



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**HCC NO. 237 OF 2016**

**BLUE ROCK SECURITY LIMITED.....PLAINTIFF**

**VERSUS**

**VIL LIMITED (Formerly Vijay Infrastructure Limited).....1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA)...2<sup>ND</sup> DEFENDANT**

**RULING**

1. VIL Limited (VIL or The Defendant) seeks to rely on the provisions of Section 6 of The Arbitration Act (the Act) to have the Dispute herein referred to Arbitration. In addition it seeks a Stay of all further proceedings in and/or arising from the main suit.
2. In a Complaint presented on 22<sup>nd</sup> June 2016, Blue Rock Security Ltd (Blue Rock or The Plaintiff) filed this Suit against VIL for a claim of Ksh.12,201,343.55. In that Complaint, Blue Rock avers that the debt arose in respect to security services the Company provided to VIL by virtue of a 24 month contract entered between the two on 1<sup>st</sup> April 2013. The case by Blue Rock is that under the terms of the contract, VIL was to pay for the Services within 45 days or receipt of an invoice and pay a penalty charge of 10% per month in the event of default.
3. Blue Rock avers that by a letter dated 1<sup>st</sup> August 2014, VIL admits the existence of the Contract at a minimum contract cost of Ksh.508,000/= per month varying upwards according to the demand on site.
4. Upon service of Summons herein, VIL filed the current application on 8<sup>th</sup> July 2016 and urges this Court to find that the dispute articulated by Blue Rock in the main Suit stems from a purported breach of terms of the contract of 1<sup>st</sup> April 2013 and then points to clause 16 of the Agreement which reads:-

*“16. All disputes, differences or questions between the Company and the Client with respect to any matter or thing arising out of or relating to the Contract and except in so far as may be otherwise provided in the Contract shall be referred to the arbitration of two persons one to be appointed by the Company and one by the client in accordance with the provisions of the Arbitration Act (chapter 49 Laws of Kenya). Unless otherwise agreed the arbitration shall take place in Nairobi. The two appointed Arbitrators will appoint an umpire whose decision will be final and binding to all”.*
5. In a Replying Affidavit sworn on its behalf by Reuben Ngoseiyue Lumwaji, Blue Rock states that the Company terminated the Contract in March 2015 and that no formal dispute has been recorded to warrant an arbitral reference. He also deposes that any dispute that may arise covers the period outside the contract and that interest continues to accumulate until payment in full. This Court is asked not to subject the matter to Arbitration.
6. But in respect to whether the debt is disputed, VIL have through a Mr. Mohammed Tariq Khan deposed that during the time of the contract it suffered various theft of equipment, material and fuel. Pointing to clause 9(a) of the Contract, VIL asserts that Blue Rock was required to indemnify the Applicant for any such loss and that the value of the stolen items far exceeds the amounts claimed by Blue Rock.
7. It is common ground that the contract of 1<sup>st</sup> April 2013 has the following Arbitration clause:-

*“16. All disputes, differences or questions between the Company and the Client with respect to any matter or thing arising out of or relating to the Contract and except in so far as may be otherwise provided in the Contract shall be referred to the arbitration of two persons one to be appointed by the Company and one by the client in accordance with the provisions of the Arbitration Act (chapter 49 Laws of Kenya). Unless otherwise agreed the arbitration shall take place in Nairobi. The two appointed Arbitrators will appoint an umpire whose decision will be final and binding to all”.*

8. Section 6(i) of the 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.

(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”.

Explicit for these provisions, a Court will not make a referral order if it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed or that there is in fact no dispute.

9. It is not asserted by the Respondent that clause 16 being the Arbitration Agreement is null and void or otherwise incapable of being performed. What Blue Rock argues is that there is no dispute because the debt is admitted and no dispute has been set up.

