REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 137 OF 2016

KORE FOREST LIMITED.....….....PLAINTIFF

VERSUS

TOTEMIC CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion dated **20 April 2016** was filed herein on **21 April 2016** by the Plaintiff/Applicant, **Kore Forest Limited,** pursuant to **Section 7** of the **Arbitration Act**, **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act**, **Chapter 21** of the **Laws of Kenya**, and **Order 40 Rules 1, 2** and **4** of the Civil Procedure Rules, for orders that:

> [a] Spent
>
> [b] The Court be pleased to issue an interim measure of relief by way of an injunction compelling the Defendant to hand over to the Plaintiff with immediate effect the Project Site that is the subject of the Construction Agreement made on **9 January 2014**, by which the Plaintiff engaged the Defendant to undertake works on the Proposed Country Homes for Rivers edge on its **Land Reference No. 168/26** at Limuru pending the settlement of the dispute by Arbitration as provided for under **Clause 45** of the Construction Agreement;
>
> [c] That the Plaintiff be required to give an undertaking as to damages within such period of the grant of Prayer Number [b] above as the Court may deem just and expedient;
>
> [d] That the Court be pleased to issue such further or other orders and or directions as it may deem fit and just to grant;
>
> [e] That the costs of the application to abide the outcome of the arbitral proceedings between the Plaintiff and the Defendant.

[2] The application, which is grounded on the affidavit of **Karani Nyamu** annexed thereto, was filed contemporaneously with the Plaint dated **20 April 2016.** About eight or so days thereafter, the Defendant herein filed **High Court Civil Case No. 152 of 2016: Totemic Construction Company Ltd vs. Kore Forests Limited,** against the Plaintiff along with a Notice of Motion of even date seeking the following orders:

[a] Spent

[b] That an injunction do issue against the Defendant by itself, its servants, agents or otherwise howsoever, restraining them from removing, dismantling or in any other way whatsoever interfering with the Plaintiff's plant, machinery, equipment, building materials, personnel at the project site pending hearing and determination of the dispute.

[c] That an order be issued referring the dispute between the parties to arbitration, as provided in Clause 45 of the Agreement between the parties dated 9 January 2014.

[d] That the costs of the application be provided for.

[3] The application was supported by the affidavit annexed thereto, sworn by the Managing Director of the Defendant, **Dan Mwangi**, sworn on **29 April 2016**; and the grounds relied on are, *inter alia*, that the Plaintiff had violated the Agreement and Conditions of contract dated **9 January 2014** and proceeded to issue a Certificate of Practical Completion in total disregard of the requirement that notice to that effect be first issued by the Defendant. It was further averred that the Plaintiff, through its Quantity Surveyor, had rejected the Defendant's Interim Payment Application No. 21 for **Kshs. 23,876,961.39** which was submitted on **18 October 2015** and the Interim Payment Application No. 22, which was submitted on **8 April 2016** for **Kshs. 16,227,140.39** by issuing a total valuation of **Kshs. 340,970.80** for both payment applications. It was thus the contention of the Defendant that it would suffer irreparable loss and damage if the Plaintiff proceeded to take possession of the Project Site.

[4] In reaction to the Defendant's application, and before filing its Replying Affidavit sworn by **Karani Nyamu** of **17 May 2016**, the Plaintiff filed the Notice of Motion dated **10 May 2016** pursuant to **Section 6** of the **Arbitration Act, Sections 1A, 1B, 3, 3A, 6 & 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, and **Order 40 Rules 1, 2** and **4 & Order 46, Rules 1 & 2** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] The Court be pleased to stay this suit and/or all the proceedings herein and refer the parties to arbitration as has been sought by the Plaintiff in HCCC No. 137 of 2016)

[c] That to give effect to Prayer [b] above, the Court be pleased to stay this suit and all proceedings therein and direct that all proceedings related to the reference of the dispute by the Plaintiff, as filed in HCCC No. 137 of 2016, be heard and determined as instituted;

[d] In the alternative and without prejudice to Prayer No. [c] above, and in so far as the same is in keeping with overriding objective of civil proceedings, the Court be pleased to order the consolidation of **HCCC No. 152 of 2016** with **HCCC No. 137 of 2016,** by virtue of the fact that the latter suit was filed first in time; and that this suit **(HCCC No. 137 of 2016)** be the Lead File.

[e] That the Court be pleased to issue such further or other orders and or directions as it may deem fit and just to grant.

[f] That the costs of the application do abide the outcome of the arbitral proceedings.

[5] Given the foregoing scenario, directions were given on **8 June 2016** for the consolidation of the two suits and for the applications to be disposed of simultaneously by way of written submissions. Accordingly, the Plaintiff's application dated **10 May 2016** was, in effect, compromised on terms, thereby leaving the applications dated **20 April 2016** by the Plaintiff and the application dated **29 April 2016** by the Defendant as the only applications in disputation. This Ruling is therefore in respect of the said applications and for the purposes therefore, the Plaintiff herein **(HCCC No. 137 of 2016),** namely, **Kore Forest Limited**, will be referred to throughout as the Plaintiff, while **Totemic Construction Company Limited**, will be hereinafter referred to as the Defendant for purposes of the two applications dated **20**

April 2016 and 29 April 2016.

[6] It is common ground that by a Construction Agreement dated **9 January 2014** between the parties hereto, the Plaintiff engaged the Defendant to undertake works on the **Proposed Country Homes for Riversedge** on its **Land Reference No. 168/26** at **Limuru** at an agreed contract price of **Kshs. 436,132,011.33.** The project entailed the erection of residential houses for various purchasers who paid for them upon an undertaking that the project would be completed in time to enable them take possession thereof. However, a dispute arose in respect of one of the Certificates of Payment, being **Interim Certificate No. 21,** which was issued in the sum of **Kshs. 23,876,961.39** Accordingly, the Defendant declared a dispute vide the letters dated **11 April 2016 and 19 April 2016**, and thereby sought the concurrence of the Plaintiff on the appointment of an Arbitrator to facilitate the resolution of the dispute pursuant to **Clause 45** of the Construction Agreement.

[7] The parties are further in concurrence that, on the **17 June 2016**, they negotiated and worked out a Payment Schedule Agreement with a view of compromising the two suits, a copy of which was exhibited as **Annexure DM6** to the Replying Affidavit of **Dan Mwangi**, filed herein on **6 February 2017**. The parties thereby agreed to value the works carried out by the Defendant per the disputed Interim Certificate at **Kshs. 31,653,120.87**; and that the Defendant was to hand over the Project Site and all keys to the Plaintiff upon the signing of that Agreement. At **Clause 3** thereof, an agreed schedule was set out as to how the Plaintiff was to pay the aforesaid sum over a period of 90 days from the date of handover of the Project.

[8] In the Replying Affidavit sworn by **Dan Mwangi**, it was deposed that the Project was indeed handed over pursuant to the Payment Schedule Agreement aforementioned. At Paragraph 15 thereof it was averred thus:

> **"THAT the Defendant duly handed over the project site on 17th June, 2016 and the Plaintiff duly issued the Defendant with a banker's cheque of Kenya Shillings 4,747,968 in fulfillment of paragraph 14(a) stated above."**

This payment was in respect of the 15% that was due upon the signing of the Payment Schedule Agreement. It is instructive that this averment of fact was not rebutted by the Plaintiff. Accordingly, it is manifest that the Plaintiff's prayer for interim measure of relief by way of an injunction, compelling the Defendant to hand over to the Plaintiff with immediate effect, the Project Site as per Prayer (2) of the Notice of Motion dated **20 April 2016**, has been overtaken by events and is no longer tenable.

[9] Given the nature of Prayers (3) and (4) of the said Notice of Motion, it is evident that nothing remains therein for the Court's determination, noting that Prayer 3 seeks that the Plaintiff be required to give an undertaking as to damages, were the interlocutory injunction sought in Prayer (2) to be granted; while Prayer (4) simply seeks for further or other orders and/or directions as the Court may deem fit and just to grant. Accordingly, the entire application is spent, save for the question of costs per Paragraph (5) thereof. It is instructive that there is no specific prayer in the Notice of Motion dated **20 April 2016** for referral to arbitration as envisaged by **Section 6 of the Arbitration Act**. Instead, the prayers for an order of stay of proceedings and for an order referring the dispute between the parties to arbitration were presented as substantive prayers in the Plaintiff's Plaint, thus making them inappropriate for consideration and issuance on an interlocutory basis. Indeed, the Notice of Motion is expressed to have been specifically filed under **Section 7** of the **Arbitration Act**, which simply provides that:

> **"(1) it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.**
>
> **(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application**

Accordingly, the Notice of Motion dated **20 April 2016** having been overtaken by events, I would dismiss it with no order as to costs.

