performance Bond.

14. The Plaintiff’s suit and application dated 22/9/2022 is hinged on whether or not the 1st Defendant had a right to call up the Performance Bond on account of the various claims it had against the Plaintiff. The Performance Bond was a creation of the Consortium Agreement in which the arbitral clause extracted above emanated from.

15. It is therefore my finding that all disputes, including the one brought by the Plaintiff regarding the Performance bond ought to be resolved through arbitration in accordance with Clause 2 of the Consortium Agreement.

16. In this case, the applicable provision of the law is Section 6 of the [Arbitration Act](#) which states:

“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.”

17. The court will therefore stay the proceedings in this suit pending reference of the matters raised in the suit to arbitration. The court grants prayer 3 and 4 of the application with costs to the 1st Defendant.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12th DAY OF JUNE
2023**

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Lawson Ondieki for the Applicant

Mr. Paul Kamara for the Respondent

Sylvia- court Assistant

