REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 487 OF 2013

NANCHANG FOREIGN ENGINEERING COMPANY (K) LIMITED….PLAINTIFF

VERSUS

EASY PROPERTIES KENYA LIMITED……DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Chamber Summons application dated 20th December 2013 and filed on 24th December 2013 was brought under the provisions of Section 4, 6 and 10 of the Arbitration Act and Rules 2, 3 and 11 of the Arbitration Rules, 1997 and all the enabling provisions of the law. The same sought the following orders :-

a. **THAT this Honourable Court be pleased to stay all/ any other proceedings herein pending the hearing and determination of this application.**
b. **THAT this Honourable Court be pleased to stay the proceedings pending arbitration.**
c. **THAT the suit be referred to arbitration.**
d. **THAT parties appoint an arbitrator to determine the dispute herein within 30 days from the date of granting the order herein in accordance with Clause 45.1 of the Agreement and Conditions for Contract for building Works dated 14th June 2011, in default thereof the Court thereof does order the Chairman of The Architectural Association of Kenya to appoint an arbitrator.**
e. **THAT the Respondent bears the costs of this application.**

2. The grounds on which the Plaintiff relied on in support of its application were generally as follows:-

a. **THAT there existed a valid and binding clause in the Agreement and Conditions of the aforesaid contract and an appointing authority as aforesaid to resolve a dispute relating to professional fees as this was within the scope of the said arbitration agreement.**
b. **THAT under the aforesaid clause, it was mandatory that parties first try to reach an amicable agreement and thereafter refer the dispute to arbitration if no amicable agreement**

was reached.

c. **THAT the suit herein was filed without complying with the arbitration clause and in the circumstances this court had no jurisdiction to entertain, hear or determine this matter.**
d. **THAT the Defendant was willing to comply with the said clause for referral of the matter to arbitration.**
e. **THAT it was in the interests of justice that the application be allowed as parties had intended that any disputes be referred to arbitration under the aforesaid Agreement and Conditions of Contract for Building Works.**

AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION

3. The Defendant's application was supported by the Affidavit of Josephat James Omari, its Accountant. There was no indication of when the same was sworn as no date was shown therein. He reiterated the grounds on the face of the application and stated that it was a waste of court's time and resources to entertain, hear or determine this matter in court.
4. The Plaintiff's Grounds of Opposition dated 6th February 2014 were filed on 7th February 2014. The same were as follows:-

a. **The application was an abuse of the court process and should be dismissed for the following reasons:-**

i. **There was in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration.**
ii. **It would delay the proportionate, expeditious and timely disposal of this action.**

b. **Any other such grounds as would be raised during the hearing.**

LEGAL SUBMISSIONS BY THE DEFENDANT

5. The Defendant's written submissions were dated 1st April 2014 and filed on 17th April 2014. It reiterated the averments contained in the grounds in the face of its application and its Supporting Affidavit. Its case was that this court did not have jurisdiction to entertain, hear or determine the dispute between it and the Plaintiff by virtue of Clause 45.1-45.4 of the aforesaid Agreement Conditions of Contract for Building Works (hereinafter referred to as "the Agreement") which mandated any disputes between them be referred to arbitration.
6. It pointed out that the Plaintiff had conveniently omitted, to attach to its Bundle of Documents, the relevant parts of the Agreement which was a clear demonstration that the Plaintiff was unwilling to pursue the avenue for resolution of disputes that had been provided in the said Agreement. It was emphatic that contrary to the Plaintiff's assertions, there was indeed a dispute as the Plaintiff's claim was hinged on the execution of the works that they had agreed upon. It was its argument that the Plaintiff had not provided the court with any facts to back its assertion.
7. It argued that the arbitrator had jurisdiction to determine whether or not there was a dispute for referral under the provisions of Section 17 of the Arbitration Act and that in any event, the arbitrator could only make the said determination once the dispute was referred to him.
8. It referred the court to the case of **Adopt-A- Light vs Magnate Ventures Limited & 3 Others [2009] eKLR** in which the court therein held that the arbitrator had power to rule on the issue of his own jurisdiction and on the validity or otherwise of the agreement, the subject of the arbitration and may even rule that the contract was null and void.
9. It therefore urged the court to allow its application.

