



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 309 OF 2017

AECOM ROA (PTY) LIMITED.....PLAINTIFF

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

RULING

1. **AECOM ROA (PTY) Limited** is the Plaintiff herein. It is an engineering and consultancy company. The **KENYA NATIONAL HIGHWAYS AUTHORITY**, the Defendant, was established under the Kenya Roads Act, 2007, to be responsible for the management, development, rehabilitation and maintenance of national roads. The Defendant under Section 4 of the Roads Act has under its functions the construction, the upgrading, rehabilitation, and maintenance of the roads under its control, controlling national roads and road reserve and access to roadside developments and ensuring the quality of road works.

THE PLAINTIFFS CLAIM

2. The Plaintiff by its Complaint filed on 27th July 2017 sued the Defendant for breach of contract for failing to pay outstanding sum under the contract between the parties of USD 316,047,000 and Kshs 5,538,333.40.

3. The Plaintiff, by its Complaint, pleaded that, under its previous name, it was contracted by the Defendant to provide, the Defendant, with Consultancy services for detailed feasibility study, environmental and social-economic impact studies and detailed engineering design of the Mombasa-Mariakani (A 109) Road.

4. That the Plaintiff successfully provided those services, as per the contract. The amount the Plaintiff has sued for is for the outstanding amount, not paid by the Defendant, plus interest.

PRELIMINARY OBJECTION DATED 17TH AUGUST 2017

5. The Defendant has raised Preliminary Objection to the Plaintiff's case as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the Defendant, will at the earliest opportunity raise the following points of law for adjudication by this Honorable Court prior to the hearing of the suit by the Plaintiff.

- 1) *The Honourable Court does not have jurisdiction to entertain the Plaintiff's suit.*
- 2) *The Plaintiff has failed to invoke, and or exhaust the dispute resolution mechanisms provided under the contract.*
- 3) *The Plaintiff has breached the special conditions of contract between itself and the Defendant.*
- 4) *The Plaintiff has failed to comply with statutory requirements on limitation of action contrary to Section 67 of the Roads Act.*

6. The Defendant by its written submission divided the Objection into two headings, namely:

- (a) Requirement for notice under Section 67(a) of the Kenya Roads Act, 2007.

(b) Jurisdiction of the Court.

ANALYSIS AND DETERMINATION

7. In the case of **MUKISA BISCUIT MANUFACTURER LTD –V- WEST END DISTRIBUTORS LTD [1969] E.A. 696** the Court of Appeal stated, in defining a Preliminary Objection:

“It raises a point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. With that in mind I shall consider the Defendant’s Objection.

9. On the Objection that the Plaintiff failed to give notice as required under Section 67(a) of the Kenya Roads Act, the Defendant submitted that Section 67(a) required the Plaintiff to make demand to the Defendant, which it did not, one month before filing suit.

10. That section provides as follows:

SECTION 67

Where any action or other legal proceeding lies against an Authority for any action done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-

(a) The action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the Plaintiff or his agent;

11. The Plaintiff in response directed the Court’s attention to two letters, to be found amongst its trial bundle of documents. One letter is dated 24th October 2016 asking the Defendant to settle the contractual amount outstanding, and informing the Defendant that it would seek to recover the amount due by alternative measures. The other letter is dated 9th February 2017, and stamped as received by the Defendant on 9th February 2017, by which letter the Plaintiff requested for payment of amount due.

12. It will be recalled, above, that it was stated in the case of **MUKISA BISCUIT (SUPRA)** that a Preliminary Objection is raised on the basis that facts pleaded by other party are correct. That being so the Defendant cannot be heard to fault the validity or otherwise of the Plaintiff’s notice to the Defendant. The fact remains that the Plaintiff gave notice 30 days before filing suit, as required under Section 67(a) of the Roads Act.

13. On that basis that ground of Objection is hereby dismissed.

14. The other ground raised by the Defendant is based on the existence of arbitration clause in the parties contract. The contract provides for amicable settlement of dispute, within 30 days of the other party’s request to settle, and if not settled in that manner the special condition applies. The special condition provides:

“Dispute shall be settled by arbitration...”

15. The Defendant submitted that the condition of that clause were mandatory.

16. The Plaintiff’s response to that ground was that the Defendant, in breach of Section 6 of the Arbitration Act Cap 49 had filed not only Memorandum of Appearance but also defence and Counter-claim.

17. Section 6 of the Arbitration Act provides:

SECTION 6

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.

18. I have considered the parties submissions and authorities. The jurisprudence of Section 6 of the Arbitration Act is that a party seeking to

stay a suit pending arbitration must file that application not later than when the party files an appearance. Stay cannot be sought by a party who has filed any further pleading. This was stated in the case **CORPORATE INSURANCE COMPANY –Vs- LOISE WANJIRU WACHIRA (1996) eKLR** viz:

“In the present case the Appellant did more than just enter an appearance. It delivered a defence, which is of course a pleading..... In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”

19. In this case the Defendant filed a Memorandum of appearance on 18th August 2017 and simultaneously filed the Preliminary object, under consideration.

20. On 4th September 2017 the Defendant filed a defence and Counter-claim and therefore ran foul to the provisions of Section 6 of the Arbitration Act. As stated by the Court of Appeal in the case above **CORPORATE INSURANCE (SUPRA)** the act of filing that pleading resulted in the Defendant’s loss of reliance of Section 6 of the Arbitration Act.

21. On that ground the second Objection raised by the Defendant fails.

22. The Plaintiff having successfully defended the Defendant’s Objection is entitled to costs of the Preliminary Objection dated 17th August 2017. In this case costs must follow the event.

23. In conclusion, the order of the Court is that the Defendant’s Preliminary Objection dated 17th August 2017 is dismissed with costs to the Plaintiff.

DATED SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... COUNSEL FOR THE PLAINTIFF

..... COUNSEL FOR THE DEFENDANT