



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NUMBER 219 OF 2015**

**ASE SOLAR ENERGY LIMITED. .... APPLICANT**

**VERSUS**

**ZHONG FA ASIA AFRICA HOTELS CO. LTD. .... RESPONDENT**

**RULING**

The parties herein Ase Solar Energy Limited and Zhong Fa Asia Africa Hotels Co. Limited entered into an agreement for the supply and installations of Solar water heating systems (subject goods) for a sum of Ksh.3,350,000/.

The said agreement was entered into, on or about the 11<sup>th</sup> July, 2013 and upon execution of the same, the Respondent paid a sum equivalent to 10% of the total sum and agreed to pay the balance upon successful installation of the goods.

The applicant alleges that despite successful installation of the goods, the Respondent failed to remit the balance of Ksh.3,014,966/- prompting the applicant to serve a demand letter on 25<sup>th</sup> September, 2014.

In response to the demand letter, the Respondent alleged that the installed subject goods were malfunctioning prompting the invocation of clauses 2.5 of the agreement that provides for all disputes that may arise be referred to arbitration but parties are unable to agree on an arbitrator. It is for that reason that the Applicant moved the court by way of a Notice of Motion dated 21<sup>st</sup> May, 2015 brought under Section 12(2) and (3) of the Arbitration Act, Order 46 Rule 5, Order 51 Rule 1 of the Civil Procedure Act and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 laws of Kenya.

The Applicant has sought the following orders.

1. Spent.
2. That this honourable court do appoint an Arbitrator to hear and determine a dispute between the parties under the contract agreement of Zhong FA Asia Africa and Ase Solar Energy.
3. That in the alternative, the Honourable Court do vest appointing authority on the Chairman of the Chartered Institute of Arbitrators, Kenya Branch.
4. The costs of this application be provided for.

The Respondent filed a replying affidavit opposing the application arguing that the arbitration process is costly for the parties as opposed to litigation which is cheaper.

The Applicant in turn filed a supplementary affidavit and avers that the issues raised herein are technical and require the matter be referred for arbitration and that arbitration process will be most expeditious and affordable avenue as opposed to litigation.

Parties agreed to dispose off the application by way of written submissions but the Respondent did not file its.

This court has considered the application and the affidavits filed herein together with the submissions by the Applicant. Clause 2.5 of the agreement is on resolution of disputes and it provides as follows: -

**“The ZHONG FA ASIA AFRICA HOTELS CO. LTD and the ASE SOLAR ENERGY CO. LTD** shall make every effort to resolve amicably by direct informal negotiations any disagreement or dispute arising between them under or in connection with the contract. If after thirty (30) days from the commencement of such informal negotiations both parties have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution to the formal mechanisms.

It is not in dispute that parties herein entered into an agreement for supply and installation of solar water heating systems. There is a dispute between the parties and they cannot agree on appointment of an Arbitrator. Clause 2.5 of the agreement is very clear on how to deal with a dispute that may arise between the parties. The Applicant has moved the court to appoint an arbitrator or in the alternative to vest appointing authority to the Chairman of the Chartered Institute of Arbitrators, Kenya Branch. Though the Respondent prefers the court process, none of the parties herein has filed a suit and the fact that the agreement contains an arbitration clause, the orders sought by the Applicant are founded. This court finds the application merited and hereby allows the same in terms of prayer 3. The chairman of the Chartered Institute of Arbitrators, Kenya Branch do appoint an arbitrator within 30 days from the date of service with the order upon him.

Each party shall bear its own costs of the application.

Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of September, 2016.

.....

**L NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Applicant.*

..... *for the Respondent.*