IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Kneller JJA & Chesoni Ag JA)

CIVIL APPEAL NO. 43 OF 1983

THE EAST AFRICAN POWER AND

LIGHTING COMPANY LIMITED …..…....….....….. APPELLANT

AND

KILIMANJARO CONSTRUCTION LIMITED ….....…… RESPONDENT

(Appeal from an order of the High Court of Kenya at Nairobi (Aganyuanya J) dated the 23rd Day of November, 1982

In Civil Case No. 846 of 1982)

JUDGMENT OF MADAN J A

The respondent (hereafter referred to as the plaintiff) instituted the proceedings against the appellant (hereafter referred to as the defendant) in the High Court. The averments in the plaint said that the plaintiff entered into a contract with the defendant to carry out the work of transmission lines on five named sub-stations situated in different parts of Kenya, the price or sum of Kshs 9,780,081, plus the price of any extra work which may be occasioned thereby (hereafter referred to as the Project). The contract provided that the plaintiff would supply to the defendant a Performance Bond by an insurance company, which it did, for Kshs 978,000 being ten per centum of the contract price before commencing work on the project; that the defendant on December 10, 1981 unlawfully and without any notice terminated the contract and ordered the plaintiff to stop all the work on the project with immediate effect, although under clause 4-44 thereof, the defendant could only terminate the contract by 30 days written notice upon the expiry of which period the defendant would reimburse the plaintiff for certain expenses, and also make certain equitable adjustments in the contract price in addition to allowing the plaintiff and its sub-contractors to remove all their construction plants from the sites: that the defendant forcibly ejected the respondent from and took possession of the materials belonging to the plaintiff on the sites; as a result thereof the plaintiff suffered special damages of Kshs 1,263,900, which the particulars thereof being set out in the plaint, which the plaintiff claimed from the defendant; a further sum of Kshs 8,996,579.50 made up of unpaid amounts in respect of certificate No 3 and for the extra work done. The plaintiff also claimed general damages suffered by it in its standing as a Road Contractor of repute with the Insurance Company which issued the Performance Bond, and other Insurance Companies, which had been adversely affected, inconsequence of the defendant prematurely demanding payment of the amount of the Performance Bond from the Insurance Company which issued it.

The defendant entered appearance and before taking any other steps in the proceedings, it applied for stay of all further proceedings pursuant to Section 6(1) of the Arbitration Act. The affidavit sworn by Mr

Ndonye the Assistant Secretary of the defendant deponed that the matters in the action arose solely out of an agreement dated July 11, 1981 between the plaintiff and the defendant; clause 457 thereof contained inter alia the following provision:

> "if any dispute or difference shall arise concerning the interpretation or application of the contract, or after the determination of a breach thereof, it shall first be referred by either party to Acres (Acres International Limited) (the agent and manager of the Project for a decision. If Acres fails to render a decision in writing within 90 days, or if either party is not satisfied with the Acres' decision, the dispute shall be settled by arbitration upon written notice by either party."

The Affidavit further deponed that the matters in dispute related to the termination of the agreement, delays the plaintiff, and, what if any, sums were due to the plaintiff. Copies of nine letters written by Acres, the plaintiff and its advocates and the defendant were attached to Mr Ndonye's affidavit who also deponed that certificate No 3 and the extra work certificates 2 and 3 were submitted to Acres but without the supporting documentation in spite of a request for the same. The plaintiff was not forcibly ejected, nor possession of its materials taken by the defendant. No amount was payable as the plaintiff had not complied with clause 5, 6 of the agreement. The defendant had a good defence to the action. The defendant was at that time these proceedings were commenced, and still is, ready and willing to do all things necessary for the proper conduct of the arbitration in accordance with the provisions of the agreement.

The Managing Director of the plaintiff swore a replying affidavit in which he deponed that the matters in dispute set out in the plaint both in fact or law did not fall within the scope of the arbitration provision: that the defendant was not at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration now being sought; that the defendant called upon the Insurance Company to pay up the amount of the performance Bond without waiting for a decision of any arbitration proceedings on the questions of the liability of the parties to each other; that the Acres cannot in law act as arbitrator being disqualified as unfit to be arbitrator on the matters in dispute set out in the plaint as the conduct of Acres was a major cause of the dispute with which it was identified, and having acted as a spokes man for the defendant it was not a fair or impartial party; also having already acted contrary to the interests of the plaintiff, it would be a Judge in its own cause.

The plaintiff's Managing Director also attached to his affidavit a whole bunch of letters, which had been exchanged between the parties.

Aganyanya J dismissed the defendant's application.

On this appeal before us by the defendant the grounds of appeal are that the Judge erred in exercising his discretion and refusing to grant a stay, in holding that the disputes which were the subject of the proceedings did not fall within the scope of the arbitration agreement, in holding that the defendant was not ready and willing to do all things necessary to the proper conduct of the arbitration, in holding that there were sufficient reasons why the matter should not be referred to arbitration, and in awarding costs for two counsel.

The learned judge set out the remainder of the arbitration clause, which reads as follows:

> "If either party is not satisfied with the decision they make written notice within 90 days of receipt of the decision for the dispute to be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters appointed under such rules. Neither party shall be limited in proceedings to evidence or arguments put before Acres nor shall Acre's decision disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter relevant to the dispute or difference."

The reference of the dispute to Acres would have been a preliminary skirmish only, and more in the nature of a rehearsal in the event of either party being dissatisfied with the decision. Perhaps the real object of the reference to Acres in the first instance was to settle minor disputes in the nature on pi-pricks

on the sites.

The learned judge also set out the conditions which must be met before an order to stay the proceedings can be made. He specifically pointed out that Section 6 (1) of the Arbitration Act gives the court discretion to order stay of proceedings where no sufficient reason is shown why such order should not be made. He also said that there was a valid agreement between the parities upon which the defendant was entitled to rely, and it had taken no steps in the proceedings after filing appearance. There was also no dispute that the defendant terminated the contract by its letter of December 10, 1981. The disputes between the parties were about the expenses incurred and damages suffered as a result, and work done as per certificate number 3 which had not been paid for (paragraphs 7, 8 and 12 of plaint). The learned judge expressed the opinion that these disputes were not covered by or within the scope of this agreement between the parties so as to stay them. In addition though the defendant appeared to insist that the dispute initially should be submitted to Acres for decision, nowhere in the correspondence was it shown that it took any step to refer the dispute to Acres though they were aware of it, and the respondent had clearly accepted that it would be willing to refer the matter to the arbitrator. Why "throw the decision upon the plaintiff," said the learned judge, to refer the dispute to Acres knowing well the active part Acres were playing in the Project as Project Manager and Supervisor; most of the correspondence was addressed to the plaintiff by Acres who stood in for the defendant and it was futile to expect the plaintiff to refer the dispute to them, having been accused by Acres for being responsible for the delay in the completion of the project. In these circumstances the defendant could not come to the court at the last minute to ask for a stay of proceedings with a view to referring the matter to arbitration which it never intended or contemplated initially.

The learned judge also said he was satisfied that there was sufficient reason why the matter should not be referred to arbitration in accordance wit the agreement. He said Acres acted as the defendant's agents and supervised the job. The plaintiff was genuinely doubtful about the impartiality of Acres.That was why the plaintiff offered cooperation and pleaded for an independent arbitrator to settle the dispute. The defendant never anticipated arbitration in any of the correspondence except in one case where it threw the burden of applying for it upon the plaintiff insisting that Acres should first make the decision even though a dispute had occurred and the defendant itself was in a better position to invoke the arbitration clause. The defendant never took this initial step. Most clauses were designed to favour the defendant and no reasonable court would place much reliance to them to stay proceedings with a view to sending the matter to arbitration. This was not a proper case for the court to exercise its discretion in favour of the defendant.

On this aspect of the matter it must be remembered that the defendant itself terminated the contract.

Thus the learned judge refused the defendant's application for stay on three (3) grounds:

1. The defendant itself took no steps, it never intended and was not ready and willing to do all things necessary to refer the dispute to arbitration in accordance with the provisions of the agreement; and
2. There was sufficient reason why the matter should not be referred to arbitration; and
3. This was not a proper case to exercise the court's discretion in favour of the defendant.

On August 25, 1981, Acres wrote to the plaintiff stating that they were not satisfied with the rate of progress of the work as in their opinion, it would not ensure completion by the time prescribed for it, and failure to improve the satisfaction of Acres would be considered a default in the performance of the contract.

On December 10, 1981 the defendant wrote to the plaintiff. It referred to Acres' letter of August 25, and stated that as the plaintiff did not heed the warning sounded by the defendant's Consultants Acres, the plaintiff, in the defendant's judgment, was in default of the contract. In the circumstances the contract between it and the plaintiff was terminated. The plaintiff was required to stop all works on the project with immediate effect. The defendant further stated that it was calling the Performance Bond issued by the Insurance Company, which it did.

