IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 147 OF 2019

BETWEEN

YOOSHIN ENGINEERINGCORPORATION.....APPELLANT

AND

AIA ARCHITECTS LTD.....RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Mombasa

(P.J. Otieno, J.) delivered on 23rd September 2019

in

H.C.C. Suit No. 36 of 2019.)

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JUDGMENT OF THE COURT

1. This appeal arises from the ruling of **P. J. Otieno, J.** delivered at Mombasa on 23rd September 2019. The ruling was in respect of two applications by the respondent and a preliminary objection by the appellant.

2. The factual background to the two applications and the preliminary objection is that sometime in 2012 the parties entered into an agreement to place a bid and tender with the Kenya Ports Authority for consultancy services for detailed designs, review and supervision of construction of the three berths and associated infrastructure for the proposed Lamu Port.

3. The tender was annexed by a letter dated 31st January 2013. In its pleadings before the trial court, the respondent stated that after the award of the tender the appellant sidelined the respondent from participation in the project; and the appellant coerced the respondent into signing a sub-consultancy agreement dated 18th August 2017 which changed the terms of the original agreement.

4. The respondent averred that according to the original tender agreement, it was entitled to ***Kshs.413,900,005*** amounting to **42%** of the award that was allocated to the local component, but as per the sub-consultancy agreement that it was coerced into signing much later, the appellant was to pay it only **Kshs.18,000,000**.

5. By a plaint dated 8th May 2013, the respondent stated, *inter alia*, that the sub-contract agreement was unlawful, fraudulent, a violation of the Constitution and the Public Procurement and Assets Disposal Act; that it had fulfilled its part of the contract by handing over to the appellant hard copies of the detailed designs for the buildings but the appellant had not paid it as per the award; that the appellant was coercing it to submit the soft copies of the designs of the project; that the appellant had issued it with a 7 days' notice for termination of the contract and was intent on engaging another firm in its place.

6. The respondent sought, *inter alia*, a declaration that the appellant had no capacity to terminate the contract between it and the Kenya Ports Authority; an order that it is entitled to retain the soft copies of the project designs until they are handed over to the Kenya Ports Authority upon completion of the construction and supervision of the work; payment of Kshs.413,900,005; a declaration that the sub-contract signed between the parties on 18th August 2017 is null and void *ab initio*; a declaration that the notice of termination of the contract dated 4th May 2019 is null and void; and an order that it continues to work on the project as per the tender award.

7. On 31st May 2019 the respondent filed an application seeking several orders, among them an order of injunction to restrain the appellant from conducting the works of design, construction and supervision of buildings and associated infrastructure of the Lamu Port by itself, its associates, employees or agents, or entering into any sub-consultancy agreement with any other person or company for the design and supervision of the said project pending hearing and determination of the suit.

8. In an earlier application filed on 8th May 2019, the respondent sought, *inter alia*, an order suspending the date of effect of the notice of termination of the contract issued by the appellant pending hearing and determination of the suit; an order to continue working on the project as per the terms of the tender award pending hearing and determination of the suit; and an order to continue holding on to the soft copies of the project designs pending hearing and determination of the suit.

9. On 24th May 2019 the appellant filed a Notice of Preliminary Objection to the respondent's suit and the application dated 8th May 2019 and prayed that the suit be "*struck off and/or stayed with costs to the Defendant/Respondent, on account of the following points of law:*

i. THAT this Honourable Court lacks the jurisdiction to hear and determine the matter;

ii. THAT the matter ought to be referred to arbitration in accordance with the contract entered between the parties; and

iii. THAT the suit is otherwise premature, bad in law, frivolous, vexatious and an abuse of the court process."

10. With the appellant's approval, the trial court directed that the two applications and the Preliminary Objection be heard together. Following a full hearing of the preliminary objection and the two applications, the learned judge held that there was an arbitration agreement as known to the law under the **Arbitration Act, 1995;** that the appellant had sought to terminate the agreement incorporating the arbitration clause, but the appellant had raised the preliminary objection four days after it entered appearance, contrary to ***section 6(1)*** of the ***Arbitration Act*** which provides as follows:-

"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."

11. The learned judge held:

"It is my finding that by the time the objection was filed the statutory time for insisting on the arbitration clause had passed and the defendant was thus deemed to have forfeited the right to insist on reference to arbitration, stay or lack of the court's jurisdiction to entertain the matter and to have it referred to arbitration."

12. Regarding the two applications, the learned judge held that the respondent had established proprietary interest in the tender that was well founded prior to execution of the sub-consultancy agreement. He therefore granted most of the injunctive prayers as sought in the two applications.

13. Being aggrieved by those orders, the appellant has preferred an appeal to this Court. The memorandum of appeal raises 17 grounds which basically fault the learned judge for dismissing the preliminary objection regarding the court's jurisdiction for the reason that it had not been filed at the time of entering appearance; and for granting the respondent the injunctive orders.

14. When the appeal came up for hearing, the parties relied on their written submissions, which were briefly highlighted by their respective advocates.

15. We begin with the issue of the trial court's jurisdiction in view of the arbitration clause. It is not disputed by the appellant that the memorandum of appearance was filed on 20th May 2019 and the Notice of Preliminary Objection filed 4 days later, on 24th May 2019. The appellant's contention is that it had not filed any statement of defence or otherwise acknowledged the claim before it raised the preliminary objection. The appellant further argued that ***Article 159(2)(c***) of the ***Constitution*** seeks to promote alternative dispute resolution and therefore the trial court ought to have interpreted the provisions of ***section 6(1)*** of the ***Arbitration Act*** in a manner that fortifies ***Article 159*** of the ***Constitution***. The Supreme Court's decision in **Geoffrey M. Asanyo & 3 Others v Attorney *General* *[2018] eKLR*** was cited in support of that submission.

16. The appellant's counsel further submitted that even in situations where jurisdiction of the court is objected to after entering appearance, the Court has sanctioned the referral of disputes to arbitration. This Court's decision in ***Adrec Limited v Nation Media Group Limited [2017] eKLR*** was cited. In that matter, the Court upheld the High Court's referral of a dispute to arbitration despite the fact that the application for referral to arbitration was made nine (9) days after entry of appearance.

17. Opposing the appeal, the respondent's counsel submitted that the trial court rightly held that the appellant had forfeited its right to apply for referral of the dispute to arbitration because, apart from its failure to file the necessary application at the time of entering appearance, the appellant had subsequent to the filing of the Notice of Preliminary Objection filed a replying affidavit dated 31st May 2019 and a further

replying affidavit dated 25th July 2019.

18. The respondent's counsel further submitted that although the appellant did not file any statement of defence, it had already taken other steps in the proceedings under the second limb of ***section 6(1)*** of the ***Arbitration Act*** by taking directions four days before filing the Notice of Preliminary Objection and thereafter filing the two replying affidavits. Counsel cited, *inter alia*, this Court's decision in ***Mount Kenya University v Step Holding (K) Ltd [2018] eKLR*** where the Court reiterated that an application seeking reference to arbitration must be filed simultaneously with the entry of appearance with no further procedural steps being taken thereafter.

19. The respondent's counsel further submitted that the Preliminary Objection as filed was defective and bad in law in that it introduces issues of facts and law in the same application. The appellant, having challenged the Court's jurisdiction in the same preliminary objection, had also asked the Court to find that the suit was premature, bad in law, frivolous, vexatious and an abuse of the court process and proceed to strike it out. That was tantamount to acknowledging that the court had jurisdiction.

20. Regarding applicability of ***Article 159(2) (d)*** of the ***Constitution***, the respondent's counsel submitted that failure to comply with the provisions of ***section 6(1)*** of the ***Arbitration Act*** is a fundamental issue of law, not a mere procedural technicality that can be cured under the cited Article of the Constitution. This Court's decision in ***Kakuta Maimai Hamisi v Peris Tobiko & 2 Others [2013] eKLR*** was cited in support of that submission.

21. For those reasons, we were urged to find that the High Court had jurisdiction to hear the application and grant the impugned orders.

22. We start with the issue of jurisdiction. The place of jurisdiction in legal proceedings and the necessity to deal with it at the earliest opportunity was well captured and immortalized in the oft-cited words of ***Nyarangi, J.A*** in ***Owners of the Motor Vessel "Lillian S" v Caltex Kenya Ltd [1989] KLR 1***.

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

23. Section 6(1) of the ***Arbitration Act*** mirrors the above quoted holding with regard to the timing of raising an objection to a court's jurisdiction to determine a matter, where a party argues that the proceedings are subject to an arbitration agreement. The section stipulates that such party should apply for stay of the proceedings "***not later than the time*** **when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought**."

24. How should a party move the court to stay proceedings under section 6(1) of the Act? Although the section does not expressly prescribe the mode of moving the court, we do not think that a Notice of Preliminary Objection is the ideal tool. In our view, such a party should file a formal application. ***Rule 2*** of the ***Arbitration Rules, 1997*** states that:

> **"Applications under sections 6 and 7 of the Act shall be made by summons in the suit."**

25. We must, however, point out that ***Order 51 rule 1*** of the ***Civil Procedure Rules, 2020*** requires that all applications to the court shall be by motion and shall be heard in open court unless the court directs otherwise. ***Rule 11*** of the ***Arbitration Rules, 1997*** states that as far as appropriate, the Civil Produce Rules shall apply to all proceedings under the Rules. That therefore implies that an application for stay of proceedings under section 6(1) of the Arbitration Act should be made by way of a notice of motion. ***Order 51 rule 4*** stipulates that every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

26. It may therefore be necessary to, not only state the grounds for seeking stay of the proceedings, but also have an affidavit sworn in support of the motion to which the arbitration agreement or clause shall be attached. That way a court will be able to determine whether indeed the alleged arbitration agreement actually exists, and if so, whether it is operative or not.

27. In the appeal before us, the appellant filed a Notice of Preliminary Objection on grounds as earlier stated. The appellant went beyond the scope of existence of an arbitration agreement as the basis for urging the court to find and hold that it had no jurisdiction to hear and determine the matter. The appellant also urged the trial court to find that the suit was bad in law, frivolous, vexatious and an abuse of the court process.

28. For the trial court to determine all the issues raised in the preliminary objection, it had to consider the substance and propriety of the suit. By so claiming, the appellant had submitted itself to the jurisdiction of the court and was estopped from challenging the same, having tasked the court with the responsibility of looking into the substance and merit of the claim to determine whether it was "*bad in law, frivolous, vexatious and an abuse of the court process*," which are not jurisdictional issues.

29. But that is not all. Apart from filing an inappropriate Notice of Preliminary Objection instead of a notice of motion, the appellant's attempt to challenge the trial court's jurisdiction was not made within the prescribed time under ***section 6(1)*** of the Act. An application for stay of legal proceedings under that rule should be made ***"not later than the time when that party enters appearance or otherwise acknowledges the*** **claim against which the stay of proceedings is sought."** (Our own emphasis)

30. The preliminary objection was raised four days after entry of appearance. This Court has severally held that the provisions of sections

6(1) of the Act must be construed strictly. In ***Mount Kenya University v Step up Holding (K) Ltd*** (supra), this Court held: -

> **"We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed."**

31. Similarly, in ***Charles Njogu Lofty v Bedovin Enterprises Ltd [2005] eKLR***, this Court affirmed the position taken by the trial court (***Githinji, J***.) (as he then was) who held that: -

> **"In my view, section 6(1) of the Arbitration Act, 1995, which (this) court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance."**

32. In our view, the preliminary objection was not only improperly worded but was also raised after entry of appearance, and the appellant having acquiesced the jurisdiction of the court.

33. The last issue for our consideration is whether in granting the injunctive orders the learned judge exercised his discretion judiciously. The principles that guide this Court in determining whether to interfere with the exercise of a trial judge's discretion were well stayed by ***Madan J.A.*** in ***United* India Insurance Company Limited v East African Underwriters Kenya Ltd *[1985] KLR 898*** where he stated: -

> **"The Court of Appeal will interfere with a discretionary decision of a judge appealed from where it is established that the judge,**
>
> **a. misapprehended himself in law,**
>
> **b. misapprehended the facts,**
>
> **c. took account of considerations of which he should not have taken account,**
>
> **d. failed to take account of considerations of which he should have taken account,**
>
> **e. his decision, albeit a discretionary one, is plainly wrong."**

34. The appellant's complaint is that the learned judge did not consider three principles that guide trial courts in applications for interlocutory injunctions as held in the *locus classicus* case of ***Giella v Cassman Brown & Co. Ltd [1973] E.A. 358***. The learned judge isolated only one principle, existence of a *prima facie* case. He did not consider the second principle, that is, whether irreparable loss was likely to be occasioned unless the orders sought were granted, the appellant submitted.

35. The appellant further submitted that since the respondent's claim was for Kshs.413,900,005, no irreparable loss could be suffered by the respondent if the injunctive orders were not granted. And even if the court were to consider the last principle, that is, balance of convenience, the same would tilt in favour of not granting the injunctive orders, considering the nature of the project that the parties were undertaking *vis-a-vis* the reliefs that were being sought.

36. The injunctive reliefs have the effect of stalling the Lamu Port construction, which is a LAPPSET Corridor Project, a Kenya Vision 2030 flagship project, the appellant's counsel submitted; adding that an injunction would have the effect of restraining third parties being the client (the Kenya Ports Authority) and the Contractor, (China Communications Construction Company Limited), who are not parties to the suit.

37. The respondent on the other hand submitted that apart from establishing existence of a *prima facie* case, it had also demonstrated that it would suffer irreparable loss if the injunctive orders were not issued. The respondent's contention was that the appellant had plagiarized the project designs and was using them for the construction and passing them off as its own by removing the respondent's logo and name from the designs. The respondent urged this Court to affirm the injunctive orders.

38. In the impugned ruling the learned judge in granting the injunctive orders delivered himself as follows: -

> **"24. Having perused and reviewed the material availed to Court by both sides, and having found that the subject tender awarded was premised on the joint bid by the two parties now in dispute and that the bid was necessitated by the requirement of the law under section 157(9) of the Public Procurement and Asset Disposal Act. That to this Court was the genesis and foundation of the relationship between the two parties. The need to comply with the law expressly brought out in the advert by the proponent of the project, the Kenya Ports Authority.**
>
> **25. Having so said, I do find that the plaintiff had an established proprietary interest in the tender well founded before the Sub-Consultancy Agreement dated 18/8/2017. With such interest, which I find were not side stepped by the sub-consultancy**

agreement, because nothing in the said sub-consultancy agreement purports so, I do find that there is a right of the plaintiff that stands to be infringed in total violation of the law which to this court established a prima facie case and thus invites, an injunction pending the hearing and determination of the suit. I thus grant the plaintiff orders in terms of prayer 3, 4 & 7 of the Notice of Motion dated 8/5/2019."

39. It is therefore indubitable that the learned judge did not consider the other principles for grant of an interlocutory injunction apart from the first one, *prima facie* case.

40. It is trite law that the principles in ***Giella v Cassman Brown*** case must be approached and applied sequentially. That means that in an application for interlocutory injunctive orders a court has to start with making a finding on the existence of a *prima facie* case, then proceed to determine whether the applicant stands to suffer irreparable loss if the orders sought are not granted; and if it is in doubt about the first two, then consider the application on a balance of convenience.

41. In **Nguruman Ltd v Jan Bonde Nielson & 2 Others** ***[2014] eKLR***, this Court held: -

"It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* ***[2001] Vol. 1 EA 86. If the applicant establishes a*** **prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case *is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

42. With due respect to the learned judge, this is exactly what the learned judge did. Without any consideration whether the respondent was likely to suffer irreparable damage unless the injunctive orders were granted, having determined that the respondent had a *prima facie* case, he proceeded to grant most of the injunctive orders sought.

43. In the plaint, the respondent's main prayer was for payment of Kshs.413,900,005 amounting to 42% of the contract sum. In its application dated 31st May 2019, the respondent sought *inter alia*, pending hearing and determination of the suit the appellant to deposit with the court Kshs.200,000,000 being security for the works of design and supervision; and also, outright payment of Kshs.53,085,830 being the balance of payment due to it for designs and disbursement for preparation of the designs.

44. On our own assessment, we do not think that the respondent stood to suffer irreparable loss unless the injunctive orders were granted, having quantified what was due and payable to it by the appellant.

45. Had the learned judge taken the above into consideration, we doubt whether he would have granted the orders he did.

46. Having come to this conclusion, we must set aside all the injunctive orders that were granted by the trial court, which we hereby do.

47. Since the appellant has partially succeeded in this appeal, we award one half of the costs of the appeal and in the High Court applications. We further direct that the pending suit in the High Court be heard and determined on priority basis.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR