



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 507 of 2015**

**PARKLANE CONSTRUCTION LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**FECHIM INVESTMENT LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The Matter now before the Court was commenced by a Plaint filed on 15th October 2015 albeit it is dated 9th October 2015. At the same time as filing the Plaint the Plaintiff filed an application by Notice of Motion filed under a Certificate of Urgency.

2. The Application was brought under **Sections 1, 1A, 3, 3A, 4A, 63(b), (c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya Section 3(1) of the Judicature Act, and Order 36 rules 1, 5 and 7, Order 40 rules 1, 2, 4, 8, 10, Order 51 Rule 1 of the Civil Procedure Rules, Section 68 of the Land Registration Act and any other relevant provisions of the law**). The Grounds of urgency can be summarised as follows. The Plaintiff and Defendant were in a contractual relationship. The Defendant wanted to develop its land known as **RUIRU/RUIRU EAST/BLOCK 7/16** by building a shopping mall and external buildings. The Plaintiff is a building contractor who was contracted to undertake the construction. The contract was under the standard terms of JBC terms and several copies have been filed. The Contract was to commence on 14th December 2014 and be completed on [16] March 2016. By July 2015 the Plaintiff had completed two phases. The Architect had issued Payment Certificates 1 and 2. They were not paid on the due dates. Rather than pay the sums due, the Defendant is alleged to have demanded the Plaintiff leave the site, The Plaintiff wishes to be paid and is exercising a lien over the building works it has completed.

3. The Notice of Motion prays for orders "THAT:

1. *The application be certified urgent and be heard ex-parte in the first instance.*

2. *Pending the hearing and determination of this application inter partes*

*(a) A temporary injunction do issue restraining the Defendant, either by itself, its agents, administrators servants, assignees and/or anybody acting on its authority from interfering with the Plaintiff's physical possession of the property known as **RUIRU/RUIRU EAST/BLOCK 7/16** and from howsoever dealing with alienating, selling, transferring, charging, leasing, disposing of and/or assigning the property known as **RUIRU/RUIRU EAST/BLOCK 7/16***

*(b) In the alternative, an inhibition do issue inhibiting the registration of any dealing whatsoever with property known as Land Reference Number **RUIRU/RUIRU EAST/BLOCK 7/16***

3. *This Honourable Court do enter summary judgment and/or judgment on admission in favour of the Plaintiff and as against the defendant for:*

*(a) The Sum Certified through Interim Payments Certificates 1 and 2 of **Kshs. 59,239,458.00**;*

*(b) Interest on delayed payments as at 17th August 2015 in the sum of **Kshs.6,712,471.00***

*(c) interest on (a) above at commercial bank lending rate in force at Barclays Bank of Kenya Limited rates from 17th August 2015 until payment in full.*

(d) in the alternative to (b) and (c) above, interest on (a) above calculated at court rates of 12% p.a. from 22nd December 2014 and 23rd February 2015 [for Interim Payment Certificates Nos. 1 and 2 respectively] until payment in full.

(e) contractual claim on stoppage and extension in the sum of **Kshs. 10,807,378.77**

4. The judgment amount referred to in clause 3 above be settled forthwith by the Defendant failure to which the property known as **RUIRU/RUIRU EAST/BLOCK 7/16** be attached and sold forthwith to satisfy the said judgment sum.

5. Pending the hearing and determination of the main suit or any until further orders of the Court an inhibition do issue inhibiting the registration of any dealing whatsoever with the property known as land reference **RUIRU/RUIRU EAST/BLOCK 7/16**.

6. A declaration do issue that the Plaintiff has and is lawfully exercising its possessory lien over the property known as **RUIRU/RUIRU EAST/BLOCK 7/16**.

