IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA

CIVIL APPEAL NO. 53 OF 1981

BETWEEN

CONSTRUCTION ENGINEERING &

BUILDERS (KENYA) LTD.....APPELLANT

AND

MUNICIPAL COUNCIL OF KISUMU.....RESPONDENT

JUDGMENT

Potter JA This is an appeal from an Order of Scriven J made at Kisumu on May 28, 1981. On April 4, 1978, the appellant company (hereinafter called "the Contractor") entered into a contract (hereinafter called "the Contract") with the respondent (hereinafter called "the Employer") for the construction of water works for the Employer.

By Clause 63(1) of the Contract, the Employer was empowered in certain circumstances to expel the Contractor from the Site and the Works. The material part of the Clause is as follows:

> "63(1) … or if the Engineer shall certify in writing to the Employer that in his opinion the Contractor -
> …
> 9(d) is not executing the Works in accordance with the Contract or is persistently or flagrantly neglecting to carry out his obligations under the contract … then the Employer may after giving fourteen days notice in writing to the Contractor enter upon the Site and the Works and expel the Contractor therefrom without thereby avoiding the Contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract and may himself complete the Works or may employ any other contractor to complete the works and the Employer or such other contract may use for such completion so much of the Constructional Plant Temporary Works and materials which have been deemed to be reserved exclusively for the construction and completion of the Works under the provisions of the Contract as he or they may think proper and the Employer may at any time sell any of the said Constructional Plant Temporary Works and unused materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the Contract."

We have not seen the provision of the Contract defining "the Engineer", but we are informed that he is the Director of Water Development in the Ministry of Water Development.

The Employer invoked Clause 63(1) (d) by a notice to the Contractor dated March 6, 1981, having received from the office of the Director of Water Development a recommendation that the Employer should do so. The Employer took possession of the Site on April 22, 1981, having informed the Contractor by notice dated April 9 that it would do so.

By a letter dated May 8, 1981, the advocates for the Contractor made a final demand to the Employer for the payment of Kshs 209,494.78 allegedly due to the contractor under an Interim payment certificate issued by the Engineer. On May 14, the same advocate wrote to the Employer that they were not informed that the Employer had taken possession of the Site, and that under Clause 69 of the Contract, notice was given by the Contractor terminating the Contractor's employment under the Contract.

So far as material Clause 69 is as follows:

> "69. (1) In the event of the Employer -
> a. Failure to pay to the Contractor the amount due under any certificate of the Engineer within 30 days after the same shall have become due under the terms of the Contract … the Contractor shall be entitled without prejudice to any other rights or remedies to terminate the employment of the Contractor under the Contract by giving notice in writing to the Employer.
>
> 1. upon the giving of such notice the Contractor shall … with all reasonable despatch remove from the Site all Constructional Plant brought by him thereon."

On May 15, 1981, the Employer filed a plaint in Civil Case No 97 of 1981 in the High Court at Kisumu seeking, *inter alia*, a declaration that the Contractor had forfeited the Contract to the Employer, and an injunction to restrain the Contractor from removing any plant or materials from the work sites. In the affidavit sworn on its behalf in support of the application for an injunction, the Employer alleged that the Contractor had, upon receiving the Employer's notices of March 6 and April 9, 1981, surreptitiously and in breach of contract, begun to remove materials from the work sites, and that when the Employer did take possession of the sites it was found that the Contractor had removed considerable amounts of materials. It was also alleged that there was a danger that the Contractor would continue to remove materials from the sites unless restrained from doing so.

On May 21, Scriven J granted a temporary injunction. On May 28, 1981, Scriven J heard the advocates for the Employer and the Contractors on the Employer's chamber summons for the injunction, and on the Contractor's Notice of Motion under Section 6 of the Arbitration Act (Cap 49) for the stay of the proceedings in the suit.

The Contractors relied upon the provisions of Clause 67 of the Contract providing for the settlement of the dispute by arbitration. Nothing turns on the precise terms of this Clause. It provides for all disputes between the Employer or the Engineers and the Contractor to be referred to and settled by the Engineer in the first place. Either party may refer the Engineer's decision for final settlement under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

Scriven J made the following order:

> "(1) On Chamber Summons dated May 21, 1981 - Injunction continued until further order of this Court on plaintiff's continued undertaking through their advocates in damages.
> 1. On motion dated May 26, 1981 (in No 97 of 1981) - All further proceedings in this Suit Stayed (save for the purposes of application by either party relating to the injunction referred to me (1) above) pending reference of all matters in dispute pursuant to Clause 67 of the contract referred to in Clause 3 of the plaint to the Engineer and or Arbitrator and on defendants undertaking to pursue their remedies in that direction with all due despatch.
> 2. Liberty to both parties to apply. Costs in cause."

The Contractor appeals against the Order, and asks that the stay of proceedings be made unconditional, that the order for the injunction to be continued be discharged, and that the appellant should have the

costs of the suit below and of this appeal.