[10] The Defendant's application dated **29 April 2016** on the other hand, was filed pursuant to **Section 6(1)** of the **Arbitration Act**, and there can be no doubt that it was filed within the strictures of the aforesaid provision, in terms of timelines. It is instructive that the Plaintiff, in essence, supported the application, save for the prayer for temporary injunction. In the Replying Affidavit thereto sworn by **Karani Nyamu on 17 May 2016,** it was conceded that the Defendant's application in **HCCC No. 152 of 2016** seeks substantially the same reliefs for which the Plaintiff filed this suit and that it was agreeable to the dispute being referred to arbitration. In particular, the Plaintiff deponed thus at paragraph 8 of the Replying Affidavit filed on its behalf in **HCCC No. 152 of 2016**:

> **"I concede that the Defendant is agreeable to the dispute between it and the Plaintiff being referred to arbitration upon the declaration of a dispute by the Plaintiff in line with Clause 45 of the Construction Agreement made on 9th January 2014..."**

[11] However, in their submissions filed herein, the Defendant changed tack, contending that, the dispute it declared was centered on Interim **Certificate No. 21**, which dispute was subsequently resolved by the parties in accordance with **Clause 45.4** of the Construction Agreement, by which the parties had covenanted thus:

> **"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."**

[12] It was thus the Defendant's submission that having agreed, on **17 June 2016**, on the sum due in respect of **Interim Certificate No. 21**, and the modalities of its payment, there is no issue or dispute to refer to arbitration, adding that the Project Site had been handed over and the first instalment 15% instalment payment made. The cases of **Nanchang Foreign Engineering Company (K) Ltd vs. Easy Properties Kenya Limited [2014] eKLR** and **TM AM Construction (Africa) Group vs. Attorney [2001] eKLR** were cited in support of the argument that it is a condition precedent that there be a dispute capable of being referred to arbitration before a court can stay proceedings filed in court for purposes of such a reference.

[13] With regard to the Schedule of Payments, which the Plaintiff is said to have breached, the case of **Adcock Ingram East Africa Limited vs Surgilinks Limited [2012] eKLR** was relied on, in which **Musinga, J.** (as he then was) expressed himself thus:

> **"The defendant has not shown why it has refused to make payment of the undisputed amount, which is not less than Kshs. 65 million as expressly admitted. It would therefore be unreasonable to refer the entire claim to arbitration."**

The Court was thus urged to find that the parties have settled the dispute for which the two suits were filed and therefore that what remains is the enforcement of the Payment Schedule Agreement, which only the Court is mandated to effect; and therefore that no useful purpose would be served by having the matter referred to arbitration.

[14] In response to the Defendant's submissions, the Plaintiff's posturing was that the Payment Schedule Agreement does not constitute a bar to arbitration, contending that it was subject to certain conditions being met by the Defendant, which conditions were not met. It was further submitted that the said Agreement does not fully settle the entire disputed claim, noting that the Defendant has put in a claim in **HCCC No. 152 of 2016** for a total sum of **Kshs. 40,104,101.75.** The Plaintiff further posited that, by Clause 7 of the Payment Schedule Agreement, the parties' respective rights under the Construction Agreement were preserved, such that the Payment Schedule neither modified nor superseded the Construction Agreement.

[15] The Plaintiff further argued that parties are bound by their pleadings, and that in so far as the Defendant had not withdrawn the Notice of Motion dated **29 April 2016** or amended its Plaint, it was bound to support the prayers sought thereby. Counsel relied on the cases of **Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited [2005] eKLR; Independent Electoral & Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** and **Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries PLC S.C 91/2002** in support of this argument and urged the Court to disregard the Defendant's submissions to the extent that they were at variance with his pleadings and application.

[16] I have carefully considered the parties submissions as well as the useful authorities relied on in respect of the Notice of Motion dated **29 April 2016.** There is no gainsaying that the Construction Contract made provision for arbitration at **Clause 45.1** thereof. That Clause reads as hereunder:

> **"In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment 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. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman of the Architectural Association of Kenya, on the request of the party applying."**

[17] Where there is an arbitral agreement as is the case herein, **Section 6(1)** of the **Arbitration** recognizes 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 that 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."**

[18] That a dispute was declared by the Defendant is not in doubt; and one of the grounds raised by the Defendant in support of that application was that:

> **"The Plaintiff on 19th April, 2016 wrote to the Defendant declaring a dispute and sought concurrence on the appointment of an arbitrator in accordance with the Agreement between the parties."**

[19] Thus, whereas I agree entirely with the submissions by **Mr. Masika** for the Plaintiff, that parties are bound by their pleadings, it is evident herein that the respective positions of the parties did change thereafter with the negotiation and signing of the Payment Schedule Agreement dated **17 June 2016**, whereby the total value of works carried out by the Defendant as per the impugned Certificates was agreed at **Kshs. 31,653,120.87**, and an agreement reached as to how that sum was to be paid. It was further agreed that the Defendant would hand over possession to the Plaintiff upon the payment of the first instalment; both of which have since come to pass. The question that remains for my determination therefore is whether the Payment Schedule Agreement dated **17 June 2016** provided a comprehensive solution to all aspects of the dispute; or put another way, whether there is in fact a dispute between the parties.

[20] According to the Defendant, the Plaintiff has not proved that it has any claim against it that is outstanding. Counsel for the Defendant relied, *inter alia*, on **Nanchang Foreign Engineering Company**

(K) Ltd vs Easy Properties Kenya Limited [2014] eKLR wherein **Kamau, J** expressed herself as follows:

> **"It is a condition precedent that there be a dispute capable of being referred to arbitration before a court can stay proceedings filed in court. Bearing in mind that it is trite law that he who alleges must prove, the burden of proving that a dispute indeed exists for it to be referred to arbitration lies with the party alleging the fact ... This court's conclusion is similar to that in the case of Ellis Mechanical Services Limited vs. Wates Construction Limited ... cited in the case of Civil Appeal No. 26 of 2007 UAP Insurance Company Limited vs. Michael John Beckett (Supra) where Lord Denning had the following to say:-**
>
> **The defendants cannot insist on the whole going to arbitration by simply saying that there is a dispute or difference about it. If the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration."**

[21] From a perusal of the Defence filed in herein, it is clearly evident from paragraphs **22** to **28** thereof that following the handing over of the Project Site, the Plaintiff suspended all payments vide a letter to the Defendant dated **15 July 2016**, contending that the works were incomplete. That letter is marked **Annexure DM8** to the Defendants Replying Affidavit herein (in **HCCC No. 137 of 2016**, and it states as follows in part:

> **"...We would like to inform you of the following**
>
> - **We will be making a claim to reduce amounts due to you because of incomplete works, amounts currently being certified by the project Quantity Surveyor.**
> - **We will be making a claim for penalties due to delayed project completion.**
> - **There are other amounts owed for physical damages and for example to Kenya Power on the meters you were using during construction, we have been forced to pay this on your behalf and will be making a claim on this too.**
>
> **The amounts above are likely to be greater than amounts currently stated as owed to you thus, we will suspend all payments pending agreement between both teams on amounts owed and owing..."**

[22] Thus, while the Defendant contended that the Plaintiff had unlawfully refused to pay it the outstanding amount of **Kshs. 26,905,152.87** (due post the Payment Schedule Agreement of 17 June 2016), for which it placed a Counter claim herein; the Plaintiff contends that it had valid cause for stopping the agreed payments. Clearly therefore, there is a dispute evinced thereby, which superseded the Payment Schedule Agreement; and although the Defendant's posturing was that all that remains is enforcement, this cannot be when the Plaintiff's contention is that the works are incomplete and therefore not in keeping with the tenor and effect of the said Agreement. It is for this reason that I find distinguishable the authorities relied on by the Defendant, in which there was a clear demarcation between what was admitted and what was in contestation.

[23] In the result, I am satisfied that there is indeed a dispute between the parties that ought to be referred to arbitration as prayed in Prayer (3) of the Notice of Motion dated **29 April 2016**; but would direct that before such a reference can be made, the parties be given an opportunity to review their agreement dated **17 June 2016** pursuant to **Clause 45.4** of the Construction Agreement with a view of settlement. It is further ordered that costs of the two applications be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2017

OLGA SEWE

JUDGE