LEGAL SUBMISSIONS BY THE PLAINTIFF

10. The Plaintiff's written submissions were dated and filed on 22nd May 2014. It admitted that there was an arbitration clause but that its mere existence did not negate the **xxxx n**on- existence of the debt and it did not create a dispute that then had to be referred to arbitration.
11. It argued that the suit had been filed for payment of professional fees and that there was nothing that had been placed before the court to demonstrate that there was a dispute within the meaning of Section 6 of the Arbitration Act. It contended that the Defendant had not filed a Defence to demonstrate that there was a dispute capable of being tried.
12. It relied on the case of **Civil Appeal No 26 of 2007 UAP Insurance Company Limited** vs Michael John Beckell (unreported) in which the Court of Appeal cited the case of **Ellis Mechanical Services Limited vs Wates Construction Limited [1978] 1 Lloyd's Rep 33 at page 35** and stated that the defendants therein could not insist on going to arbitration by simply saying that there was a dispute or difference.
13. It was its submission that the Defendant had not denied the existence of its obligation to make payments due to it and that since the matter involved an undisputed claim, the Defendant's application ought to be dismissed. It referred the court to the case of **Niazsons (K) Limited vs China Road and Bridge Corporation [2001] 2 EA 602** to buttress its argument in this regard.
14. It also submitted that the burden of proving that there existed a dispute lay with the Defendant as had been held in the case of **TM AM Construction Group (Africa) vs Attorney General [2001] 1 EA 282** . It therefore urged the court to find that that was the position in this case and that as the matter herein was a simple claim for recovery of a debt that the Defendant had refused to pay, it would not be in the interests of justice if the court allowed further delay of the fulfilment of the Defendant's contractual obligations towards it.

LEGAL ANALYSIS

15. Section 6(1) of the Arbitration Act provides as follows:-

"**A court before which proceedings are brought in a matter which is the subject of an arbitration 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 of 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…"**

16. This court therefore has jurisdiction to stay proceedings filed in court pending the hearing and determination of arbitral proceedings under Section 6 of the Arbitration Act, 1995. This court's position is similar to the one that was taken by the court in the case of **Harnam Singh & others vs Mistri [1971] EA 122** where Spry J referred to the case of **Jadva Karsan vs Harnam Singh (1953) 20 E.A.C.A 74** where it had been held that:-

"there is no doubt that there is an inherent power of stay of proceedings where the ends of justice so require."

17. While the court has power to stay proceedings in a court with a view to referring of a matter to arbitration, the court has to satisfy itself that the following conditions exist:-

a. **THAT the application seeking a stay of the proceedings with a view to having the matter referred to arbitration is presented to the court not later than the time when the applicant enters appearance or otherwise acknowledges the claim against which the stay of**

proceedings is being sought;

c. **THAT the arbitration agreement is not null and void, inoperative or incapable of being performed; or**

b. **THAT there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.**

18. While the court notes the Plaintiff's submission that the Defendant's failure to file a defence herein meant that its claim was undisputed and that such a conclusion may ordinarily be reached depending on the facts of a case, the situation is somewhat different in a case where a party seeks orders for a stay of proceedings pending referral of the matter to arbitration. Such an applicant should not, under any circumstances, file any defence in a matter filed in court if he intends to make an application to stay the proceedings filed in court. If he does so, the court becomes automatically seized of the jurisdiction of the dispute between the parties and he cannot thereafter make an application for such stay of proceedings.
19. A perusal of the court record shows that the Defendant did not enter any appearance in the suit herein. It is the view of this court that the filing of the present application seeking referral of the dispute to arbitration was an acknowledgment of the existence of the dispute. The Defendant was therefore right on track when it filed the present application seeking orders to stay the proceedings herein and have the dispute between it and the Plaintiff referred to arbitration in accordance with Section 6 of the Arbitration Act, 1995.
20. There was no evidence that was furnished to the court to demonstrate that the arbitration agreement was null and void, inoperative or incapable of being performed. In the absence of any evidence to the contrary, it is the conclusion of this court that the arbitration agreement was not null and void or incapable of being performed and the present application herein was competent and valid for determination.
21. A perusal of the clause in respect of Settlement of Disputes under the Agreement provided as follows:-

> **45.1. 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 30 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 appointment by the Chairman or Vice Chairman of the Architectural Association of Kenya, on request of the applying party.**
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> **45.2 The Arbitration may be on the construction of this Agreement or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or on withholding by the Architect of any certificate to which the Contractor may claim to be entitled or measurement and valuation referred to in Clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract.**
>
> **45.3 Provided that no arbitration proceedings shall be commenced on any dispute or difference unless notice has xxxx been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.**
>
> **45.4 Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute shall not commence unless an attempt has in the first instance**

has been made by the parties to settle such dispute or difference amicably with or without assistance of third parties.