Mr Behan, who appeared for the appellant Contractor, submitted that the learned judge erred in continuing the injunction when the suit should have been terminated, and the costs of the suit should have been given to the appellant. He submitted that the discretion of the court to grant a stay of proceedings under Section 6 of the Arbitration Act can only be exercised either to stay the whole suit, or not to stay any part of it. For this proposition of law, Mr Behan cited no authority. I assume that Mr Behan was not aware of any authority, because if he were, it would it would have been his duty to assist the court by referring to it, whether it was favourable or unfavourable to his own case. Nevertheless, I am surprised that an advocate of Mr Behan's experience was not aware of any authority, because it is not difficult to find.

In *Ives and Barker v Willans* [1894] 2 Ch 478, the Court of Appeal dealt with a not dissimilar point and Lindley LJ at page 489 to 490, had this to say:

> "Then, the third point is this. It is said that the language of this section in the Arbitration Act, 1889, only gives power to stay the proceedings. The language is, "The Court, if satisfied that there is no sufficient reason why the matter should not be referred, may make an order to stay proceedings." It is said that in as much as you cannot refer the whole action there is no power to refer any part of it. It is all or none, and the case which was referred to of *Turnock v Sartoris* (1890) 43 Ch D 150, it is said, goes to support that view. Now, the matters which are to be referred under the 4th section are matters which are agreed to be referred and if matters which are agreed to be referred are mixed up in an action with matters not agreed to be referred there is no reason why the 4th section should not be applied to those matters which have been agreed to be referred, leaving the action to go on as to the other matters. But I quite see that if the matters agreed to be referred were not the main matters in dispute, but were of a subordinate and trifling nature and if the matters not agreed to be referred were the main matters in dispute, it would be very inconvenient, to say the least of it, to refer that small part and let the action go on as to the large part. That was the case in *Turnock v Sartoris*, but that is not the case here. The position is reversed. The great controversy is as to the matters which have been referred, and the matters which have not been referred are comparatively small, and I see no reason at all why those matters which have been referred should not be referred, and the action go on as to the rest, if it is found worthwhile to go on with it."

It should be noted that Section 4 of the Arbitration Act, 1889 (of the United Kingdom) and Section 6 of the Kenya Act, are in all material respects, in substantially the same terms.

And in *Bristol Corporation v John Aird & Co* [1913] AC 241, (HL (E)) Lord Parker of Waddington delivered himself of the following dictum, at page 261 to 262:

> "I do not think it is advisable that any doubt should be thrown upon what I personally know to be the practice of the Courts below, and in particular of the Chancery Division, with regard to exercising their discretion under the Arbitration Act. It is, I know, a common thing to stay an action as to one matter in dispute and at the same time to allow it to proceed as to another, notwithstanding that both matters are within the reference; and I think it is obviously a desirable course in many cases, for this reason, that very often the matters subject to the reference include both the question of the true construction of the instrument containing the submission, and also various matters of detail, and it may be of account. Everybody knows that with regard to the construction of an agreement it is absolutely useless to stay the action, stated; therefore it is more convenient on a question of construction to allow the action to proceed; and at the same time with regard to accounts and matters of detail to allow the arbitration to proceed."

That dictum of Lord Parker was applied by Plowman J in the more recent case of *Hyams v Docker* [1969] 1 Lloyd's LR 341 (Ch Div). In that case, the defendant vendor of a motor yacht sought a stay of proceedings under Section 4 of the Arbitration Act, 1950 on the ground that the matter had been referred to arbitration, in an action brought against him by the plaintiff purchaser. Section 4 of the Arbitration Act,

1950 is in all material respects in substantially the same terms as Section 6 of the Kenya Act.

A difficulty facing the judge in ordering a stay of the whole proceedings was that the arbitrator appointed by the relevant federation was unwilling to arbitrate on the construction of the contract, which was an issue raised in the statement of claim in the action. Having said, applying Lord Parker's dictum, that there was a great deal to be said for leaving the first part of the statement of claim, raising the issue of construction in the Chancery Division, and staying the action in respect of the remainder of the statement of claim, the judge decided that the first part of the statement of claim was not formulated in the way in which a pure question of construction would have been formulated if it had been intended to be a pure question of law and nothing else. For that reason the judge granted a stay in respect of the whole statement of claim, on an undertaking by the defendant forthwith to issue an originating summons in the Chancery Division raising the question of construction. The question of construction was then formulated before the court rose.

I have no doubt that the above decisions correctly reflect the law as it is in Kenya in relation to the judge's discretion to stay court proceedings where there is an arbitration agreement. In my view, Mr Behan's proposition is not sound, and the learned judge was permitted by law to grant a stay only as to part of the court proceedings. Mr Behan's memorandum of appeal does not contain any ground of appeal attacking the injunction on its merits. Indeed, I cannot find in the record any denial of the Contractor of the allegations made by the Employer in the plaint and by Mr Alloo in his affidavit, on which the application for an injunction was founded. Accordingly, in my view, the Contractor's appeal against the continuation of the injunction and the failure of the judge to terminate the whole suit must fail.

