



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 253 OF 2017**

**SEYANI BROTHERS & COMPANY KENYA LTD.....1<sup>ST</sup> PLAINTIFF**

**NORKUN INTAKES LIMITED.....2<sup>ND</sup> PLAINTIFF**

**TEAM 2 ARCHITECTS.....3<sup>RD</sup> PLAINTIFF**

**HAROLD R. FENWICK & ASSOCIATES.....4<sup>TH</sup> PLAINTIFF**

**ENGPLAN CONSULTING ENGINEERING LIMITED....5<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**GREEN SQUARE LIMITED..... DEFENDANT**

**RULING**

1. As it will be seen from the title of this case there are five Plaintiffs. The Plaintiffs' claim relate to their contractual relationship with the Defendant where each one had specific contracts in the construction of a building for the Defendant on L.R. No. 631/1033 Kericho.
2. The 1<sup>st</sup> Plaintiff was contracted to carry out the complete works of construction erection and completion of semi basement parking and three rental floors. The 2<sup>nd</sup> Plaintiff was contracted to render electrical and architectural engineering consulting services. The 3<sup>rd</sup> Plaintiff was contracted to provide architectural services. The 4<sup>th</sup> Plaintiff provided quantity surveyor services. The 5<sup>th</sup> Plaintiff was contracted to construct, erect and complete semi-basement parking and three rental floors.
3. The Plaintiffs' claim is that the Defendant breached their agreements by defaulting in payment of part of their contract price.
4. There are two applications for consideration in this ruling. Both applications are dated 21<sup>st</sup> July 2017. One application is filed by the Plaintiffs and the other by the Defendant.
5. I will begin by considering the Defendant's application first because if it is successful there will be no reason to consider the Plaintiffs' application.
6. The Defendant seeks two prayers. The first is that the proceedings in this suit be stayed pending referral of this matter to Arbitration. The second prayer is for the parties dispute to be referred to Arbitration.
7. The prayers are supported by the grounds that Clause 45 of the Agreement, the Defendant entered with Plaintiffs, provides for any dispute or difference arising therefrom to be referred to Arbitration; that the present suit was filed in violation of that agreement; that Section 6 of the Arbitration Act (the Act) empowers the Court where a matter is subject to Arbitration agreement to stay the proceedings; and that the Defendant is ready and willing to proceed to Arbitration.
8. The 1<sup>st</sup> Plaintiff swore an affidavit, through its Director, where it stated the Defendant, after this suit was instituted, paid its principal debt less the interest of Kshs. 100,243,742.18 out of the total amount of Kshs. 106,843,742.18. On that basis 1<sup>st</sup> Plaintiff stated that the Defendant having substantially paid its debt the request for the matter to be referred for Arbitration was overtaken by events.
9. The Defendant by its supplementary affidavit deponed that it had fully paid the debts of the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs but had not paid the

interest on the 1<sup>st</sup> Plaintiff's debt because the 1<sup>st</sup> Plaintiff had failed to address various snags as agreed.

### **ANALYSIS OF DEFENDANT'S APPLICATION**

10. As correctly stated by the defend the agreement with the Plaintiffs does contain an Arbitration Clause. Clause 45 thereof provides that when a dispute arises it "shall be notified in writing by either party to the other with a request to submit it to Arbitration and to concur in the appointment of an Arbitrator within thirty days of notice." Clause 45 needs to be read in conjunction with Clause 34 which provides: "unless a written request to concur in the appointment of an Arbitrator shall have been given under Clause 45 of these conditions by either party before the final certificate has been issued, or within thirty days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this contract."

11. There is no evidence before Court of the Defendant's compliance with either Clause 45 or 34. In other words the Defendant has not declared a dispute. Moreover the Defendant, after this suit was instituted fully settled the claims by 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs and substantially settled the 1<sup>st</sup> Plaintiffs claim. The allegation that the 1<sup>st</sup> Plaintiff's claim is not fully settled because of remaining snag list is in my view a smokescreen to cloak the claim before Court. Surprisingly the Defendant did not allege outstanding snag list until the Plaintiffs filed their application for judgment. Even the emails which the Defendant relies upon as communication of those snag list they are dated in the year 2016 before this suit was filed. The question then is were these snags there when the suit was filed.

12. On the whole I find that there is no dispute between the Plaintiffs and the Defendant capable of being referred to Arbitration. It follows Section 6 of the Arbitration Act is not satisfied. There is no dispute needing referral to Arbitration which would then justify staying this suit. No not at all. In the case **NANACHANG FOREIGN ENGINEERING COMPANY (K) LIMITED V EASY PROPERTIES KENYA LIMITED (2014) eKLR** the Court stated:

*"The Defendant's argument was really that since there was an Arbitration Clause, the matter should be referred to Arbitration. Such referral is not automatic. As has been seen in Section 6 (1) (b) of the Arbitration Act, 1995, it is a condition precedent that there be a dispute capable of being referred to Arbitration..."*

13. The Court of Appeal in the case **UAP PROVINCIAL INSURANCE COMPANY LTD V MICHAEL JON BECKETT CIVIL APPEAL NO. 26 OF 2007** made a finding in the same vein as my discussion here, thus:

*"In our view, the issue with which Mutungi J. was concerned when dealing with the application under Section 6 of the Arbitration Act was whether or not the Arbitration Clause would be enforced and whether the matter was one for reference to Arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an Arbitration agreement to refer the dispute to Arbitration. Section 6 of the Arbitration Act under which UAP's application for stay of proceedings was presented provides in the relevant part:*

*"6. (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) ...*

*(3) ..." (our emphasis)*

*It is clear from this provision that the enquiry that the Court undertakes and is required to undertake under Section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to Arbitration. In other words, if as a result of that enquiry the Court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the Arbitration agreement, then the Court refers the dispute to Arbitration as the agreed forum for resolution of that dispute. If on the other hand the Court comes to the conclusion that the dispute is not within the scope of the Arbitration agreement, then the correct forum for resolution of the dispute is the Court."*

14. In view of the above discussion there is only but only one outcome of the Defendant's application. It is dismissed with costs to the Plaintiffs.

### **PLAINTIFF'S APPLICATION**

15. The Plaintiffs' application is for judgment to be entered for the Plaintiffs as against the Defendant.

16. As stated before the Defendant acknowledged it paid the 2<sup>nd</sup> up to 5<sup>th</sup> Plaintiffs' entire debts. It follows that there is no defence to those claims.

17. In respect to the 1<sup>st</sup> Plaintiff following my discussion above there cannot be any legitimate defence to its claim. The only reason the Defendant has refused to pay 1<sup>st</sup> Plaintiff's interest is because of the alleged outstanding snags. The Defendant relied on emails of the year 2016, before this case was filed, discussing those snags. The Defendant did not show that those snags subsisted after this suit was filed and if they subsisted that the 1<sup>st</sup> Plaintiff was informed of them.

18. It follows that on the Plaintiffs' application for entry of judgment there is no contest. It is allowed with costs.

**CONCLUSION**

19. The following are the orders of the Court:

**a. The Defendants Notice of Motion filed in Court on 21<sup>st</sup> July 2017 and dated the same date is hereby dismissed with costs to the Plaintiffs.**

**b. The Plaintiffs' application filed in Court on 24<sup>th</sup> July 2017 and dated 21<sup>st</sup> July 2017 is granted as prayed with costs to the Plaintiffs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>TH</sup> day of OCTOBER, 2019.**

**MARY KASANGO**

**JUDGE**

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

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFFS

.....FOR THE DEFENDANT