7. This Honourable Court issues any further direction as it may deem feet (sic) in the circumstances of the case.

8. Costs of and incidental to this application be borne by the Respondents.

4. The Application is based on the grounds that appear on its face and the Affidavit of Ghanshyam Patel. In summary it is the Plaintiff's case that the Defendant engaged the Plaintiff to construct a shopping mall on the Property. The Agreement between the parties was the standard for JBC Agreement. It was dated 10th November 2014. The work commenced around 24th November 2014. Certain works were done and the Architect in consultation with the Quantity Surveyor issued Interim Payment Certificate Nos 1 and 2 as set out above. Payments were due in December 2014 and February 2015. The Defendant has only paid KShs.6,500,000/= out of the sums claimed. At the time the Defendant did not contest the payment and is alleged to have asked for more time to pay. From the correspondence exhibited to the Affidavit, it is clear there was no contemporaneous challenge to the Interim Payment Certificates. In particular the Letter from the Defendant dated 20th July 2015 states "*We regret your decision to terminate the Contract within 14 days of the letter, an action you confirmed during the reference meeting. We however fully understand and appreciate the perspective of your action ... for the purposes of clause 39.4, we wish to request you notify us in advance when you are ready to vacate the site so that we can organize the physical presence of our Quantity Surveyor and ourselves, .... As indicated in the meeting, Fechim has been honest from the start and did not in any way mislead Parklane as to our capacity to pay for all certificates for the work done to completion; we genuinely believed we had secured funding and we regret that the finances did not come through ... we once again sincerely thank you for your goodwill and patience... We reiterate that we are aware and committed to honour our obligations as per the Contract. By a Letter dated 2nd September 2015 the Plaintiff through its lawyers demanded payment within 10 days. The sum demanded was made up of the two Interim Certificates less the KShs.6,500,000/= received and came to a total of KShs.70,259,307.77 together with the sum of KShs.1,123,889.67. That letter was responded to by the Defendant's Advocates. They stated that the Agreement provided "that if there was stoppage of work, your client would hand over the site. This was after a joint inspection by both parties to quantify the value of works". The Clause from which that assertion arises is not identified. That Letter (dated 11th September 2015) goes on to demand that the Plaintiff hands over the site forthwith. It states that "The hand over will mitigate any alleged expenses and provide a platform for verification of the claim. Liability for the claim as framed is denied."*. The Letter was received on 25th September 2015 and the Plaintiff filed its plaint and this Application on 15th October 2015.

5. Although the Plaintiff was filed in October 2015, the Summons to Enter Appearance was not issued until 9th December 2015. It was signed by Hon DR S. Ogot. It was then served on 17th December 2015. In the meantime the Application was proceeding. On the first instance (16th October 2015), the Court did not certify the matter as urgent as the risk of sale had not been given a date or prospective date. The Plaintiff was ordered to serve the Defendant. Service was drawn out because the Plaintiff did not seem to know where the Defendant's registered office was situated. In the event the Defendant was eventually served (27th October 2015) and both Parties through their Advocates attended the Hearing on 14th December 2015. The Defendant through its Counsel asked for more time to respond to the Application. The Plaintiff sought interim relief. Direction were given and an order in the terms of prayer 2(a) were granted pending hearing of the Application. The Defendant is recorded as having no objection to maintaining the status quo until the Defendant files its papers and the parties are back before the Court.

6. In January 2016 the Defendant intimated that the Parties could settle the matter amicably. The Court was also informed that financing was being processed with the intention that the Plaintiff would be the first to be paid. The Defendant filed a Memorandum of Appearance on 14th January 2016, appeared in Court and requested firstly time to respond and later further time to reach a negotiated settlement. It is clear there was no settlement because on 11th February 2016 the Defendant filed its Replying Affidavit, and on the same day the Plaintiff filed an Application for Judgment in Default of a Defence. The sums claimed were the two certificates and interest together with the contractual claim on stoppage as at 17th August 2015. The Hon DR issued the order on 3rd March 2016.

7. The Replying Affidavit set out the terms of the JBC Contract. The Affidavit argues points of law (which are not evidence). The Defendant argues that the matter is not appropriate for summary judgment. It is said that the Plaintiff has refused to hand over the site which the Defendant needed to mitigate the damages. It is also argued that interim orders would allow the Plaintiff to steal the march over the Defendant. At Paragraph 14 it is said that "*the plaintiff has not demonstrated that the Defendant is unable to pay the sum owed to the Plaintiff... The Plaintiff already has an interim measure of protection and the physical lien and attempt to summarily attach the property is inequitable*". At paragraph 18 it is said that the Plaintiff exercising its lien has inhibited the Defendant's ability to source for financing. the Defendant feels that is unjustified. At paragraph 19 it is said "*That this is a fit matter for a stay of proceedings and the Defendant reserves the right to lodge a motion to stay the proceedings herein pending arbitration*". That was not done till much later.

8. It was only after the Plaintiff sought and obtained judgment in default of defence that the Defendant filed any Application. That Application was dated 23rd February 2016 but not filed until 21 March 2016, nearly one month later. The Chambers Summons application prays for the following orders:

"1. THAT the Application be certified as urgent deserving priority hearing and ex parte in the first instance

2. THAT this application be admitted for priority hearing and be heard on 26th February 2016 contemporaneously with the Plaintiff's application dated 9th October 2015.

3. THAT pending the hearing and determination of this application inter parties (sic), this Honourable Court do issue and to stay all proceedings in respect of this matter, pending arbitration.

4. THAT this Honourable court do issue and grant any orders that it deems fit to ensure that the ends of justice are met.

5. THAT the costs of this application be provided for.

9. The Application is brought under "**Section 1A, 1B and 3A, Order 51 rules 1 and 4, Order 40 rules 1, 2 and 3 of the Civil Procedure Rules 2010, Section 6 of the Arbitration Act Cap 49 and all other enabling provisions of the law**". The Application is Supported by the Affidavit of Mr Mburu Muiruri, the Deponent of the Replying Affidavit. The Principal Ground relied upon in the Ground is that Clause 45 of the Agreement provides for all disputes between the Employer and the Contractor whether during or after completion of the works to be referred to Arbitration. The Supporting Affidavit alleges that the Defendant's Letter of 11th September 2015 raised the issue of a dispute and sought reference to arbitration. Further it is alleged (paragraph 6) that the dispute relates to the stoppage and valuation of the works. In addition, the supporting Affidavit complains that the orders sought are tantamount to final orders. What that statement fails to realise is that what is sought is in fact summary judgment/judgment on admissions which is a final order and does not pretend to be anything else.

10. The Plaintiff opposes the Defendant's Application on the basis that the issues raised are now res judicata. The Parties filed written Submissions which they highlighted on 22nd September 2016.

11. The wording of Clause 45 is important. It provides: "*In the case any disputes or difference shall arise between the Employer and the Contractor either during the progress or after completion 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 30 days of the notice. The dispute shall be referred to arbitration and the final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, .... The Arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder.... Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute (45.3) Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.(45.4).*"

12. There is consensus between the Parties on the applicability of the Arbitration Act. **Section 6 of the Arbitration Act Cap 49 Laws of Kenya** (as amended) which provides:

(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."*

In deciding whether to stay proceedings the Court must first be satisfied that there is an agreement that is not null and void, inoperative or incapable of being performed (**Section 6(1)(a)**) and also that there is a dispute between the parties. (**Section 6(1)(b)**). In order to succeed in its application, the Defendant has first to satisfy the Court that there is in fact a dispute to be referred to arbitration. It is common ground between the Parties that the Plaintiff carried out some work. That work was valued by the Architect and the quantity surveyor. The Plaintiff accepted those valuations. The Architect is the agent of the employer. As there cannot be a dispute between a person and itself, there can be no dispute arising from the Interim Payment Certificates. In any event any dispute as to value would have arisen in January/February 2015 so by September 2015 the 90 days would have lapsed.

13. In so far as it is the Defendant's allegation that the dispute is whether or not the Plaintiff is entitled to demand payment, that is not a subject for dispute but enforcement. Unwillingness or refusal to pay does not amount to a dispute within Section 6(1)(b). By the time that issue was raised, the Plaintiff had terminated the Contract (Letter 14th July 2014) and the Defendant had accepted that termination (Letter 20th July 2014). There was thereafter no contract to which a dispute could relate. The contract was similarly not completed. Further the Defendant has not pointed to any attempts at an amicable settlement made between 11th September 2014 and when the Court became seized of this matter.

14. **Section 6 of the Arbitration Act** provides for the Court to stay proceedings provided the Party seeking the stay has not submitted to the jurisdiction. In this case after filing a memorandum of appearance, the Defendant did not apply for a stay. Instead the Defendant instructed Advocates to appear in Court on 14th December 2016. Thereafter, the Defendant sought the Court's indulgence to adjourn the matter to allow for an amicable settlement. That was not an application for a stay but an adjournment. The Defendant had submitted to the jurisdiction of this Court completely and with the benefit of legal advice. There was no settlement forthcoming and the Plaintiff sought judgment in default.

15. The Defendant's Application is a mere afterthought to delay the inevitable which is enforcement of a debt. The Defendant complains that the file was not brought to Court on 26th February 2016. Although that is the case and is a regrettable lapse on the part of the Registry, it would not have had made a difference because the judgment in default had already been entered. The Defendant has not made any application to set aside the judgment in default. Application for stay is dismissed with costs.

**Orders accordingly.**

**FARAH S. M. AMIN**

**JUDGE**

**SIGNED AND DELIVERED AT NAIROBI this 10th day of September 2018.**

**In the Presence of:**

**Court Clerk: Mohamed**

**Plaintiff: Mr. Nyaribo with Mr. Muturi**

**Defendant: Ms. Mutenda HB Mr Gitanga**