REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 91 OF 2018

RIFT VALLEY TECHNICAL TRAINING INSTITUTE.....APPELLANT

-VERSUS-

TAIMEL BUILDING AND CONTRACTORS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. C. Obulutsa, Chief Magistrate, in Eldoret CMCC No. 582 of 2018 delivered on 13 July 2018)

JUDGMENT

[1] This is an interlocutory appeal from the Ruling and Order of the Chief Magistrate's Court (Hon. C. Obulutsa) delivered on the **13 July 2018** in **Eldoret CMCC No. 582 of 2018: Taimel Building and General Contractors Ltd vs. Rift Valley Technical Training Institute.** The Respondent had sued the Appellant before lower court claiming special damages in the sum of **Kshs. 4,187,500/=** together with interest and costs being sums certified as due on the basis of a construction contract, but which sums had not been paid by the Appellant.

[2] The Respondent's cause of action before the lower court was that it had been contracted by the Appellant to construct a twin workshop, classrooms and offices for a consideration of **Kshs. 53,251,372.80;** and that the works would be paid for periodically by the Appellant upon the issuance of Payment Certificates by the Project Manager. It was further the contention of the Respondent before the lower court that it commenced the works and that good progress was made on the project; and that on the **4 April 2018**, the Project Manager issued a Payment Certificate to the Appellant for the payment of **Kshs. 4,177,500/=,** which certificate was due for payment on or before **4 May 2018,** but which remained unpaid beyond that period in spite of several oral and written reminders; hence the suit.

[3] Upon being served with the Respondent's pleadings, the Appellant filed a Preliminary Objection, contending that the lower court had no jurisdiction to entertain the matter; its jurisdiction having been ousted by an arbitration clause in the works agreement. The Appellant had pitched the argument that the parties ought to have exhausted the alternative dispute resolution mechanism espoused in their contract before seeking the intervention of the court. The trial magistrate, having given consideration to the Preliminary Objection and the arguments proffered by the parties in respect thereof, dismissed the same on the ground that there did not exist a dispute that would warrant the invocation of the arbitration clause. In particular, the lower court held that:

> **"…In the authorities cited it was held that courts should not intervene where the parties have agreed to submit themselves to arbitration. According to the plaintiff there is no dispute to warrant an arbitration as is required of clause 37.3.**

The said clause provides that no constitution powers shall be commenced on any dispute or default where a notice has not been given within 90 days. After being served with the payment certificate. I have no indication the defendant challenged it. It is noted this is the 5th payment. There is no dispute to warrant the kicking in of an arbitration process. The Preliminary Objection as raised lacks merit and is dismissed with costs."

[4] Being aggrieved by the Ruling and Order made by the lower court, the Appellant filed this appeal on **7 August 2018** on the following grounds:

[a] That the Honourable Magistrate erred in law by holding that the Preliminary Objection was not properly founded;

[b] That the Honourable Magistrate erred in law by holding that he has jurisdiction to hear and determine the matter;

[c] That the Honourable Magistrate erred in law by disregarding the provisions of **Section 10** of the **Arbitration Act, 1995;**

[d] That the Honourable Magistrate erred in law by disregarding the Arbitration Agreement between the parties herein.

[5] Accordingly, the Appellant prayed for the setting aside of the trial court's Ruling dated **13 July 2018**; and for the same to be substituted with a Ruling that the court has no jurisdiction to entertain the suit in view of the existence of the Arbitration Agreement.

[6] The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on **17 July 2019.** In the Appellant's written submissions filed herein on **8 August 2019** by the law firm of **Gumbo & Associates**, it was reiterated that part of the parties contractual obligations were that the Respondent was to construct and install the works in accordance with the specifications and drawings issued by the Appellant; while the Appellant was to pay the monies due within 30 days of generation of a Payment Certificate. It was further submitted on behalf of the Appellant that a dispute arose between the Appellant and the Respondent on account of the fact that the construction had not been proceeding as expected; and that there was also a dispute as to the quality of materials on a section of the building that would have required the Respondent to remedy prior to payment, thereby resulting in a stalemate, which ought to have gone for arbitration in accordance with Clause 37 of the parties' contract.