As the learned judge correctly pointed out, numerous letters followed between the parties thereafter with repeated offers of co-operation by the plaintiff to refer the dispute to an independent arbitrator. Nowhere in any of the letters addressed by the defendant to the plaintiff did the defendant suggest that the matter be referred to arbitration. The only reference to arbitration was continued in its letter of March 26, 1982 as follows:

> "Clause 4.57 of the contract lays down the procedure for resolving any disputes. Such disputes have to be referred to Acres initially for a decision in writing. If you do not wish to endeavour to resolve this matter in the manner set out above then you must submit the dispute to Acres in accordance with the provisions of the contract. We must make it clear that we are not waiving the arbitration provision in the contract."

If a party asked to refer the dispute pursuant to the arbitration provision in the contract, whether warned or not that proceedings will be instituted in court in default, merely replies that he does not waive the arbitration provision in the contract but takes no other action, then, if proceedings are instituted, he cannot be heard to say that he was and still is ready and willing to do all things necessary for the proper conduct of the arbitration in accordance with the provisions of the contract. He is not also entitled to an order to stay proceedings. In order to comply with the arbitration provision in the contract the steps necessary for a reference to arbitration must be set in motion by the party on his initiative or in response to an invitation by the other side. There should be, either way, some positive action taken which could lead to a reference to arbitration, so that, even though it may not actually take off the ground owing to refusal or non-action by the other party, the court is able to say that there was and is readiness and willingness to do all things necessary for the proper conduct of the arbitration; all this is one of the pre-requisites to an order for stay of proceedings. "the manner set out above" referred to in the letter was a demand for the plaintiff to agree certain calculations of the work done in manner dictated by the defendant.

The defendant was woken up into a remembrance of the arbitration provision in the contract by the plaintiff's advocates' letter dated February 25, 1982 written to the defendant, the pre-ultimate paragraph whereof read:

> "Our clients are prepared to abide by the Rules of Conciliation and Arbitration of the International Chamber of Commerce as provided in the contract if you can supply us with a copy of such Rules.
>
> If we do not hear from you within seven days from the date Hereof, we will assume that you do not intend to refer the matter To arbitration and in that event we will advise our clients to file The proceedings in the High Court, Kenya, and if you should make any application to stay the proceedings because you wish the matter to be referred to Arbitration we will ask for costs in opposing such application."

The plaintiff's advocates gave both a clear reminder and indication to the defendant that the plaintiff was prepared to go to arbitration, even blindly without having read the rules of Conciliation and Arbitration. The defendant was also warned that in default of agreement to go to arbitration proceedings will be files in the High Court; the defendant, however, neither showed any intention to do so, nor did it initiate arbitration proceedings as it may well have done itself for the arbitration clause states that either party (italics mine) may refer the dispute either to Acres or the International Chambers of Commerce. To that extent, perhaps this particular arbitration clause was different in a small way from the normal run or arbitration clauses in contracts, but that's what it provided. It was therefore unfair criticism by Mr LePelley to have told us while arguing the appeal that the learned judge was unreasonably of the view that the defendant should willy-nilly have itself set the arbitration proceedings in motion, and not "thrown the decision' upon the plaintiff, to refer the dispute to Acres. Add to it the learned judge's indisputable finding that Acres actually stood in for the defendant and it was futile to expect the plaintiff to refer the dispute to them in the circumstances, they having previously accused the plaintiff for being responsible for the delay in the completion of the project.

The learned judge was right in saying that it was futile to expect the plaintiff to refer the dispute to Acres; more so, when it is borne in mind that the plaintiff itself wrote to Acres on November 25, 1981 that it was

the plaintiff's opinion and observation that Acres were looking for scapegoats to cover up their shortcomings in the execution of their part of the contract, that the plaintiff laid the delays equally to Acres' lack of experience, and the rest of the allegations vis-à-vis the equipment, supervision and quality were pure fabrications which the plaintiff rejected forthwith.

Also add to it the defendant's immediate action in calling in the performance Bond. The defendant thereby arrogated to itself the assumed accuracy of its conduct beginning with the termination of the contract. On November 23, 1981 the defendant adopted the attitude that the Sphinx had spoken. It wrote to the plaintiff to say that copying to it the correspondence between the plaintiff and Acres no longer served any purpose. Well, perhaps it did not, the defendant, being Acres' principal, having adopted the attitude that it did.

When I pull in all the threads I must say that by all the foregoing the learned judge was saying that there was sufficient reason why the matter should not be referred to arbitration. In addition there was the plaintiff's claim for damages for defamation arising from the defendant's decision to call in the Performance Bond. This dispute did not fall within the scope of the agreement as it was not connected with the work to be done there under. It could not have been properly referred to arbitration, though a reference may be split up Kenya Oil Company Ltd v Abdul Sultan Jiwa Nathoo and Another CA 50 of 1977 (unreported).

In my opinion the learned judge was right in his reasons, and he exercised his discretion properly in refusing to stay the proceedings. The defendant had handcuffed, it has only itself to blame.

When the ruling was delivered the plaintiff's advocate, Mr Bhandari asked for costs for counsel - for himself and Mr Nowrojee. The record tells me that Mr Nowrojee appeared for the plaintiff on three occasions, and each time the hearing was adjourned by consent of the parties. Mr Bhandari and Mr Nowrojee never appeared together in court for the plaintiff. The defendant's advocate pointed out that there was no indication given of a leading counsel; that Mr Nowrojee merely assisted in the case and he was not present when the case was argued which was on November 10 and 11, 1982 when only Mr Bhandari appeared for the plaintiff, though the learned judge's note for that day reads" "Coram as before" which referred back to Mr Towrope's appearance on a previous occasion.

This was undoubtedly an inadvertent slip. Mr Bhandari himself appeared alone on that day and the following day and he alone argued the case on behalf of the plaintiff.

With respect the order giving costs for the two advocates was not justified. I would dismiss the appeal with costs but first amend the decree of the High Court by limiting the order for costs to one advocate only. I would not alter the order for costs of the appeal as the defendant has scored only a minor success.

As Kneller JA and Chesoni Ag JA agree, it is so ordered.

JUDGMENT OF CHESONI, AG J A

I have had the advantage of reading the judgment of my brother Madan JA in draft and I fully agree with him what is said therein.

The appellants brought the agreement between the parties to an end by their letter of December 10, 1981, which read:

> "By a letter dated August 25, 1981 our Consultants, M/s Acres International Limited drew your attention to the fact that the rate and standard at which you were executing the above contract was not satisfactory to both the consultants and ourselves. In the stated letter you were also warned that unless you improved on your performance the client might be compelled to terminate the contract.
>
> As you did not heed the warning sounded by our Consultants you are, in our judgment, in default on the contract. In the circumstances, therefore, we hereby notify you that in accordance with

Clause 4, 45, 1, 3 contract CC61000-01 between your company and ourselves is hereby terminated."

The appellants showed little, if any, respect for the contract which was the basis upon which either party or both could refer the settlement of disputes to arbitration. Termination of the contract was done with full knowledge of the provisions therein, including the one to go to arbitration, and which the appellants did not invoke, prior December 10, 1981. It is doubtful whether a party who has unilaterally repudiated a contract should be allowed to rely on it when he chooses to do so.

The disputes to be referred to arbitration were stated in Clause 4, 57, 1 and they were on:

1. interpretation of the contract or after the determination of a breach thereof; or
2. application of the contract or after the determination of a breach thereof.

It would appear termination of the contract or dispute over the quality of work or payment did not fall within the matters to be referred to arbitration.

Had it been otherwise the appellants would have gone to arbitration before terminating the contract.

M/s Acres were the appellants' Consultants and they had given the warning about the standard of work by the respondent which formed the ground for termination of the contract between the parties; the respondents were entitled, in the circumstances, to say that M/s Acres would not act impartially.

In my opinion the above three grounds are enough to justify the Learned Judge's finding that the matter should not be referred to arbitration in accordance with the provisions on the agreement.

It was not enough for the appellants to say that they were ready and willing to go to arbitration. They should have gone further and demonstrated their willingness and readiness to do so by taking active steps to refer the matter to arbitration for such reference was the duty of both parties. In the letter of February 5, 1981 by the respondents even after the contract had been terminated the appellants were given time to refer the disputes to arbitration, but they did nothing.

I would not say, in view of the foregoing reasons that the learned judge exercised his discretion wrongly. I would dismiss this appeal with costs on the lines suggested by Madan JA.

JUDGMENT OF KNELLER, J A

I agree with the judgment of Madan JA and the orders he proposes should follow it.

Dated and delivered at Nairobi this 21st day of November, 1983.

C.B MADAN

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

Z.R CHESONI

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR