



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.224 OF 2019

ANAALI KENYA LIMITED.....PLAINTIFF

VERSUS

DONWOODS COMPANY LIMITED.....1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY.....2ND DEFENDANT

RULING

1. Before Court are 4 applications filed by the parties at various times. The first application by the plaintiff is dated **14/9/2019**. It was brought under **sections 3A, B, C and 63 (e) of the Civil Procedure Act and Order 40, Rule 2,3 and 4 of the Civil Procedure Rules 2010**.
2. The application sought a temporary injunction to restrain the 1st defendant from interfering with the plaintiff's continued conduct of the project works and appointing any third-party sub-contractor(s) in respect of the project works comprised in the Partnership Agreement dated 9/7/2018, Sub Contract 01 Milestone 03-05 dated 9/11/2018, Sub Contract 02 Milestone 06-08 dated 9/11/2018 and Sub Contract 03 Milestone 09-10 dated 9/11/2018 (hereinafter jointly referred to as 'the contract') pending the hearing of the suit.
3. The second application dated 30/9/2019 was filed by the 1st defendant. It was brought under **Section 6 of the Arbitration Act** and sought a stay of proceedings pending the reference of this matter to arbitration in terms of the Contract between the plaintiff and 1st defendant.
4. The third application dated 22/10/2019 was filed by the plaintiff under **sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 2,3 & 4 of the Civil Procedure Rules**. It sought, *inter-alia*, a temporary injunction restraining the 2nd defendant from making any payments for work completed on the project works comprised in the Contract to the 1st defendant.
5. The fourth application dated 16/4/2020 was filed by the plaintiff under **Order 8 Rule 3, Order 40 Rule 2,3 & 4**. It sought leave to further amend its plaint and enjoin a 3rd defendant and for an injunction prohibiting the officers of the 2nd and proposed 3rd defendant from interfering with the site office and any works completed by the plaintiff based on the contract before a joint valuation is carried out.
6. When the parties appeared in Court on 25/11/2020, they intimated that attempts to settle the matter out of court had failed and urged the Court to make a determination on the pending applications. The Court then directed them to file and exchange written submissions on the applications within 30 days. However, as at the time of writing this ruling, none of the parties had done so.
7. A brief background to the dispute is that the plaintiff and 1st defendant entered into a Partnership Agreement dated 9/7/2018 and 3 subsequent addendums/subcontracts. Under the contracts, the plaintiff was to take up part of the project works relating to a road construction in Tharaka Nithi County. A dispute arose in relation to the contracts and the plaintiff filed this suit against the 1st defendant alleging a breach of the agreement and the addendums thereto.
8. The Court has considered the entire record. It has also considered the applications. Considering the nature of the dispute and the applications, the Court is of the view that the second application that seeks the stay of proceedings pending the referral of this matter to arbitration, should be determined first.
9. The application was brought under **section 6 of the Arbitration Act** which 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 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”.

10. The basic requirement under the above provision is that the court must, first and foremost, determine whether the contract between the parties has an arbitral agreement. Once it so determines, it has no alternative but to stay the proceedings and refer the matter to arbitration.

11. The Court has considered the Contract between the parties. **Section 13** thereof, as well as the three sub-contracts, provide: -

“All claims, disputes and matters in question arising out of or relating to this Agreement or the breach thereof shall be first negotiated between the parties to reach an amiable settlement. Should the parties fail to reach an acceptable settlement within 15 days, the dispute shall be referred to an arbitral tribunal consisting of a sole arbitrator appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya”.

12. The foregoing provision is crystal clear. The parties intended that any disputes between them be referred to arbitration for resolution. The Court must respect the parties’ intention as contained in the Contract. Further, **Article 159(2)(c) of the Constitution** directs that in their exercise of judicial authority, Court should promote alternative forms of dispute resolution including reconciliation, mediation and arbitration.

13. In this regard, this matter is for arbitration and not for this Court. That being the case, the other three applications do not fall for determination by this Court. Some of the reliefs sought therein can be determined by the arbitrator.

14. Accordingly, the application dated 30/9/2019 is allowed on the following terms: -

a) The proceedings herein are hereby stayed and the matter referred to arbitration.

b) In accordance with section 13 of the Contract, the Chairman of the Architectural Association of Kenya is hereby directed to appoint a sole arbitrator within 30 days of the date of this ruling to arbitrate on this dispute.

c) Costs of the application and the suit to abide the arbitral proceedings.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 6th day of May, 2021.

A. MABEYA, FCI Arb

JUDGE