



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.472 OF 2015

BRIDGEWAYS CONTRACTORS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

VIL LIMITED.....DEFENDANT/APPLICANT

RULING

1. VIL LIMITED, the Defendant/Applicant through a chamber summons dated 4th May 2017 brought to court pursuant to section 6 of the Arbitration Act, 1995, Rule 2 of the Arbitration Rules, 1997 and all enabling provisions seeks the following orders:-

- a) THAT all further proceedings relating to this matter be stayed pursuant to Section 6 of the Arbitration Act, 1995.
- b) THAT all disputes and questions between the Applicant and the Respondent be referred to arbitration in accordance with Clause 10 of the sub-contract entered into between the parties in relation to the Rehabilitation of the Kakamega – Kaburengu (*Webuye*) Road (*"the Sub-Contract"*).
- c) THAT the costs of this application and of this suit be borne by the Respondent.

2. The application is premised on the grounds on the face of the application numbering from Nos 1 – 6. It is further supported by an affidavit of Mohammed Tariq Khan.

3. The application is opposed. The Plaintiff/Respondent filed a Replying affidavit dated 11th May 2017 in opposition of the application sworn by John Kamau Njau on the same date.

4. The Plaintiff/Respondent in a suit filed on 29th September 2015 prays for judgment against the Defendant/Applicant for Kshs.165,540,823/40 plus contractual interest thereon upto to date of payment. The Defendant/Applicant entered appearance under protest dated 8th October 2015 and stated in the appearance that the appearance under protest is prompted by the presence of an arbitration clause in the putative contract the subject matter of the instant suit. The claim of Kshs.165,540,823/40 is in respect of works allegedly performed under sub-contract entered into between the parties herein regarding the rehabilitation of the Kakamega-Kaburengu (*Webuye*) Road (*The sub-contract*).

5. I have perused the previous proceedings of this matter, the history of this suit and noted all previous orders leading to the present application and the reason as to why the Defendant/Applicant is relying on supporting affidavit which pre-dates the present application. I have considered the application, affidavit in support, the Replying affidavit and counsel rival submissions and issues arising thereto for consideration can be summarized as follows:-

- a) **Whether there is a valid agreement providing the settlement of dispute by an arbitration?**
- b) **Whether the application meets the threshold for stay of the proceedings as provided for under section 6 of the Arbitration Act?**

A) Whether there is a valid agreement providing the settlement of dispute by an arbitration?

6. Section 6 of the Arbitration Act 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.

(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.

7. In the instant case, the dispute between the parties stems from a sub-contract entered into between the parties on 7th August 2014 (*the sub-contract*) annexure "MTK-2" together with the Addendum thereto signed off on 27/8/2014). The sub-contract is founded on the main contract entered into between the Applicant and the Kenya National Highways Authority – KENHA (*the main contract*.) (Exhibit 'MTK-4) as per affidavit of Mohamed Taric Khan sworn on 16th October 2015.

8. In the sub-contract Agreement there exists arbitration clause – **Clause 10** provides:-

"In case of disputes arising from variations in works a one man panel will be convened at the discretion of both parties. As agreed by the Main-Contractor and Sub-Contractor, this one man panel will consist of Engineer Bernard Wangusi (0726 170587). Eng. Wangusi's decision will be final and both parties have to accept his deductions of the dispute without prolonging stoppage of work or payments."

9. The scope of work is covered by **Clause 1.1** which provides:-

"Scope of Sub-contract Work: Items 4, 5 7 9 of BOQ as attached. It is understood the total scope or works covers 41 kms however the same will be broken down in to 5 km phases for this sub-contract. The Sub-Contractor is being given the first 5 kms and the continuation thereafter to a minimum of 15 kms in total based on phase. The estimated Contract Sum (total of bills 4, 5 and 9 at VIL Ltd rates for 15 Km is approx. Kshs.98M).quality and successful completion of each."

10. The contract price is covered under **clause 4**.

"The price agreed and accepted for the complete scope of work and as detailed in the attached Bills of Quantities shall be; AS CERTIFIED BY RE IN MEASUREMENT SHEETS.

(Price per km = Kshs.7.9M) (Measured Back to Back)

Both parties agree that:

The sub-contractor will be paid at 90% of the rates of the Main Contractor. The quantity of work shown with the BOQ is only an estimate, while the actual quantity of work may be more or less; the sub-contract payment is thus a fixed lump sum subject to the provisions' of Sub-Clause 4.1 or deletes specific works detailed in the BOQ.

The main Contractor may initiate variations at any time during the contract period, which have to be confirmed in writing by way of a Variation Order. The value of such variations shall be based on unit rates in the Bill of Quantities or as quoted and agreed prior to undertaking the works and payment made to Sub-Contractor accordingly."

11. Payment conditions are covered under **clause 5** which states:-

"There will be an advance payment as agreed with the main contractor's representative. Main contractor will pay for works in full after completion of every 3.5 kms. Extension of contract as in Clause 1.1 above will be given after completion of every 5kms sections. Main contractor will deduct 20% of full payment due after 2.5 km until advance payment is full recovered. The income tax deduction made by client will be treated as part of the amount within 20%. All other taxes & duties such as work contract tax, royalty, labour cess, security deposit, retention money deducted as applicable will be to sub contractor's account. SD Retention money shall be released to the sub-contractor by VIL after getting the same from client. The deduction of income tax against sub-contracting, shall be deposited to Income Tax Department from the account as explained above and such certificate of tax deduction shall be given to sub-contractor by VIL."

12. In the instant suit, there is no dispute that there exists a valid arbitration agreement between the parties. I therefore find that as per clause 10 of the sub-contract Agreement (MTK-2) dated 7th August 2014 and duly executed by both parties there is a valid Agreement for the dispute arising from variation in works to be referred to arbitration.

13. As regards the issues in dispute clause 10 of the sub-contract Agreement refers to disputes arising from variation in works. The dispute herein relates to payment for the work done. It is urged by the Respondent the dispute being on payment and not on variation or work is not a dispute contemplated under the arbitration clause 10. In giving wide interpretation to clause 10 one has to look at the scope of work, contract price and payment conditions as well. One cannot separate all the above and say the dispute of payment do not touch on dispute contemplated under the arbitration clause No.10. The Arbitration clause 10 also refers to stoppage of work or payment and as such it does not restrict arbitrator to variation of works but giving arbitrator authority to deal with disputes related also to stoppage of works or payment, when the plaintiff's entitlement is challenged on grounds that it had not performed the task it was to perform under sub contract and more so to the extent it meant to. This in my view brings up the issue of whether there was variation or not and squarely falls under the contemplated issues. I therefore find the dispute existing is a kind of dispute contemplated under the Arbitration clause entered into between the parties and not otherwise.

14. In **Nectel (K) Limited vs Eastern and Southern African Trade and Development Bank [2008] eKLR** Hon. Justice Kimaru stated thus:-

"The court is mandated to grant an order staying proceedings if it is established that there is an agreement that provides the settlement of the dispute by arbitration. This court is required to consider whether or not to order stay of proceedings and not make any other order concerning the arbitral process."

B Whether the application meets the threshold for stay of the proceedings as provided for under section 6 of the Arbitration Act?

15. In the instant suit, the Defendant/Applicant entered appearance on 8th October 2015 under protest which was prompted by the presence of an arbitrator clause in the putative contract subject of the instant suit. The application for stay of the proceedings was filed contemporaneously to the filing of a memorandum of appearance under protest on 8th October 2015. The same was timeously as provided for under section 6 of the Arbitration Act. There is no dispute of existence of clause 10 of the sub-contract, that constitutes a valid arbitration agreement. That there exists a dispute between the parties as contemplated under the arbitration clause No. 10 of the sub-contract Agreement dated 7th August 2014.

16. In the instant suit, the Plaintiff/Respondent has not demonstrated that the arbitration agreement is null and void, in operation or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to the arbitration.

17. Upon revisiting clause 10, it emerges out that the disputes arising for variation of works; deductions of the dispute without prolonging stoppage of work or payments are the disputes which the parties agreed to Engineer Wangusi to arbitrate and whose decision the parties agreed would be final on whether the payment of Kshs.165, 540,823/40 should be made. I find that this was a dispute that was contemplated by parties under clause 10 of the sub-contract. In view of the above I find the Defendant/Applicant has met the threshold for stay of these proceedings to be granted as provided for under section 6 of the Arbitration Act.

18. In considering this application, I have considered Article 159(2) (c) of the Constitution which enjoins court to promote alternative forms of dispute resolutions, which includes reconciliation, arbitration and even traditional dispute resolution. Justice is not only found in court as it can also be found and expeditiously from alternative forms of dispute resolution and reduce the ever increasing blocking in courts. I am of the view that court in embarrassing alternative dispute resolution will be doing the right thing and encouraging the litigants to seek first alternative dispute resolution mechanism and settlement of the matters out of court.

19. Having said that much, I find the Applicant application to be meritorious. I proceed to make the following orders:-

- a) **THAT all further proceedings relating to this matter be stayed pursuant to Section 6 of the Arbitration Act, 1995.**
- b) **THAT all disputes and questions between the Applicant and the Respondent be referred to arbitration in accordance with Clause 10 of the sub-contract entered into between the parties in relation to the Rehabilitation of the Kakamega – Kaburengu (Webuye) Road ("the Sub-Contract").**
- c) **THAT cost of the application be in the cause.**

Dated, signed and delivered at Nairobi this 7th day of February, 2019.

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J .A. MAKAU

JUDGE