22. It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the Plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant's application would automatically fail as referral to arbitration would be premature.
23. Notwithstanding the above, it does not, however, mean that the court would be powerless to refer the dispute to amicable settlement. The supreme law and enacted legislation clearly shows that the court has power to refer disputes to alternative methods of dispute resolution.
24. Article 159 (2)(c) of the Constitution of Kenya provides as follows:-

"In exercising judicial authority, the courts shall be guided by the following principles:-

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."

25. Under Section 59 C of the Civil Procedure Rules Cap 21 (laws of Kenya), it is provided that:-

"1. Any suit may be referred to any other method of dispute resolution where the parties agree or <u>the court considers the case suitable for such referral</u> (emphasis court).

2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order. .."

26. In addition, under Order 46 Rule 20 (1) of the Civil Procedure Rules, 2010, it is stipulated as follows:-

"<u>Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion</u> (emphasis court) **or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act."**

27. It is evident that the court is mandated by the supreme law to promote the use of alternative dispute resolution mechanisms and that it is also vested with power in civil cases to refer any matters it deems suitable for resolution by such appropriate methods for the attainment of the overriding objective contemplated under Sections 1A and 1B of the Civil Procedure Rules, 2010. The court would therefore be acting within the law to refer, on its own motion, any dispute between the parties herein to attempt an amicable settlement for resolution under the Agreement as it was a condition precedent before the dispute between them could proceed for determination under the arbitration process.
28. Having found that a dispute between the parties herein could be referred to attempt an amicable settlement, the court has to satisfy itself that there is in fact a dispute between them. It is therefore important for the court to address the question of whether or not there was indeed a dispute between the parties herein that was capable of being referred for them to attempt an amicable settlement.
29. It was the Plaintiff's submission that in the absence of a defence by the Defendant, its claim was undisputed. It also contended that its claim was a simple matter for the recovery of a debt that the Defendant had failed to pay.
30. A perusal of the Plaintiff's Plaint dated 6th November 2013 and filed on 7th November 2013 shows that the dispute herein was in respect of unpaid interim payment certificates. In paragraph 8 of the said Plaint, the Plaintiff said it presented an interim certificate of payment for Kshs 39,456,853.42 that was payable on or before 1st July 2013. It stated that the Defendant paid a sum of Kshs 15,000,000/= as partial settlement of the interim certificate of payment on 2nd July 2013,

leaving a balance of Kshs 24,456,835.42 which it was now claiming in its Plaint.

31. Under Clause 34.1 of the said Agreement, the Contractor was to submit to the Quantity Surveyor an application for payment giving sufficient details of the work done and the materials on site and the amounts which the Contractor considered himself to be entitled to. The application for payment was to be copied to the Architect and Employer. The procedure of how and when this payment was to be paid to the Contractor was detailed in Clause 34.0 of the said Agreement. In Clause 34.23 of the said Agreement, it was provided as follows:-

    "Save as aforesaid, no certificate of the Architect shall of itself be conclusive evidence that any Works, materials or goods to which it relates are in accordance with this contract.

32. The Defendant's argument was really that since there was an arbitration clause, the matter should be referred to arbitration. Such referral is not automatic. As has been seen in Section 6 (1) (b) of the Arbitration Act, 1995, 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, who in this case was the Defendant herein.

33. In its Supporting Affidavit, the Defendant did not say whether or not it was challenging the interim certificates of payment that had been issued by the Architect. Whereas it was not required to file a defence before it could file the application herein, it was under a duty to satisfy the court that there would be value added if the matter was referred to arbitration or amicable settlement. It was not sufficient for it to contend that since there was a dispute resolution clause, the matter should as matter of course be referred to arbitration or amicable settlement.

34. This court's conclusion was similar to that in the case of **Ellis Mechanical Services Limited vs Wates Construction Limited** (Supra) 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 sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration."

35. The court also finds itself in agreement with the holding of Musinga J (as he then was) in the case of **Adcock Ingram East Africa Limited vs Surgilinks Limited [2-1-] eKLR** where he stated as follows:-

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

36. Similarly, while dismissing an application for stay of proceedings pending referral of a matter to arbitration, in the case of **TM AM Construction Group (Africa) vs Attorney General [2001] 1 EA 282 (CAU)** relied upon by the Defendant, Mbaluto J (as he then was) observed as follows:-

    "**A party who is wholly unable to produce the minutest evidence to support an allegation of a dispute in a contract of that magnitude evidenced in this matter has absolutely no right to come to this Court and seek a stay of proceedings and reference to arbitration allegedly because he for the first time alleges that there is a dispute between the parties.**

37. The Defendant did not provide any evidence that it had challenged the interim certificate of payments that had been issued by the Architect. It paid a sum of Kshs 15,000,000/= as partial settlement of the interim certificate of payment of Kshs 39,456,853.42 that was payable on or before 1st July 2013 leaving a balance of Kshs 24,456,835.42. It did not explain why this balance had not been paid.

38. Referral of a matter to arbitration or other alternative method of alternative dispute resolution is

not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reaching an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute.

39. If there is no dispute which can be referred to such fora, the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, Article 50 of the Constitution of Kenya, 2010 provides that every person has a right to have any dispute decided in a fair and public hearing before a court.
40. From the facts that have been presented before this court, it has found itself more persuaded by the Plaintiff's submissions that its claim against the Defendant was one of recovery of a simple undisputed debt and that it would be in the interests of justice that the Defendant not be allowed to abuse the process of the court with a view to frustrating the Plaintiff from proceedings with the matter in this forum.
41. The court has arrived at the conclusion that it would not be in the interests of justice to stay the proceedings herein as had been sought by the Defendant for the reason that it did not demonstrate that there was indeed a dispute that was capable for referral to arbitration. The case of **Adopt-A-Light vs Magnate Ventures Limited & 3 Others** (Supra) it relied on was not relevant in the circumstances of the matter herein and would not assist it in any way. The Defendant's application would also fail on this ground.
42. The court also wishes to point out that its intervention in matters that are governed by the Arbitration Act can only be exercised within the parameters set out in Section 10 of the Arbitration Act, 1995. The said section stipulates as follows:-

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

43. Hence, there was no need for the court's intervention as far as the appointment of an arbitrator was concerned. Clause 45.0 of the Agreement was clear as to the process of appointing an arbitrator. it would therefore not be within its powers or jurisdiction to make such an appointment as had been sought by the Defendant. Its prayer in this regard would not be one that this court can grant.
44. Finally, the court found that the Defendant's application was incompetent and fatally defective *ab initio*. Its Supporting Affidavit on the court record was not dated. This was contrary to the mandatory provision of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (laws of Kenya) which provides as follows:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall truly in the jurat or attestation at what place and on what date (emphasis court) **the oath is taken or made."**

45. However, the court felt it necessary not to dismiss the Defendant's application on this technicality as Article 159 (2) (d) of the Constitution mandates this court, that in exercising its judicial authority, it shall administer justice without undue regard to procedural technicalities. It is for that reason that the court deemed it necessary to address the merits or otherwise of the Defendant's application to erase any doubt of what would have been the court's position had the Supporting Affidavit complied with the provisions of the Oaths and Statutory Declarations Act.
46. Accordingly, having carefully considered the parties' pleadings, written and oral submissions and the case law they relied upon, the court finds that the Defendant was not able to persuade this court to grant it any of the prayers it had sought in its application.

DISPOSAL

47. For the aforesaid reasons, the court finds the Defendant's Chamber Summons application dated 20th December 2013 and filed on 24th December 2013 was not merited and in the circumstances, the same is hereby dismissed with costs to the Plaintiff herein.
48. Orders accordingly.

DATED and DELIVERED at NAIROBI this 16th day of July 2014

J. KAMAU

JUDGE