There was no cross-appeal. The only remaining ground that was argued on behalf of the appellant was that the judge erred in not ordering the Employer to pay the costs of the suit and of the application.

Rule 13 of the Arbitration Rules gives a judge a wide discretion as to costs on stay of proceedings, which is as follows:

> "13. If on hearing of the motion the court orders the proceedings to be stayed, it may direct by whom the costs in the action are to be borne, and may order the arbitrators or umpire to include in their award the taxed costs or such sum as the court may fix in lieu of taxed costs."

It is clear that the primary purpose of the suit was to obtain and maintain the injunction. In that the Employer has succeeded. As to the appellant's application for a stay, that was not apparently resisted by the Employer as regards any matters which could be referred to arbitration. Indeed, it is apparent to me that the main purpose of the application for a stay was to obtain a discharge of the injunction. In that, the appellant failed. In the circumstances, I do not think that the appellant Contractor can complain at the judge's ordering that the costs of the application be costs in cause.

I would dismiss this appeal and award the costs of the appeal to the respondent.

Law JA. I have had the advantage of reading in draft the judgment prepared by Potter JA with which I agree.

Mr Behan for the appellants submitted that whereas the court had a discretion whether or not to stay a suit, it had not discretion to order a partial stay. Mr Behan could cite no authority for this proposition. Potter JA has cited what Lord Parker had to say on the subject in *Bristol Corporation v John Aird and Co* [1913] AC 241. That authority was cited with approval and followed by this Court in *Kenya Oil Co Ltd v Rajwani* (Civil Appeal No 50 of 1977 unreported). I refer in particular to the following dictum of Madan JA:

> "The court may stay an action as to one matter and allow it at the same time to proceed as to another, even if both matters are within the reference."

It follows, in my opinion, that the learned judge was entitled to exercise his discretion in the way he did,

by staying only further proceedings in the suit. I see no reason to interfere with that exercise of discretion.

As Miller JA also agrees, it is ordered that this appeal be dismissed as proposed by Potter JA.

Miller JA. Upon considering the merits of this appeal and the arguments adduced, the following have influenced my judgment: By Section 77 subsections 9 & 10 and Section 84(1) of the Constitution, the parties have the right of resort to the High Court without prejudice to agreement for arbitration.

It has not been shown at any stage of the litigation, that the parties expressly contracted out of that statutory right, for all and whatever may be the nature and circumstances of dissention or complaint arising between them at the instance of either party to the contract of employment.

The nature and prayers of the Municipal Council's approach to the High Court by plaint and chamber summons when contrasted with the terms and scope of the written contractual agreement, amounted to this:

1. That the High Court do pronounce that the Council's actions of entering upon the works' Sites and terminating the appellant's contract of employment after due and agreed notice were appropriate and unquestionable (although subject to appeal) and
2. That despite agreement for arbitration an injunction be granted to restrain the appellant from further spiriting away materials from the Works' Sites which would result in irreparable financial damage.

The gist of the appeal is that the learned judge erred in later making an order for the stay "of all further proceedings in the suit" but ordering the continuation of the above injunction, when the appellant moved the court praying that the "suit and all subsequent proceeding" be stayed. Further, that the learned judge, having given due cognisance to the referring of matters in dispute to arbitration in his said order he "failed to appreciate that a stay of proceedings under Section 6 of the Arbitration Act implies a dismissal of the suit and consequently a termination of all interlocutory orders in respect of the suit."

The order of the High Court appealed against was a discretionary one. It clearly appears to me, that by his order, the learned judge intended to protect, and to keep intact, and the parties at arms length with respect thereto, a most vital aspect of the entire contract of works ie the wherewith by which the works per se may continue.

For my part, I would continue to interpret and apply our written laws and rules of procedure in close conformity, where appropriate, with Government policy geared to the welfare of *wananchi*.

At all events, and be it strictly by way of judicial notice or through avenues as to which I think that judges ought not to be insensible, the following come to mind:

a) the nature of the contract of works was obviously a matter of Government policy and for the benefit of *wananchi*.

b) Accusations against Municipal Councils for supposed maladministration of Government's policy schemes are frequent; even with respect to land within their jurisdiction.

c) further, it coincidentally happened, that at the very moment of the hearing of this appeal, the Kisumu Township was beset by defects in water supply even to the inconvenience of tourist hotels and certainly not to mention the areas for which Government's welfare intentions were to be effected by the Water Works in the case.

I would myself have made the same order as the learned judge of the High Court made, particularly in the light of the sworn and unchallenged averment on behalf of the respondent Council, that the materials for the performance of the contract and works had been and were being secretly filched away by the appellant.

My approach has been on principles attending that which I would term an appeal to the concurrent protective or supervisory authority of courts of law in the instant case, (in this case beginning in the High Court), and the reasonableness of the exercise of the learned judge's discretion on the facts and circumstances of this particular case. In the result, I am firmly of the view that this appeal be dismissed.

I have also had the benefit of reading the draft judgment of my brother Potter JA with which I agree and his proposed order as to costs.

Dated and delivered at Kisumu this 25th day of January, 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR