



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 85 OF 2017

ONGATA WORKS LIMITED.....PLAINTIFF

- VERSUS -

KENYA NATIONAL EXAMINATION COUNCIL.....DEFENDANT

RULING

1. The defendant, **KENYA NATIONAL EXAMINATION COUNCIL**, has asked the court to set aside the judgement which had been entered against it on 14th June 2017.
2. The defendant's further request was that the dispute ought to be referred to arbitration, in accordance with the terms of the contract between the parties
3. The defendant was duly served with the Complaint together with Summons to enter Appearance.
4. On 24th March 2017 the defendant's advocates, messrs **OBURA MBECHÉ & COMPANY ADVOCATES**, filed a Memorandum of Appearance. However, the defendant did not file a Defence thereafter.
5. In the light of the failure to file a Defence, the plaintiff, **ONGATA WORKS LIMITED**, applied for Judgement.
6. The defendant deems the judgement to be irregular, whilst the plaintiff insists that the judgement was regular.
7. I note that although the plaintiff had requested the court to enter judgement in default of Defence, the Decree shows that the court had entered judgement on the grounds that;

"The defendant having been served with the complaint and summons but failed to enter appearance within the stipulated time AND upon request for judgement filed on 12th June 2017 by the advocates for the plaintiff."
8. It is inexplicable how the learned Deputy Registrar decided to enter judgement on the grounds that the defendant had failed to enter appearance. However, as the defendant had actually entered appearance, the judgement premised on the alleged failure to enter appearance was wrongful.
9. Therefore, the court has no alternative but to set it aside, as I now hereby do.
10. The next question is whether or not the dispute ought to be referred to arbitration.
11. Pursuant to Clause 37.1 of the contract between the parties;

"In case any dispute or difference shall arise between the Employer or the Project Manager on his 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 that notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties....."

12. As far as the defendant is concerned, a dispute had arisen between the parties, and the same ought to be referred to arbitration.

13. Indeed, the defendant submitted that the plaintiff had come to court prematurely, because the parties had a contract which contained an agreement requiring disputes to be resolved through arbitration.

14. On the other hand, the plaintiff expressed the view that there was no dispute between the parties. That view was premised on the fact that the amounts being claimed arose from Certified Certificates, which had been received by the defendant.

15. As the defendant had not raised any issues about the foundation of the amounts being claimed, the plaintiff submitted that there were no disputes which could be referred to arbitration.

16. The defendant's answer to that submission was that the Certificates were not incontestable. In that regard, the defendant drew attention to Clause 37.8 of the contract which stipulates as follows;

“The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given”

17. On a *prima facie* basis, I find that the certificates were not necessarily final, conclusive and binding on the parties. The parties expressly clothed the Arbitrator with requisite powers to open up, review or revise any certificate.

18. Meanwhile, there has been no indication from the defendant that it was disputing any of the certificates. Therefore, whilst an arbitrator would have power to open up, review or revise certificates, he could only exercise that power when a dispute had arisen. And before the defendant had raised issues with one or more of the certificates in question, I find that the court would be wrong to make a presumption that there exists a dispute between the parties.

19. On the other hand, I wish to make it clear that I have not made a determination on the question as to whether or not the defendant can dispute the plaintiff's claim. I have deemed it necessary to make that clarification, lest it be imputed that if the defendant had not raised a dispute over the certificates, it could not raise any dispute henceforth.

20. Finally, although neither of the parties made reference to the provisions of Section 6 (1) of the Arbitration Act, this court cannot ignore it.

21. The said section stipulates that;

“ A court before which proceedings are brought in a manner 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.....”

22. The defendant ought to have made its application, to have the matter referred to arbitration, not later than the time when it entered appearance. However, whilst Appearance was entered on 14th June 2017, it was not until 16th October 2017 that the defendant applied for the case to be referred to arbitration.

23. Accordingly, I find that the defendant's application has been brought late. Secondly, the defendant tendered no explanation for its failure to bring the application at the time when it entered appearance.

24. In the circumstances, I reject the application, seeking to refer the case to arbitration.

25. As the application has succeeded partially, and because the part which was successful was necessitated by the defendant's earlier failure to file its Defence within the time prescribed by law, I order that the defendant will not be awarded the costs of the application dated 16th October 2017. Each party will meet its own costs of that application.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of June 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mungo for the Plaintiff

No appearance for the Defendant