[7] Counsel for the Appellant relied on the **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** and **Supreme Court Petition No. 7 of 2018: Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad** to support his argument that if a court lacks jurisdiction to entertain a suit it ought to down its tools. Counsel further submitted, on the authority of **Central Farmers Garage Ltd vs. The Cooperative Insurance Co. of Kenya Limited [2010] eKLR** and **Nyutu Agrovet vs. Airtel Networks Limited [2015] eKLR** that where an agreement provides for arbitration, it is only proper that such a channel be utilized first by the parties before resorting to court action.

[8] Ms. Gona, learned Counsel for the Respondent, opposed the appeal, contending that it has been brought in bad faith, with the sole intention of delaying justice to the Respondent. She took the stance that there was no dispute declared; and therefore that the Respondent acted within its rights in seeking payment by way of specific performance. Counsel further posited that, if indeed there was a dispute from the Appellant's perspective that ought to have gone for arbitration then it ought to have declared in the manner set out in **Clause 37** of the Agreement within the timelines set out therein. She accordingly urged the Court to find that the issue of arbitration has been raised belatedly, and is therefore an afterthought, intended only to frustrate the Respondent. Thus, Counsel urged the Court to dismiss the appeal with costs to the Respondent.

[9] I have given careful consideration to the appeal, the written submissions filed by learned Counsel for the parties, as well as the brief oral highlights made before the Court. There is no gainsaying that

jurisdiction is everything; and that without it the court can make no valid step in a matter placed before it; a point aptly expressed in the Owners of **Motor Vessel "Lillian S" Case** (supra) thus:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[10] And in the work, **The Major Law Lexicon, Volume 4,** jurisdiction is defined thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[11] Hence, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court made the point that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law." (see also Mohamad Abdi Mahamud vs. Ahmet Abdullahi Mohamad & 3 Others, supra**)**

[12] There is no question that, by dint **of Section 7(1)(a)** of the **Magistrates Courts Act**, the Chief Magistrate's court has the jurisdiction to hear civil disputes in which the subject matter does not exceed **Kshs. 20,000,000/=;** and therefore that the lower court could entertain the subject dispute. However, it is also a truism that the Constitution, in **Article 159(2)(c)** thereof, also recognizes that disputants have an option of having their disputes determined through other dispute resolution mechanisms. Thus, **Section 10** of the **Arbitration Act, No. 4 of 1995** stipulates that:

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

[13] Hence, in **Anne Mumbi Hinga vs Victoria Njoki Gathaara [2009] eKLR**, the Court of Appeal restated this legal position thus:

"We therefore reiterate that there is no right for any Court to intervene in the arbitral process, or in the award, except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties, and similarly, there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act."

[14] Similarly, in **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR** this position was reiterated thus:

"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."

[15] A perusal of the lower court record does show that the parties, vide **Clause 37** of their Agreement covenanted that:

> **"In case any dispute or difference shall arise between the Employer or the Project Manager on is behalf and the Contractor, either during the progress or after the completion or termination of the Works, such dispute 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 the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties…"**

[16] As far as can be ascertained, the Appellant was served with a Payment Certificate but failed to honour the same within the 30 days' period stipulated in **Clause 23.3** of the Agreement. Although in the Appellant's written submissions, issues to do with timelines and quality of work were raised as the reasons for non-payment, no dispute was declared in writing by the Appellant in terms of Clause 37 of the Agreement. On its part, the Respondent took the posturing that there was no arbitrable dispute; and hence is approached the court to enforce payment of the sums then due. It was at that juncture that the Appellant raised the issue of arbitration as a preliminary point. Accordingly, the only issue for determination in this appeal is the question whether the lower court erred in dismissing the Appellant's Preliminary Objection on jurisdiction.

[17] I am mindful that this is an interlocutory appeal and that an appellate court, in such a scenario as this, ought not to interfere with the exercise of discretion by the trial court, even if, on the facts, it would have come to a different conclusion. Accordingly, the limited circumstances in which an appellate court can interfere with the exercise of discretion by the trial court were well articulated by ***Madan, JA*** (as he then was) in ***United India Insurance Co. Ltd V. East African Underwriters (Kenya) Ltd [1985] E.A 898,*** as follows:

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

[18] The **Arbitration Act** recognizes and does provide for instances in which the intervention of the courts would be permissible. For instance, in **Section 7** of **the Act**, it is recognized that it is not incompatible with an arbitration agreement for a party to request for interim measures of protection from the High Court, before or during arbitral proceedings. Hence, the High Court is accordingly clothed with the mandate, notwithstanding the provisions of **Section 10** of the Act, to grant such orders as are recognized under Section 7 of the Act. More importantly, the **Arbitration Act** recognizes that for purposes of recognition and enforcement of awards, recourse would have to be made to the High Court in accordance with Part VII of the Act.

[19] Likewise, **Order 46 Rule 1** of the **Civil Procedure Rules,** provides that:

> **"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at**

any time before judgment is pronounced, apply to the court for an order of reference."

[20] It is manifest therefore that the mere fact that the parties entered into an arbitration agreement does not automatically divest the Court of jurisdiction; and that an aggrieved party, such as the Respondent herein, is at liberty to approach the court for such relief as deemed appropriate. However, the party that is desirous of having an arbitration clause enforced is not without recourse. It is in the light of the foregoing that, in **Section 6(1)** of the **Arbitration Act**, it is stipulated that:

"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 the party enters appearance or otherwise acknowledges the claim against which the stay 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."

[21] The Plaint before the lower court was filed on **29 May 2018** along with a Notice of Motion under a Certificate of Urgency for the immediate payment of the sums claimed. The lower court record further shows that a Memorandum of Appearance was thereafter filed on **31 May 2018** by **Gumbo & Associates** on behalf of the Appellant. However, the Notice of Preliminary Objection was not filed until **4 June 2018**; and there is no indication that the Appellant sought stay of proceedings as envisaged by **Section 6(1)** of the Act. In the circumstances, the Appellant is presumed to have submitted to the jurisdiction of the Court by waiving its right to have the dispute resolved by way of arbitration.

[22] In this respect, the Court of Appeal confirmed the decision of the High Court in a similar facts situation in **Lofty vs. Bedouin Enterprises Limited [2005] 2 EA 123** to the effect that:

"...section 6(1) of the Arbitration Act of 1995 which the Court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time the applicant enters appearance. It seems that the object of Section 6(1) of the Arbitration Act of 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings ... Section 6(1) has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance."

[23] It is plain therefore that, in the absence of an order of stay, made pursuant to **Section 6(1)** of the **Arbitration Act** following a valid application in that regard, there would be absolutely no basis for the Defendant to argue, as it did, that the lower court has no jurisdiction to entertain the suit. In the premises, I would adopt the persuasive expressions of the Court in **Astro Exito Navegacion SA (The Messiniaki Tolmi) (1984) 1 Lloyd's Rep 266** that:

"...a person voluntarily submits to the jurisdiction of the court if he voluntarily recognizes or has voluntarily recognized that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of the claim."

[24] Moreover, it is manifest from **Section 6(1)** that even where an application for stay is timeously brought, the applicant would have to satisfy the court that there is in existence an arbitrable dispute. The record shows that following the decision of the lower court, an application was filed for default judgment was made and allowed. Consequently, a Decree has since been drawn for execution. Thus, in **UAP**

Provincial Insurance Company Ltd vs. Michael John Becket (supra) the Court of Appeal acknowledged 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."

[25] In the result, it is my finding that the lower court cannot be faulted for dismissing the Preliminary Objection. Hence, the Appellant's appeal is totally devoid of any merit and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE