



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL CASE NO.002 OF 2021

SAHSON CONSTRUCTION LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PRINCIPAL ADMINISTRATIVE SECRETARY.....1ST DEFENDANT/APPLICANT

COUNTY GOVERNMENT OF MARSABIT.....2ND DEFENDANT/APPLICANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The 1st and 2nd defendants/Applicants have filed a Notice of Preliminary Objection dated 10th March 2021 based on the grounds that:

1. This honourable court lacks jurisdiction to hear and determine this matter owing to arbitration agreement between the parties as stipulated at paragraph 37 of the tender document on settlement of disputes.

2. This suit is otherwise premature, bad in law, frivolous, vexatious and an abuse of the court process.

2. The application was opposed by the plaintiff/Respondent through the written submission of their advocates, **Mang`era & Co. Advocates**. The advocates for the Defendant/Applicants, **J.G. Behailu Advocates** did not make any submissions.

3. The background to the preliminary objection is that the Plaintiff/Respondent was contracted by the 1st and 2nd defendants to construct the Governor's Residence in Marsabit Town. After the plaintiff had taken over the site, some issues cropped up that made the work to stall. The plaintiff filed the current suit to enforce the contract. The defendants thereafter filed the instant preliminary objection on the grounds that there is an arbitration clause in the contract between the plaintiff and the defendants providing on how any arising disputes would be settled.

4. The advocates for the plaintiff/Respondent submitted that an arbitration clause contained in an agreement does not automatically deprive the court of its jurisdiction over such a matter. That section 6(1) of the Arbitration Act, 1995 envisions a situation where a matter before court can be referred to arbitration which means that an arbitration clause does not completely strip the court of its jurisdiction over the matter. That the applicant should therefore have sought for the matter to be referred to arbitration as opposed to seeking to have it being dismissed.

5. Counsel submitted that as the matter can only be referred to arbitration, it cannot be disposed of by way of Preliminary Objection. Counsel relied on the case of **Bahari Transport Company v A.P.A. Insurance C. Ltd** (2007)eKLR where Serгон J. considered whether a matter subject to arbitration clause can be dismissed by the court and held that:

“The sum total is that the worst that can happen is that the suit will be stayed but cannot be dismissed. Consequently, issues touching on arbitration clauses cannot be argued by preliminary objections because at the end of it all the action or suit will not be disposed of.”

On the effect of arbitration clauses on contracts, the learned Judge continued that:

**“..Lastly, it has been asked on many occasions and in this matter as to what is the effect of arbitration clauses in contracts”
The legal position is that they do not preclude parties from accessing courts of law.” - see**

6. Counsel urged the court to refer the matter to arbitration and make an order for the status quo to be maintained at least until an arbitrator is

appointed as the Respondents may offset the status quo.

7. I have considered the application and the submissions by the advocates for the Plaintiff/Respondent. There is no dispute that there is in existence an arbitration clause in the contract between the two parties. The Applicants pleaded that the court has no jurisdiction to entertain the matter in view of the arbitration clause. The issue before me is whether an arbitration clause ousts the jurisdiction of the court in such a matter as the one before me.

8. The Constitution of Kenya 2010 in Article 159(2) requires courts of law to promote alternative dispute resolution mechanisms. The Article provides that:

“159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

a. Justice shall be done to all, irrespective of status;

b. Justice shall not be delayed;

c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

9. Arbitration is only one of the modes of alternative dispute resolution mechanism. Parties in a contract are therefore at liberty to adopt any mode of dispute resolution mechanism that appeals to them. In the case of the **County Government of Kirinyaga v African Banking Corporation Ltd** (2020)eKLR the court held that:

“ ...The tenor and import of Article 159(2)(c) of the Constitution as read together with section 6(1) of the Arbitration Act is that where parties consensually agree to arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement..”

It is thus the duty of the court to promote arbitration between parties.

10. Section 6(1) of the Arbitration Act provides as follows:

“(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.”

11. In my reading of the said section, it does not oust the jurisdiction of the court in a matter that is subject of an arbitration clause. Neither does the Arbitration Act provide for dismissal of such a matter in situations where they land into court before the agreed alternative dispute resolution mechanism is employed. I concur with the holding of Seron J. in **Bahari Transport CO. vs A.P.A** (supra), that the effect of arbitration clauses in contracts is that they do not preclude parties from accessing courts of law. In **Kenyatta University – v – Step Up Holdings (k) Ltd (2018) eKLR** the Court of Appeal upheld Ouko J’s (as he then was) refusal to refer the matter to arbitration. The matter had then to proceed before the High Court. That meant that the High Court had jurisdiction to entertain the matter despite the existence of an arbitration clause between the parties.

In the premises I do hold that the court has jurisdiction to entertain the matter.

12. The advocates for the plaintiff/applicant have asked the court to refer the matter to arbitration. As can be seen from the provisions of Section 6(1) of the Arbitration Act to be met, there are some conditions precedent before a matter can be referred to arbitration. The referred to section requires for a matter to be referred to arbitration on an application by a party. The applicant did not make such an application. The issue only came out in the submissions of their advocates which was in no way an application. It would be irregular for this court to refer the matter to arbitration when the issue has not been urged by both parties.

13. The upshot is that there is no merit in the Preliminary Objection and the same is dismissed with costs to the Plaintiff/Respondent.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 8TH DAY OF JULY 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

Mr. Odhiambo for Plaintiff/Respondent

Mr. Behailu for 1st and 2nd Defendants/Applicants

Miss. Kungu for 3rd Defendant

Parties:

Plaintiff/Respondent:- Absent

Defendant/Applicants:- Absent

Court Assistant:- Barako