REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 276 OF 2009

TRIPLE EIGHT CONSTRUCTION (KENYA) LTD.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

RULING

1. The application before the court is a Chamber summons dated 7th July 2015 and filed in court on 16th July 2015 by the Plaintiff/Applicant. The application seeks to secure as the main order that this suit be referred to arbitration in accordance with clause 2 of the Form of Agreement dated 20th February, 2008, as read with clause 67.3 of FIDIC Conditions for Works of Civil Engineering Construction.

2. The application is premised on the grounds set out therein, and is supported by affidavit of **MARGARET NDERITU** sworn on 7th July 2015 with annextures thereto.

3. The brief history of the application is as follows. This suit was commenced by the Plaintiff on 3rd April, 2009 and the Defendant entered appearance and filed its defence and later on a counter claim. The matter has since been pending in this court. Since the year 2012 there have been activities on the matter. On 25th May 2012 the court allowed the parties to make any amendments to the pleadings and the Plaintiff amended the plaint, while the Defendant was given the leave to file a Further Amended Statement of Defence and Counter Claim. Pursuant to several mentions of the matter, parties, by 22nd January 2015 had pledged to conform with pre-trial directions within 30 days. The matter was to be mentioned on 2nd March 2015 for the purposes of confirming compliance with pre-trial directions and the fixing of the matter for hearing. That mention did not take place. The next activity in this matter is this application.

4. The Plaintiff's case for referral of this suit to arbitration is hinged on the delay of this matter, arising from which the Plaintiff claims that third parties with which the Plaintiff entered into various contracts are attempting to execute against the Plaintiff and causing unnecessary hardles, and that the continued pendency of this matter is likely to result in the involvement of more third parties claiming their lawful dues on account of their involvement in the Tender to the utter financial detriment of the Plaintiff. The Plaintiff's case now is that there exists a binding arbitration clause as per clause 2 of the Form of Agreement dated 2nd February 2008 as read with clause 67.3 of the FIDIC Condition of contract of works

of Civil Engineering Construction both of which stipulated the rights and obligations of the parties herein. The Plaintiff's case is that the instant suit relates to the non-payment of the Plaintiff's contractual fees by the Defendant which dispute squarely falls within the scope of the aforesaid arbitration clause and hence this application.

5. The Defendant opposed the application through the Replying Affidavits sworn by **GLORIA ROBI KHAFAFA**, the Senior Legal Officer, Ligation and Compliance of the Defendant. The Defendant's case is that the Plaintiff commenced this suit in 2009 and after the Defendant was served with summons, the Defendant entered appearance, filed a Further Re-Amended Statement of Defence and Counter-claim dated 7th December, 2009. The Defendant's case is that the Tender or contract the subject of this suit was a procurement governed by the Exchequer and Audit (Public Procurement) Regulations 2001, the Public Procurement and Disposal Regulation, 2006, and which make no provision for arbitration. The Defendant's case is that the Form of Agreement dated 20th February 2008 referred to at paragraph 8 of the Supporting Affidavit of **MARGARET NDERITU** is not executed by the Defendant and is not binding. In any event, the Defendant's case is that it is the Plaintiff who chose this court as the forum to adjudicate its claim and it is stopped from now seeking to forum shop by purporting to refer the matter to arbitration. The Defendant's case is that the matter has steadily progressed in this court and it is not the right time now to refer the matter to arbitration.

6. Parties filed submissions which were orally highlighted in court. I have carefully considered the application and submissions of the parties. In my view, the following are the issues for determination.

i. ***Whether there is an arbitration clause on the said Form of Agreement dated 20th February 2008, as read with clause 67.3 of the FIDIC Conditions of Contract for Works of Civil Engineering Construction.***

ii. ***Whether the Plaintiff can at this stage of proceedings seek to refer this matter to arbitration.***

7. To address the first issue, it is true, and the Plaintiff/Applicant concedes to this, that the said Form of Agreement dated 20th February 2008 is not executed by the Defendant. In fact the Defendant has totally denied that there is a binding contract pursuant to that Form of Agreement. This denial is despite the fact that payment has been made under that Form of Agreement and despite the fact that the parties have been guided under that Form of Agreement. I have looked at that Form of Agreement dated 20th February 2008. I have also considered clause No.67.3 of the FIDIC Conditions for Works of Civil Engineering Construction. I have found that those two documents do indeed contain arbitration clause under which this matter may be referred to arbitration. However, the Form of Agreement dated 20th February 2008 is not signed or executed by the Defendant. The Defendant can therefore pick and choose which clauses it recognizes as binding. The fact that there have been payments under the contract does not without full hearing on that issue and a finding thereon, make each and every clause under that Agreement binding upon the Defendant. It is important that such documents be properly executed by all parties in order to be found liability if any clause therein is abrogated. Since the Defendant has expressly denied the existence of the said contract, I am not able, except after a full hearing to establish the truth, to find that, the said contract is binding to enable me admit the said arbitration clauses. The finding of this court on the first issue is that the alleged arbitration clauses referred to in the said Agreement are not at this stage, binding upon the Defendant since the Defendant did not execute the said Agreement.

8. On the second issue, that is, whether the Plaintiff can at this stage of the proceedings in this matter seek to refer the matter to arbitration, the opinion of this court is that the Plaintiff had the liberty to come to court and seek interim measures of protection under Section 7 of the Arbitration Act, pending the

reference of this matter to arbitration. That it did not do. The Defendant then entered appearance and filed a defence, and later a Further Re-amended Statement of Defence and Counter- claim. The Defendant did not seek to refer the matter to arbitration. If it later occurred to the Plaintiff that it was necessary to refer the matter to arbitration, then the Plaintiff did not seek to do that within a reasonable time. I say so because the matter has been pending in this court since 2009. After a long drawn process, this court was due to fix this matter for hearing within 30 days of 22nd January 2015. That did not happen, and it is the Plaintiff who scuttled that event by filing this application. It must also be noted that the Plaintiff has substantially contributed to the delay of this matter, and was also largely responsible for the delay in completion of pre-trial directions herein. It is therefore a faulty reasoning on the part of the Plaintiff that they seek to transfer this matter to arbitration due to delay in hearing of this matter in this court. If the Plaintiff did not bring the current application, I am certain that a hearing dated for this suit would have been fixed in the year 2015. Any referral of this matter to arbitration will only delay the finalization of the matter. In any event, the application is not in my finding merited. In the case of **MARTIN OTIENO OKWACH & CHARLES ONGONDO WERE T/A VICTORIA CLEANING SERVICES VS. KENAY POST OFFICE SAVINGS BANK**[2014]eKLR the Court stated that;

"although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having duly filed its statement of defence in this matter…unless parties consent to have the matter referred to arbitration under Order 46 Rule 1 of the Civil Procedure Rules 2010, they were firmly stuck in the court system".

9. In **CHARLES NJOGU LOFTY VS. BEDOUUN ENTERPRISES LIMITED (2005)eKLR** the Court of Appeal held that section 6(1) of the Arbitration Act requires a party to seek stay of the Court process and have the matter referred to arbitration at the time of entering appearance where the agreement between the parties contain an arbitration clause. The Court stated;

"***The application for stay of proceedings and referral to arbitration was the one heard by Githinji, J. and as we have seen, he held that the application should have been made at the time of entering appearance, not long after appearance and filing of defence…in the circumstances of this case we have not the slightest doubt that the learned judge was right in refusing to refer the matter to arbitration…had the appellant been properly advised, the first suit would most likely have been referred to arbitration. But the appellant filed the application for referral to arbitration long after he had lost the right to make such request and Githinji, J. refused his application with the consequence that the superior court will have to determine whether or not the respondent breached the terms of the lease".***

10. I agree with the law as stated in the above case law. In the upshot, the application before the court must fail. I do herewith dismiss it with costs to the Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 4th DAY OF DECEMBER 2015.

E. K. O. OGOLA

JUDGE

PRESENT:

M/s. Ngonde for Plaintiff

Mr. Getanda h/b Wekesa for Defendant

Teresia - Court Clerk