IN THE COURT OF APPEAL

AT MOMBASA

(Coram : Madan, Law & Miller JJA)

CIVIL APPEAL NO.23 OF 1979

BETWEEN

ESMAILIJI.....APPELLANT

AND

MISTRY SHAMJI LALJI & CO.....RESPONDENT

(Appeal from the High Court at Mombasa, Kneller J)

JUDGMENT

The appellant (employers) engaged the services of the respondent firm of building contractors (contractors) to construct for the employers a building for the agreed sum of Kshs 1,075,000 subject to the terms and conditions and under the directions of Mr V D Chhaniyara (architect) as stated in an agreement made between them dated January 15, 1976. The contractors sued the employers in the High Court for the recovery of Kshs 96,323 being the total of two certificates dated March 21, 1978 and October 5, 1978 issued by the architect for work done under the contract and for some extra work done by them also under the supervision of the architect. The employers after entering appearance and without taking any further steps in the action applied to the court, the application being supported by an affidavit sworn by their advocate, that all further proceedings in the action be stayed under section 6 of the Arbitration Act (cap 49) the employers and the contractors having appearing in the conditions published by the East African Institute of Architects in 1972 which were incorporated in the agreement between the parties. Clause 36(1) is as follows:

"(1) Provided that in any case 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 of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith … then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the President or the Vice President for the time being of the East African Institute of Architects."

The following matters were set out in the affidavit of the advocate as being the matters in dispute between the parties within the scope of clause 36:

(a) Whether or not the employers were indebted to the contractors in the sums claimed;

(b) Whether the employers were indebted to the contractors in respect of extra work;

(c) Whether or not the contractors were liable in damages (a) for late completion of the building (b) for defective work.

The advocate's affidavit made the further assertion that the employers had always been willing and were then also prepared to submit the matters in dispute to the decision of an arbitrator in terms of clause 36. Section 6 of the Arbitration Act says:

"6(1) If a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a person claiming through or under him, in respect of a matter agreed to be referred:

(a) Any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings; and

(b) That court, if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Kneller J refused the application for stay. The employers have appealed. Under section 6 it lies within the discretion of the court whether a stay of proceedings will be ordered. The following principles can be stated in the felicitous language of Mr Justice Brandon which I have culled from his judgment in *The "Eleftheria*," 1969 1 Lloyd's Law Rept 237 at page 242:

"The principles established by the authorities can, I think, be summarized as follows:

(1) the court is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case."

A mere balance of convenience is not enough (Kerr J in *Bulk Oil (Zug) AG v Trans-Asiatic Oil Ltd SA* (1973) l Lloyd's Law Rept 129 at page 136. It is one of the conditions precedent, the others being set out in my judgment in *Kenya Oil Company Limited v Abdul Sultan Jiwa Nathoo and another*, Civil Appeal 50 of 1977 (as yet unreported) before the court will exercise its discretion and make an order staying the proceedings that the applicant must satisfy the court not only he is, but also that he was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. Did the employers satisfy this condition precedent in this case. Let's see now.

The contractors held two certificates issued by the employers' own architect Mr Chhaniyara certifying that the total sum of Kshs 96,323 had become due and owing by the employers to the contractors who in accordance with the normal practice must have presented the two certificates to the employers for payment within the period which must have been provided in the agreement between the parties for payment of the same. Did the employers honour the certificates? No. Did the employers raise any objection to the certificates that they were incorrect or prematurely issued or why they would not honour them? No. Did the employers at that stage challenge the amount of the two certificates? No. Did the employers indicate that the architect had made a mistake in any way in issuing both or one of the two certificates? No. Did the employers in any way indicate at that stage that there was any kind of a dispute with the contractors entitling them to refuse or withhold payment and that such dispute was fit for reference to arbitration under the terms of the agreement between them? No. Did the employers at any time give a notice to the contractors to concur in the appointment or an arbitrator as required under Arbitration Clause 36? No. The employers remained unconcerned. Their inattention to the demand made upon them by the contractors was total. The contractors then took the next logical step by asking their advocates to address a letter of demand to the employers whose advocates replied on their behalf four

months after the date of the first certificate on July27, 1978 to say that if any proceedings were filed the same would be defended. The employers even at that stage did not require the matter to be referred to arbitration. Their attitude was more like “sue and be sued.”

Mr Jiwaji who argued the appeal on behalf of the employers before us conceded that his clients did not ask for the matter to be referred to arbitration. Also, his submission that because the parties knew they were bound by the arbitration clause the employers were not required to say that they wanted to go to arbitration is I think incorrect. Even so the employers had to satisfy the court, the onus as to which was upon them, that they were then and also at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. This they failed to do. Though aware of the arbitration clause there was no onus upon the contractors to suggest arbitration for no dispute existed so far as they were concerned.

The contractors filed their suit in the High Court. The employers entered appearance. Then, for the first time on January 10, 1979 the employers’ advocate referred to the already mentioned disputes which he swore in his affidavit existed between the parties. It is difficult to resist the impression that it was an afterthought which was being used as a delaying tactic. The employers obviously first thought of arbitration when the suit was filed against them. They had never before that dated referred to it or requested the contractors in writing to concur in the appointment of an arbitrator. Their own architect deponed in an affidavit that they had not objected to the issue of the two certificates, also that at no time did they intimate to him that they wished any dispute to be referred to arbitration. The employers’ assertion on January 10, 1979 that they were always willing to submit the matter in dispute to arbitration was contrary to the history of events and also negatived by their attitude which I have related. With respect, I agree with the learned judge that the proper moment in time to ask for the dispute and differences to be referred to arbitration, I would have said it was even earlier, was when there was a letter of demand and there was notice of the contractors’ intention to sue instead of merely saying that the employers would defend themselves in any proceedings taken against them.

The employers’ advocate deponed in his affidavit in support of the motion to stay the proceedings that the employers were always willing and were then also prepared to submit the matter in dispute to the decision of an arbitrator in terms of clause 36. How did he know? He did not say in his affidavit that this information had been imparted to him by the employers and he verily believed the same to be true, nor did he refer to any document from which such information could be inferred. What he said instead was:

“What I have stated above is true and derived from the file submitted to my firm by defendants (employers).”

The course taken by the events between the parties indicates that there was no mention of arbitration in the employers’ file. Apart from the question of the advocate’s competence to swear the affidavit it was insufficient for the purpose which it sought to serve. It would seem that what is required is an affidavit by the applicant himself as he is the only person who can depose as to his intention. Jessel MR *Piercy v Young*, 14 Ch Division (1880) 200 at page 209. Perhaps I am obsessively tidy, for this reason alone I would have refused the order for stay of the proceedings. The contractors successfully showed strong cause why the matter should not be referred to arbitration. This was not a proper case for granting a stay, and the refusal of stay was a proper exercise of the judge’s discretion. I would dismiss the appeal with costs. As Law and Miller JJA agree, it is so ordered.

Law JA. I agree with the judgment delivered by Madan JA.

I would only add one comment. In his order, the subject of this appeal, Kneller J said:

“To stay or not to stay: where does the onus lie? Law JA in the *Kenya Oil* case said it was on the party asking for it.”

With respect, that is not what I said. What I did say was, and I quote verbatim:

"… nor do I think that the respondents discharged the onus of proving that the matters in dispute fell within the terms of the agreement."

This accords with what Lord Selborne LC said in *Willesford v Watson* (1873) LR 8 Ch App 473, that the party moving for a stay has to show that the dispute is within a valid and subsisting arbitration clause. It is only when that has been achieved that the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay. In the *Kenya Oil* case that stage was never reached, as the party moving for a stay did not discharge the onus of showing that the matters in dispute fell within the arbitration clause, so that the onus never shifted. In this instant case, the onus did shift. The learned judge appreciated this. He correctly directed himself in law and did not in any way misapprehend the facts. His conclusion was as follows:

"I now exercise my discretion in favour of the respondent who, I find, has persuaded this court on the balance of probabilities (that) this dispute or these differences should not be stayed or go to arbitration."

That discretion was, in my opinion, exercised judicially and on the application of correct principles, and I see no reason for interfering with the exercise of that discretion.

I would dismiss this appeal, and I concur in the order proposed by Madan JA.

Miller JA. I have had the benefit of reading in draft the judgment of Madan JA in this appeal. I agree with it and the order he has proposed.

Dated and Delivered at Mombasa this 6th day of February 1980.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

I Certify that this is a true

copy of the original

DEPUTY REGISTRAR.