



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & GITHINJI, J.J.A.)

CIVIL APPEAL NO. 325 OF 2000

BETWEEN

CHINA ROAD AND BRIDGE

CORPORATION (KENYA)..... APPELLANT

AND

D. M. K. CONSTRUCTION LIMITED..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Justice Onyango Otieno) dated 27th

January, 2000

in

H.C.C.C. NO. 256 OF 1999)

JUDGMENT OF THE COURT

This is an appeal from the ruling of Onyango Otieno J (as he then was) delivered on 27th January, 2000 by which the learned Judge allowed the respondent's application for review of his orders made on 7th April, 1999.

The appellant is a foreign entity incorporated in the Peoples' Republic of China and duly registered in Kenya under the Companies Act. It is one of the major building and civil engineers in the country. The respondent is a company incorporated in Kenya and also carries on the business of building and civil engineering contracts within the country.

By a plaint lodged in the High Court of Kenya at Milimani Commercial Courts the respondent sued the appellant for an alleged breach of Sub-Contract Agreement in respect of the construction of 26 kilometre road in length from 170 km upto 144 km towards Hola direction. The respondent pleaded, inter alia, as follows:

"5. Vide clause G(3) of the said Sub -Contract, the Defendant agreed to pay the Plaintiff such sums as would from time to time be certified, by the Engineer appointed by the Employer for that purpose, to be payable, such payment to be made within 75 days of such certification by the

Engineer, but not later than 14 days after the receipt of funds for that purpose by the Main Contractor.

6. Vide clause 60(4) of the Main Contract, it was expressly provide d that if a certificate, duly issued by the certifying authority aforesaid, remained unpaid beyond the aforesaid period, the Defendant would pay to the Plaintiff interest on the unpaid amount, for the period it remained outstanding, at the Commercial Bank Lending Rate prevailing during the period of default.

8. Further vide clause 12(a) & (b) of the Sub -Contract, it was specified that a Performance Bond and an Advance Payment Bond were to be provided by the Plaintiff, to the Defendant, prior to the commencement of the works.

11. Despite having been furnished with the Performance Bond, and the Advance Payment Bond, in December 1996, the Defendant in breach of the said Sub -Contract refused, failed or neglected to pay to the Defendant the entire Advance Payment in lump sum, but instead chose to erratically make piecemeal instalments, which action occasioned loss and damage to the Plaintiff”.

The respondent further averred that it having fully observed and fulfilled all the terms of the Sub-Contract the appellant, despite demands made and notice of intention to sue having been issued, has refused, failed or neglected to pay the sums demanded or to admit liability.

The respondent claimed against the appellant for losses and expenses incurred by it due to what it termed cumulative breaches of the Sub- Contract; Shs.4,970,614.30 being interest at Bank rates; Shs.2,917,205.35 in respect of Interim Certificate No. 2 together with interest; Shs.17,752,194/= loss of profit; general damages for breach of contract and a permanent injunction restraining the appellant or its servants and agents from making any recourse to the Performance Bond and the Advance Payment Bond.

The appellant duly entered appearance on 24th March, 1999, and on the same day applied by a Chamber Summons under **Sections 6(1)(a), (b)** and 2 of the Arbitration Act, 1995, **Rule 2** of the Arbitration Rules, 1997 and **Section 3A** of the Civil Procedure Act for stay of proceedings pending reference to arbitration in terms of an arbitration Clause contained in the contract between the parties. On 7th April, 1999, the learned Judge granted the orders sought and referred the suit H.C.C.C. No. 256 of 1999 , to arbitration.

However, on 23rd April, 1999, the appellant instituted two suits **H.C.C.C. No. 466 and 467 of 1999** , at Milimani Commercial Courts against **Stallion Insurance Company Ltd** (the Insurance Company) claiming various sums of money in respect of local and foreign portions guaranteed under the Performance Bond and Advance Payment Bond. By a Motion lodged on 23rd July, 1999, the respondent moved the superior court to review its orders made on 7th April, 1999, with a view to setting them aside on the ground that the appellant had, since obtaining the orders referring the dispute to arbitration, instituted two other suits which form the crux of the claim in H.C.C.C. No. 256 of 1999 and that by filing the said two suits the appellant had exhibited lack of **bona fides** as it cannot approbate and reprobate. But, the appellant contended that the two subsequent suits relate to contracts of suretyship between it and a third party, the Insurance Company, which contracts create their own obligations and causes of action independent of the dispute between the appellant and the respondent; and moreover, any orders obtained in H.C.C.C. No. 256 of 1999 cannot be enforced against the Insurance Company, the defendant in H.C.C.C. No. 466 and 467 of 1999. The appellant further averred that the two suits are based on Advance Payment Bond and Performance Bond which bonds do not contain any arbitration Clauses. The appellant also contended that the same bonds expressly waive the necessity of it demanding the debt from the respondent.

The learned Judge in a reserved ruling held:

“I find that as a result of the Respondent/Defendant in th is case having filed two cases H.C.C.C. No. 466 of 1999 and H.C.C.C. No. 467 of 1999 after the Ruling I made in which I stayed the proceedings in this case and referred this case to the arbitrator and these other two

cases seeking the reliefs which in this case the Plaintiff/Applicant was seeking Courts order to stop them from seeking, the Respondents have in effect, by conduct waived their rights to rely on the arbitration

clause in the sub -contract as to allow them to exploit the same right will mean their making recourse to the same performance bond and the same advance payment bond in the normal Courts of law while in this case the proceedings are stayed to await arbitration. In my humble opinion, that would be unfair and unjust”.

The learned Judge then concluded:

“I have no alternative, in the circumstances but to review my orders made on 7 th April, 1999. The same orders are hereby reviewed and it is now ordered that this case will proceed as normal in the Court of Law”.

Being aggrieved by that ruling, the appellant has preferred this appeal citing eight grounds of appeal the main grounds being that the learned Judge erred in failing to give effect to the mandatory provisions of **Section 6(1) (a) and (b)** of the Arbitration Act when he reviewed his decision to refer the dispute in H.C.C.C. No. 256 of 1999 to arbitration yet the appellant had satisfied all the conditions specified in the said Section; and, that the learned Judge ought to have found that the two latter suits were severable and had distinct causes of action and facts in issue from those in H.C.C.C. No. 256 of 1999.

In the ruling delivered on 7th April, 1999, the learned Judge was satisfied that there clearly existed a dispute between the parties to this appeal and that it was mandatory under the Sub-Contract and the main Contract to refer the dispute to arbitration and that is why he made the orders that he did. However, the main issue now before us is whether or not there were justifiable grounds for him to review those orders, or in other words, had the appellant reneged on arbitration so as to attract review?

We think that the act by the appellant of subsequently filing other suits can clearly be construed to mean that it was no longer ready and willing to do all things necessary to the proper conduct of the arbitration. The lodging of the suits can also be taken to mean that the appellant was no longer ready to perform its part of the agreement under the Sub-Contract and the contract regarding arbitration. In the circumstances, the learned Judge cannot be faulted in his decision which resulted in the suits being ordered to be heard and disposed of in Court. We would further agree with the learned Judge that it is not desirable to maintain two disparate tribunals (the Court and the Arbitrator) concurrently determining multiple suits with the same facts and the law. In this regard we adopt the holding in the case of **TAUNTON COLLINS VS. CROMIC & ANOTHER** [1964] 2 All E.R. 332 where it says:

“It was undesirable that there should be two proceedings before two different tribunals (The official referee and an arbitrator) who might e.g. reach inconsistent findings: accordingly there were special reasons for the exercise of the discretion refusing a stay of proceedings”.

Mr. Miller, for the appellant, has submitted before us as in the superior court that the suits H.C.C.C. No. 466 and 467 of 1999 concern different parties and relate only to the question of suretyship which in law is not bound by the decision in this case between the contractor and its employer. To support his argument Mr. Miller has referred us to the case of **EXPARTE YOUNG IN RE KITCHIN CA 669** where James L. J. says at page 670:

“The judgment in an action against a principal debtor is not binding on the surety, unless he is made a party to the action;

it is res inter alios acta”.

But, the reliefs sought in the two latter cases include an order to stop the appellant from having recourse to the Performance Bond and to the Advance Payment Bond moneys and a decision on them by the arbitrator may very well affect or contradict decisions by the Court in the latter suits and vice versa. In

our view, such a situation may not augur well to and may ridicule judicial process.

Mr. Miller further submitted that Performance Bonds are on a class of their own just as in the case of a confirmed letter of credit and the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes and only in exceptional cases would the courts interfere with the machinery of irrevocable obligations assumed by the Bank. He referred us to **R. D. HARBOTTLE (MERCANTILE) LTD AND ANOTHER VS. NATIONAL WESTMINSTER BANK LTD. & OTHERS** [1977] 2 All ER 862. Mr. Miller therefore defended the institution of the two latter suits arguing that they were separate from H.C.C.C. No. 256 of 1999 and the question of inconsistency would not arise. With respect, we do not see any relevance of this case to the matter now before us nor to the application before the superior court. We do not therefore propose to add any comment on the case by setting out submissions in detail as to do so would be inappropriate as the three suits are still pending hearing in the superior court.

Mr. Miller also argued that the learned Judge erred in holding that **Order 44** of the Civil Procedure Rules allows review on the basis of events occurring subsequent to the time when the order sought to be reviewed was made. He urged us to allow the appeal on this ground.

As we consider the arguments advanced by counsel appearing for both parties, it would be convenient to go back to the Notice of Motion seeking review of the ruling of 7th April, 1999. The Notice of Motion was stated to have been brought under **Order 44 Rule 1 and 2; Order 50 Rule 17** of the Civil Procedure and **Section 3A** of the Civil Procedure Act. Even if the application was not brought under the correct provisions of the law, that would not be fatal to the application in view of **Order L rule 12** of the Civil Procedure Rules which provides:

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be

stated, but no objection shall be made and no application shall be refused merely by reason of a failu re to comply with

this rule”.

That being the position, we are satisfied that although the appellant might have failed to state the correct provision of the law under which the application for review was made that omission was not by itself fatal to the application.

Since the appellant was generally asking for review, we take it that the application was properly made under **Order XLIV rule 1(1)** of the Civil Procedure rules which provides:

“1. (1) Any person considering himself aggrieved -

(a) by a decree or or der from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligenc e, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

In an application for review, an applicant has to show that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent

on the face of the record or any other sufficient reason. However, the respondent was not contending that there was discovery of new and important matter or evidence or that there was an error on the face of the record. It is clear from the record that the application was brought on the ground that there was sufficient reason to warrant review of the same orders. The learned Judge considered in detail the applicability of **Order XLIV rule 1(1)** aforesaid and found no impediment in hearing the application grounded on it.

We have carefully considered the background to this dispute leading to the ruling on application for review but we are unable to say that the learned Judge of the superior court can be faulted in allowing it. We reject the grounds of appeal.

In the circumstances, this appeal is dismissed with costs.

Dated and delivered at Nairobi this 9th day of July, 2004.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR