



REPUBLIC OF KENYA

IN THE HIGH COURT OF KEYA

AT MACHAKOS

CIVIL SUIT NO. 21 OF 2015

TIMAX BUILDING & GENERAL CONTRACTORS LIMITED.....PLAINTFF/RESPONDENT

VERSUS

MACHAKOS COUNTY GOVERNMENT.....DEFENDANT/APPLICANT

RULING OF THE COURT

1. The Defendant/Applicant has filed an Application dated 18th May, 2015 and filed in court of 20th May, 2015 seeking for the following prayers:-

- 1. That there be a stay of proceedings in the suit herein pending the hearing and determination of this Application.*
- 2. That there be a stay of all proceedings herein and the dispute be referred to arbitration.*
- 3. That costs of this Application be provided for.*

2. The Application is based on the following grounds:

- i. The parties hereto entered into a tender agreement on the 4/12/2013 for construction of certain structures by the Respondent for the Applicant.*
- ii. That the contract agreement stipulated the mode of conflict resolution should dispute under the contract arise.*
- iii. That a breach of the contract arose leading to the termination of the contract by the Applicant.*
- iv. That the Respondent, aggrieved by the termination of the contract and demanding payment for work done has filed the suit hereto for determination by this Honouralbe court.*
- v. That the said dispute falls within the scope of the contract.*
- vi. That as per the Contract terms at Clause 37, any dispute arising shall be resolved by way of alternative dispute resolutions methods specifically arbitration.*
- vii. By virtue of the Agreement the parties hereto have agreed and are bound to proceed to*

arbitration on matters in dispute arising therefrom.

viii. Section 6 of the Arbitration Act 1995 (hereinafter called “the Act”) empowers the court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay the proceedings and refer the parties to arbitration.

ix. Section 6(1) of the Act grants this Honourable Court the discretion and further provides that the Court shall grant a stay of legal proceedings subject to the exceptions set out therein. None of those exceptions apply to this suit.

x. The Defendant/Applicant is ready, willing and able to proceed to Arbitration on any dispute arising from the parties as stipulated in the Agreement.

xi. That this Application ought to be granted in the interest of equity and justice.

3. The Application is further supported by the annexed Affidavit of the Applicant sworn on 18th May, 2017 which raised the following grounds:-

1. That on 4/12/2013 the Respondent entered into a tender agreement with the Applicant for construction of certain facilities for the Applicant by the Respondent.

2. That part and parcel of the agreement were conditions of contract.

3. That inter alia the Contract at Clause 37 provided for settlement of disputes by way of alternative dispute resolution and specifically arbitration.

4. That on 7/10/2014 the Applicant issued a notice of termination of the contract on grounds of breach.

5. That the Respondent being aggrieved sought legal redress by bringing of this suit before this Honourable court contesting the legality of termination of the contract and seeking payment of work allegedly already done as per the terms of the contract.

6. That the matters in issue fall within the scope of the contract and therefore should be determined as per the terms of the contract.

7. That it is trite that parties are bound by terms of the contract that they legally enter into.

8. That the Constitution at Article 159 (2c) provides for alternative dispute resolutions methods as a mode of settlement of disputes.

9. That the Arbitration Act at Section 6 gives this Honourable court the mandate to stay legal proceedings.

4. The Applicant’s case is that it had entered into a tender agreement with the Respondent for the construction of certain facilities and that in the event of a dispute the same was to be referred to arbitration vide **Clause 37** of the said agreement. The Applicant further avers that the Respondent breached the agreement and which forced the Applicant to terminate the contract. It is the contention of the Applicant that the Respondent was bound by **Clause 37** and was required to refer his dispute to arbitration. It is further the contention of the Applicant that this matter ought to be referred to arbitration pursuant to the Provision of Section 6 of the Arbitration Act 1995.

5. The Application is opposed by the Plaintiff/Respondent on the following grounds of objections:-

1. That the Application to stay the proceedings in this case and refer the matter herein to arbitration is incompetent and without merits.

2. *That the Defendant/Applicant has not denied that there was a contract agreement to carry out work between the parties to this suit.*

3. *That the claim as against the Defendant is purely for payment for work done and clearly there is in fact no dispute between the parties in regard to the matters agreed are to be referred to arbitration and indeed the Applicant in the present Application has not even alluded to which issue or difference of opinion between the parties would be taken before the Arbitrator for arbitration.*

4. *That upon termination of the contract herein as envisaged in the contract document, the Defendant issued payment certificates indicating the amounts due for payment which sums have not been refuted by the Plaintiff/Respondent and by dint of Clause 34 of the contract agreement.*

5. *That upon payments falling due, the Plaintiff/Respondent served demand notices to the Defendant, the content of which were not responded to, nor any Application for Arbitration made within 90 days of the demand notice or termination of contract by the Defendant/Applicant as they ought to have done by dint of Clause 34 of the agreement aforesaid.*

6. *That the Application herein is clearly made to delay payments by the Defendant/Applicant and is calculated to frustrate the Plaintiff/Respondent and the Application is therefore not made in good faith.*

7. *That the Application as presented to court is bad in law in that the deponent to the affidavit in support, being Counsel for the Applicant, is deponing an hearsay and also imprompting so doing and hence the Application is defective.*

8. *That by having purported to file an appearance to the suit on 8th May, 2015 the Defendant has waived his right to stay these proceedings for failing to file the Application for stay at the time of filing appearance as envisaged under Section 6 of the Arbitration Act, 1991.*

9. *That the memorandum of appearance in these proceedings in any event are irregular and not in compliance with the law and the Plaintiff's claim is therefore unopposed.*

6. With the leave of the court, parties filed submission. It was submitted for the Defendant/Applicant that the dispute herein is for referral to arbitration pursuant to **Clause 37** of the Contract Agreement. It was further submitted that it was not in order for the Plaintiff to rush to this court when it very well knew the proper forum of the resolution of the dispute namely arbitration. The Applicant seeks this court to order a stay of these proceedings and refer the matter to arbitration as provided for under **Section 6** of the Arbitration Act 1995. The Applicant sought reliance to the following cases:

a. *Jimmy Mutuku Mwithi T/A Oasis Farm =Vs= Eric Okondo Omanga T/A Cidai Farm – Civil Appeal No.3 of 2016 [2016] eKLR.*

b. *Midland Finance & Securities Globetel inc =Vs= Attorney General & Another – Misc App 359 of 2007 [2008] eKLR.*

c. *James Heather Haves =Vs= African Medical and Research Foundation (AMREF) Cause No. 626 of 2013 [2014] eKLR*

d. *Kabew Kenya Limited =Vs= Inabensa - Civil Case No.594 of 2015 [2016] eKLR.*

e. *Muriuki Mugambi =Vs= Suzanne Muthaura & 2 others – HCCC Misc. Civil Appl. 199 of 2015 [2015] eKLR.*

7. Finally it was submitted for the Defendant/Applicant that the court should be guided by the Provisions of Article 159 of the Constitution by promoting Alternative Disputes Resolutions (A.D.R.).

8. As for the Plaintiff/Respondent, it was submitted that the Applicant's Application is an abuse of the court process and should be dismissed. Counsel for the Respondent submitted that the Applicant ought to have filed the Application for referral of the matter to arbitration either before the filing of Memorandum of Appearance or simultaneously with the Memorandum of Appearance as provided under Section 6 of the Arbitration Act. It was further submitted that there is in fact no dispute capable of being referred to arbitration since the Respondent had completed the works and payment certificates duly issued only awaiting payment.

9. Finally it was submitted for the Respondent that the Application is meant to delay the finalization of the matters. The following cases were relied upon namely:-

a. *Kenga Link Limited =Vs= time Line construction co. Ltd & 3 others [2014] eKLR*

b. *Fairlane Supermarket Limited =Vs= Barclays bank limited – HCCC No.102 of 2011.*

c. *Biasovilla Holdings Kenya Limited =Vs= Foton East Africa Limited [2014] EKLK*

d. *UAP Provincial Insurance Co. Limited =Vs= Michael John Beckett – NBI C.A. NO. 26 OF 2007.*

Counsel for the Respondent submitted that the Respondent's claim is only seeking payment of monies which is long overdue.

10. **Determination:**

I have considered the Defendants Application together with the Affidavit in support and annexures. I have also considered the Plaintiff's/Respondent's replying Affidavit and annexures. I have also considered the submissions of learned counsels for the parties and the authorities cited. It is not in dispute that the Applicant and Respondent had entered into an agreement whereby the Respondent was to perform some construction works at the Applicant's premises. It is also not in dispute that the Respondent indeed performed the works. It is also not in dispute that payment certificates were duly prepared pursuant to the works undertaken so as to pave way for payments in favour of the Respondent. It is not in dispute that the Applicant terminated the contract as a result of which the Respondent moved to this court seeking for payments for the works done. It is also not in dispute that the agreement provided vide **Clause 37 (1)** thereof that any dispute was to be referred to arbitration provided the applying party issues a notice within 90 days upon the occurrence of the issue giving rise to the dispute. Having arrived at the above deductions, I find the following issues necessary for determination:-

1. *Whether the Applicant satisfied the conditions under Section 6 of the Arbitration Act 1995.*

2. *Whether the dispute herein is one suitable for referral to arbitration.*

11. As regards the first issue, it is necessary to refer to the Provisions of Section 6 of the Arbitration Act 1995 so as to establish whether from the averments of both Applicant and Respondent there is in fact a genuine dispute requiring the same being referred to arbitration.

Section 6(1) of the Arbitration Act provides that:-

(1) A court before which proceeding 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 proceedings is sought, stay the proceedings and refers 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.

12. From the above clear Provisions of Section 6(1) of the Arbitration Act the Application for stay of proceedings must be done together with the Memorandum of Appearance and filed together. The same could be filed earlier or simultaneously with the Memorandum of Appearance but NOT afterwards. The record and pleadings herein reveals that the Applicants entered appearance on the 8/5/2015 and the present Application was filed on the 20/05/2015. This clearly indicates that there was non compliance with the strict Provisions of the Act. A perusal of all the above cases cited by both learned counsels clearly shows that where the Defendant fails to file the Application prior or simultaneously with the Memorandum of Appearance they automatically waive their right to have the dispute resolved as had been envisaged by the Arbitration Clause. In the case of **BLASSOVILLA HOLDINGS KENYA LIMITED =VS= FOTON EAST AFRICA LTD – NAKURU HCCC NO.28 FO 2014** – it was held:-

“Any party who wishes to take advantage of the arbitration Clause in a contract should either at the time of entering appearance or before entering appearance make the Application for reference to arbitration.”

13. The Defendant upon first being issued with a demand notice by the Respondent of an intended suit should have been made aware and even after being served with Summons to Enter Appearance, it should have filed the Application since the contents of the contract agreement was within its knowledge. They did not do so and only made the move over two weeks after entering appearance. No reason was advanced for that serious default. I find in the circumstances that the Applicant has waived its right for an order of stay pending arbitration and the suit shall have to be resolved by the court.

14. As regards the second issue a perusal of the contents of the Replying Affidavit of the Respondent and annexures shows that indeed the Respondent had already performed the works and had been issued with payment Certificates and was only awaiting settlement of its dues. Since the Respondent has shown that it had carried out its part of the bargain and is now awaiting payment, I find there is no dispute between the parties. In fact the Applicant had already signed and issued out payment Certificates to the Respondent thereby implying that the Applicant had been satisfied with the Respondent’s performance. There is no evidence that the Applicant renounced the payment certificates or recalled them for cancellation. Indeed vide **Clause 37(3)** the Applicant was under obligation to issue a notice of 90 days to the Respondent upon discovering that there were issues raising a dispute. The Applicant has carefully avoided this Clause and only dwelt on **Clause 37(1)** of the agreement. I am therefore convinced that the present suit is purely for the enforcement of the settlement as the Respondent is merely pursuing its right to payment after being issued with the payment Certificates by the Applicant. Hence it is my considered view that there is no dispute between the parties capable of being referred to arbitration. It is now clear that the Applicant’s Application is intended to delay the Repondent from realizing the fruits of its labour. In any event this court will ensure that each party will be given their day in court to ventilate their issues.

15. In the result it is the finding of this court that the Application lacks merit. The same is ordered dismissed with costs to the Respondent. The Applicant is hereby ordered to file and serve its statement of defence if any within the next fourteen (14) days and after the close of pleadings parties do set down the matter for directions.

It is so ordered.

Dated, signed and Delivered in court at **Machakos** this **16th** day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Makundi for Respondent

.Wandegu for Muoki for Applicant

.C/A: Kituva.....