10. This Court has looked at the material placed before it and is unable to see any express admission of the debt by VIL. There is however various documents shown to this Court that VIL had made reports of theft of some of its property. That VIL should invoke the provisions of clause 9 of the Contract on Indemnity is therefore not altogether trivial. Clause 9 reads:-

“a) GENERAL PROVISION AS TO THE AMOUNT OF LIABILITY: *If pursuant to the provisions set out herein any liability on the part of the Company shall arise (whether under the express or implied terms of this Contract, or at Common Law, or in any other way) to the Client for any loss or damage of whatever nature arising out of or connected with the provision of, or purported provision of, or failure in provision of the service covered by this Contract such liability shall be limited to the payment by the Company by way of damages of a sum:*

i. *Not exceeding Kenya Shillings Ten Thousand (Khs.10,000) in respect of any one claim arising from any duty assumed by the Company which involves the operation, testing, examination or inspection of the operational condition of any alarm, machine, plant or equipment in or about the Client's premises or which involves the provision of any service not solely related to the prevention or detention of fire or theft.*

ii. *Not exceeding Kenya Shillings Twenty Thousand (Khs.20,000) for the consequences of any theft of a wheeled vehicle, its equipment and/or any goods or chattels loaded thereon.*

iii. *Not exceeding a maximum of Kenya Shillings Twenty Five Thousand (Khs.25,000) for the consequences of any incident (other than those provided for by paragraphs (a) and (b) of this condition) involving fire, theft or any other cause of liability on the Company under the terms hereof. And further provided that the total liability of the Company shall not in any circumstances exceed the sum of Kenya Shillings Twenty Five Thousand (Khs. 25,000) in respect of all and any incidents arising during any consecutive period of 12 months.*

b) SPECIAL PROVISION AS TO NOTIFICATION OF CLAIMS:-*The Company shall not be responsible in any circumstances or to any extent whatsoever, whether for breach of contract, or negligence, unless written notice is received by the Company at its Head officer within fifteen days of the happening of the default by the Company alleged to give rise to any liability.*

i. *The clients' workers will always be expected to take such precautionary measures as is usually and reasonably necessary to ensure their own safety and the safety of the other users of the premises as may be necessary during the times of their work.*

ii. *it is hereby agreed and declared as between the parties herein that at no time shall the Company bear responsibility over the safety and/or any injuries to the client's workers as may resort to them in the course of Company workers executing their duties at the Client's premises.*

iii. *The losses that might be sustained in consequence of any negligence or breach of contract or other wrongful act on the part of the Company, its servants or agents, must, if the client requires such a cover, be covered separately by insurance to be obtained by the client and the company and its servants or agents will not provide such or any insurance cover for the Client”.*

11. The Arbitration Clause is very widely worded to include not only disputes but also differences or questions between the parties to the contract in respect to any matter or thing arising out of or relating to the contract. The fact that VIL disputes the debt, even if but a portion, on the basis of a set-off is certainly a dispute or difference which is referable to Arbitration. This Court is of the view that there is in fact a dispute between the parties. However, whether or not there is merit in the allegations made by VIL is a call to be made by the Arbitrator and not within the mandate of this Court.

12. But it has also been argued that a portion of the Claim arises for a period after the contract was terminated and therefore outside the scope of the contract itself and therefore the Arbitration Agreement. This Court is then asked not to allow the referral because it would be to separate the dispute in a way that is not desirable. But this Court sees no difficulty in referring the Dispute which falls after the period of the written contract to arbitration because of the provisions of Section 59C of the Civil Procedure Act which reads:-

*“(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.*

*(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.*

*(3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.*

*(4) No appeal shall lie in respect of any judgment entered under this section.*

13. The issues that arise after the Contract period are similar to those of the contract period. Both relate to the provision of security services payment thereof and whether VIL should be indemnified for an alleged loss. These are matters that the Arbitral Tribunal should be able to determine.

14. As I close, this Court was asked by Blue Rock to grant some conservatory order in terms of Section 7 of the Arbitration Act if it were to be minded to allow the Application. This request was made in the submissions filed by Blue Rock. While I cannot say that there is no merit on the plea, it seems clear to this Court that the request for Interim Measure of Protection cannot be taken up as a sidewind. Blue Rock need make a substantive application and is entitled to do so notwithstanding any orders that this Court shall be shortly granting.

15. Ultimately I allow the Notice of Motion dated 8<sup>th</sup> July 2016 as prayed. Costs to the Defendant.

**Dated, Signed and Delivered in Court at Nairobi this 1<sup>st</sup> day of February, 2019.**

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**F. TUIYOTT**

**JUDGE**

**PRESENT:-**

Impano for Muchiri for Applicant

N/a for Respondent

Nixon – Court Assistant