



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 24 OF 2014

RELIABLE ELECTRICAL ENGINEERS LTD PLAINTIFF

V E R S U S

KENYA PETROLEUM REFINERY LTD DEFENDANT

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 29 OF 2014

NIRCON CONSTRUCTION LTDPLAINTIFF

V E R S U S

KENYA PETROLEUM REFINERY LTD DEFENDANT

RULING

1. This claim filed by **RELIABLE ELECTRICAL ENGINEERS LTD**, the Plaintiff is centered on the agreement between it and **KENYA PETROLEUM REFINERY LTD**, the Defendant. The Plaintiff pleaded that it carried out electrical works as agreed in that agreement and that electrical work was worth Kshs. 14,687,850.72. That that amount has remained unpaid by the Defendant, despite the Plaintiff having sent invoices to the Defendant. The Plaintiff by paragraph 6 of the Plaintiff pleaded-

“The Plaintiff avers that one of the share holders of the Defendant intends to sell its stake in the Defendants’ company to the Government of Kenya and there is a danger that the Plaintiff might not be paid for the electrical works done at the Defendants’ establishment.”

2. The final prayer in that Plaintiff are-

- a. **An injunction restraining one of the share holder from disposing off its 49% stake to the Government without first clearing the outstanding debt of Kenya Shillings Fourteen Million Six Hundred and Eighty Seven Thousand Eight Hundred and Fifty and Seventy Two Cents (Kshs. 14,687,850.72) to the Plaintiff.**
 - b. **A sum of Kenya Shillings Fourteen Million Six Hundred and Eighty Seven Thousand Eight Hundred and Fifty and Seventy Two Cents (Kshs. 14,687,850.72).**
3. By this Ruling this Court is considering Defendant's Notice of Motion dated 5th March 2014. That application is brought under Section 6(1) of the Arbitration Act Cap 49. Defendant seeks the stay of this case and for an order referring this case to arbitration in accordance with Section 6(1) Cap 49. The application is brought on two grounds, that is-
 - **The contract forming the basis of the parties' dispute herein expressly stipulates that all disputes and differences arising therefrom be referred to arbitration.**
 - **Consequently this Honourable Court does not have jurisdiction to hear and determine the Plaintiff's suit herein.**
 4. The Arbitration Clause in the parties agreement provides-
 - i. **All disputes and difference between the Company and the Contractor arising out of or in connection with the Contract shall be referred to a single arbitrator to be agreed upon between the parties.**
 - ii. **Any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act (Cap 49), or any statutory modification or re-enactment thereof for the time being in force.**
 5. In support of the application it was submitted by Defence Counsel that Plaintiff is bound by the terms of the agreement. Defendant relied on the case L'ESTRANGE –Vs- F. GRAUCOB LTD 1934 2 K. B 394 where Scrutton L. J. at page 403 stated that-

“When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he read the document or not.”

6. Further Defendant submitted that this Court cannot re-write parties contract and should therefore give effect to the term of the contract on arbitration. Defendant cited the case NATIONAL BANK OF KENYA LTD –Vs- PIPEPLASTIC SAMKOLIT (K) LTD & PROF SAM K. ONGERI (2001)eKLR where the Court stated-

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, J.A in the case of Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported)-

‘It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.’”

7. The application was opposed by Plaintiff on one single ground. That there is no existence of a dispute which can be referred to arbitration. That issue of referring disputes to an Arbitrator was well discussed by the Court of Appeal at Nairobi in the case UAP PROVINCIAL INSURANCE

COMPANY LTD –Vs- MICHAEL JOHN BECKETT CIVIL APPEAL NO. 26 OF 2007.

The Court of Appeal in that case was considering an appeal where the High Court had found that there was no dispute between the parties to warrant reference to arbitration. The Court of Appeal upheld the High Court's decision.

ANALYSIS

8. Section 6(1) (a) and (b) of Cap. 49 is in the following terms-

“6. (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.”**

9. The Court of Appeal in the UAP case (supra) had this to say-

- **In our view, the issue with which Mutungi J. was concerned when dealing with the application under Section 6 of the Arbitration Act was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the Arbitration Act under which UAP's application for stay of proceedings was presented provides in the relevant part**
- **It is clear from this provision that the enquiry that the court undertakes and is required to undertake under Section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.**
- **The inquiry by the Court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the Court, when dealing with an application for stay of proceedings under Section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of Section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the Court is enjoined to form an opinion on the merits or otherwise of the dispute.**

10. The Court of Appeal on further discussion of Section 6(1) (b) referred to the case ELLIS MECHANICAL SERVICES LTD –Vs- WATERS CONSTRUCTION LTD (Note) [1978]ILLOYD'S REP 33 as follows-

“To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the court

that at least \$X is presently due from the defendant to the Plaintiff? If it is, then judgment should be given to the plaintiff for that sum, whatever X may be, and in a case where, as here, there is an arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the \$X is indeed because there is no issue or difference, referable to arbitration in respect of that amount.”

11. I did set out the basis upon which the Defendant seeks to stay this case and to have it referred to arbitration. The sole reason given by Defendant is that the parties have an Arbitration Clause in their agreement. The Defendant by the affidavit in support of the application admitted the agreement on the works carried out existed, and did not deny that the Plaintiff had carried out those works according to the contract, or that the Plaintiff had raised its invoices which by virtue of that agreement ought to have been settled every month during the contractual period. It is not denied that the works had been concluded by the Plaintiff.

12. It is abundantly clear from the above that there is no dispute between the parties capable of being referred to an Arbitrator. I adopt the holding of Azangalala J (as he then was) in **CHEVRON KENYA LIMITED –Vs- TAM OIL KENYA LIMITED [2007]eKLR** where he stated-

“In my view therefore, the dispute between the Plaintiff and the Defendant is in reality not a dispute with regard to matters agreed to be referred to arbitration envisaged in the arbitration clause. It is barred by Section 6(1) (b) of the Arbitration Act.”

13. The finding in this Ruling refers to the Notice of Motion in this file dated 5th March 2014 and to the Notice of Motion dated 7th March 2014 in the **Mombasa Civil Commercial Case No. 29 of 2014**. The applications are the same the only difference is that the Plaintiffs are different.

14. Accordingly I order as follows-

- a. **The Notice of Motion dated 5th March 2014 in Mombasa Civil Commercial Case No. 24 of 2014 is hereby dismissed with costs to the Plaintiff.**
- b. **The Notice of Motion dated 7th March 2014 in Mombasa Civil Commercial Case No. 29 of 2014 is dismissed with costs to the Plaintiff.**

It is so ordered.

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE