IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Tunoi, Bosire & O'Kubasu JJ A)

CIVIL APPEAL NO 157 OF 2000

NIAZSONS (K) LIMITED …….. APPELLANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION (KENYA)…..…RESPONDENT

(Appeal from the r uling of the High Court of Kenya at Nairobi

(Justice Onyango Otieno) dated 15th April, 1999 in

HCCC No 126 of 1999)

JUDGMENTS

Bosire JA. Niazsons (K) Limited, the appellant, was sub-contracted by China Road & Bridge Corporation (Kenya), the respondent, to execute road works on a 52 km stretch of the Garsen-Hola Road at an agreed contract price of Kshs 473,665,086.10 and other mutually agreed terms which were reduced into writing. Among those terms is clause T, which provides thus:

"T Arbitration

(a) All disputes and differences in connection with this subcontract and with the execution thereof, shall be first settled between the contractor and subcontractor by friendly and amicable negotiation. If no settlement can thus be reached, the disputes and differences shall be submitted for arbitration.

(b) Either the contractor or the sub-contractor is plaintiff, the arbitration shall take place in Nairobi, Kenya, and be conducted by the Institute of Engineers of Kenya. The procedural law and rules for arbitration shall be the Arbitration Act, chapter 49 of the laws of Kenya. The appointed (sic) of arbitration shall be the Chairman of the Institute of Engineers of Kenya.

(c) The award or decision of the Institute of Engineers of Kenya shall be accepted as final and binding for both the contractor and the sub-contractor and neither the contractor nor the sub-contractor shall seek recourse to a law Court or other authorities to appeal for revision of the decision.

(d) All arbitration expenses shall be borne by the losing party."

The appellant as plaintiff in Nai High Court Civil Case No 126 of 1999, sued the respondent claiming various liquidated sums of money and damages for alleged breaches of the sub-contract aforesaid. In its plaint dated 8th February, 1999 the appellant has averred, *inter alia*, that it executed part of the contracted works whereupon certificates of satisfactory completion were duly issued. It was therefore entitled to payment for the same, but the respondent as the main contractor has failed or refused to make payment.

The respondent was served with summons to enter appearance and the plaint; it appeared, but it did not file a written statement of defence on the ground that doing so would disentitle them to a stay of proceedings under section 6 of the Arbitration Act, 1995. Instead it filed an application for orders that the proceedings in the suit be stayed with a direction that the parties submit themselves to arbitration in terms of clause T, of the subcontract, aforesaid. The application was initially expressed to be brought under section 6(1)(a) and (b) and 6(2) of the Arbitration Act cap 49 Laws of Kenya and order L rule (1) of the Civil Procedure Rules, but the application was later amended to read section 6(1)(a) and (b) and section 6(2) of the Arbitration Act 1995, rule 2 of the Arbitration Rules, 1997 and section 3A of the Civil Procedure Rules (sic) cap 21 Laws of Kenya.

At the hearing of the application the appellant through its counsel, Mr R Billing, raised a preliminary objection to it on three main grounds. First that clause T aforesaid is null and void because it relied on a repealed Act to wit the Arbitration Act, cap 49 Laws of Kenya. Second, that section 6 of the 1995 Arbitration Act unlike section 6 of the former Arbitration Act, which it repealed and replaced, does not bar a defendant in a suit from filing its pleadings. And because the respondent, on the mistaken belief that it did, was in default by failing to file its written statement of defence in the suit within the prescribed time or at all, the appellant was entitled to an *ex parte* judgment in default of defence. Third, that even assuming that the matters between the parties could be referred, there was no discernible dispute or difference which could be referred. Moreover, he further urged, the respondent by its conduct, was not ready and willing to submit to the arbitral process.

In answer to those submissions Mr Wena who appeared for Mr Miller for the respondent, as defendant in the suit, submitted on the authority of *Joab Henry Onyango Omino v Lalji Meghji Patel & Co Ltd* Civil Appeal No 119 of 1997, that in view of the pending application for stay of proceedings the appellant was not entitled to judgment in default of defence. Besides, he said, section 6 of the 1995 Arbitration Act, did not change or affect the parties' contractual obligations as the dispute between them arose after the repeal and replacement of section 6 of the Arbitration Act, cap 49 Laws of Kenya.

In *Joab Henry Onyango Omino v Lalji Meghji Patel & Co Ltd* (*supra*), this Court held, *inter alia*, thus:

".... the appellant made his application for stay of the proceedings in the superior court under section 6(1) of the Act as is outlined above. Having thus made that application, as long as the same remained, undetermined, its effect was to suspend the filing of defence by the appellant to the respondent's claim against him with the result that the default judgment entered against him cannot have been regular."

The respondent's case in the present appeal as in the case cited above is based on an arbitration agreement which was made under the repealed Arbitration Act, cap 49 Laws of Kenya.

Onyango Otieno, J who heard the matter did not agree with the appellant's counsel and consequently overruled the preliminary objection and thus provoked this appeal. There are twelve grounds of appeal, but considering what I propose to say later in this judgment I do not need to set them out here in full.

That is the more so because Mr Billing's submissions which I have already set out and which he rehashed at the hearing of the appeal, summarize the appellant's case.

Mr Cecil Miller appeared with Mr Wena for the respondent in the appeal. In his submissions Mr Miller stated that in view of the fact that the Arbitration Act, 1995, has no express provision for appeals, clause T, aforesaid, accords with the law. In the alternative, he submitted that the alleged offending parts of the said clause are severable without rendering the clause inoperative on the essential aspect of arbitration. In support of the latter submission he relied on the case of *Lee v The Showmen's Guild of G B* (1952) 2QB 329 (CA) which is in the appellant's list of authorities. Mr Miller also urged the view that the material before the trial court clearly showed the existence of a dispute or difference between the parties; and that all along the respondent has been ready and willing to submit to arbitration. It was his view, also, that section 6 of the current Arbitration Act like section 6 of the repealed Act, does not permit the taking of any step in the proceedings by a defendant who desires a stay of a suit pending a reference to arbitration. In his view, therefore, the appellant is not entitled to judgment in default of defence.

This is an interlocutory appeal. Both the suit and the application for stay of its proceedings are pending before the superior court. Much of the submissions by counsel on both sides relate to the merits or otherwise of the suit and the application. I am alive to the fact that as a court with only appellate jurisdiction, we cannot properly express any concluded view on any of the issues touching on the merits of the suit and the application as doing so will, in my view, infringe on the jurisdiction of the trial court, and may inhibit it in exercising its discretion in the matter. And yet that is what counsel on both sides appear to urge us to do. Their respective submissions which I adumbrated earlier are clearly on the merits or otherwise of the application for stay which as I stated earlier is still pending in the superior court.

The jurisdiction and powers of this Court are set out under section 3 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya. Sub-section (2) thereof enacts thus:

"For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."

As I stated earlier Onyango Otieno J heard the appellant's preliminary objection. In considering that objection he had three options. He could dismiss the objection, in which case he would thereafter proceed to hear the respondent's application for stay of proceedings. He could also decline to entertain it and proceed on to hear the stay application. He could also sustain the objection in which case he would strike out the application for stay. The first two options do not pose any problems. Suppose, instead of dismissing the preliminary objection, as he did, he upheld it, how would he proceed thereafter" Regardless of the merits of the respondent's case, Onyango Otieno J had no jurisdiction at that stage to consider the merits or otherwise of the respective cases of the appellant and the respondent.

The stage for doing so had not reached as the respondent had not and has not filed its written statement of defence. All he would properly do was to direct the respondent to file his defence and specify the time within which to do so. Consequently even assuming that Onyango Otieno J was wrong in dismissing the appellant's preliminary point our jurisdication only extends to vacating his order of dismissal of the preliminary point and substituting therefor an order either dismissing or striking out the application for stay of proceedings and directing the respondent to file its defence within a specified period. That is not however, the appellant's case.

As indicated earlier the appellant's case is that the learned judge of the superior court erred not only in

dismissing its preliminary objection but also in failing to find that the failure by the respondent to file a written statement of defence within fourteen days of entering appearance entitled it as plaintiff to an *ex parte* judgment in default of defence. By that contention which was also its counsel's submission, the appellant seems to suggest that section 6(1) of the Arbitration Act, 1995, permits parallel proceedings both before ordinary courts and a domestic tribunal. The policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved. If any authority is necessary, there is the clear enactment in section 6 of the Civil Procedure Act, which provides that:

"No court shall proceed with the trial of any suit or

proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

But the appellant cited section 6(2) of the Arbitration Act, 1995, as permitting concurrent proceedings both before the ordinary courts and before a domestic tribunal. The wording of that sub-section is in effect analogous to a reference of disputes to arbitration under order 45 of the Civil Procedure Rules. It does not at all contradict the provisions of section 6 of the Civil Procedure Act. It merely clarifies to the parties concerned that should they wish to resolve the matters in dispute between them before a domestic tribunal they should feel free to do so notwithstanding that a suit is pending in court and provided that the reference is made by consent. If they decide to do that, the proceedings before the Court must of necessity be stayed. It is therefore my view, and I so hold, that section 6(2) of the Arbitration Act, 1995, does not permit parallel proceedings to be handled simultaneously. Consequently, it was not open to the respondent to take out an application for stay of proceedings and at the same time file a written statement of defence. As stated in the *Joab Omino* case (*supra*) the bringing of an application for stay of proceedings under rule 6(1) of the Arbitration Act, 1995, the respondent's duty to file a written statement of defence was suspended.

Besides, default of defence as provided under order 9A rule 3 of the Civil Procedure Rules does not envisage a situation as exists in the present case. It envisages a case where a defendant is indolent. To deny a litigant as the respondent in the present appeal a chance to put forward a defence whether before the Court or before a private tribunal as the appellant seeks to do, more so in a case where the claim is enormous, will be tantamount to offending the *audi alteram partem* principle. The hearing it was accorded before Onyango Otieno, J and before us is merely a hearing on preliminary issues and not on the merits or otherwise of its case.

The respondent's case in the Court below is principally based on clause T. The main issue in the appeal hinges on the legality or otherwise of that clause. The appellant's main argument is that the said clause is against public policy to the extent that paragraph (c) thereof ousts the jurisdiction of the Courts to deal with any disputes between the parties arising from the sub-contract aforesaid. It cannot be gainsaid that in an appropriate case an offending part of a contract or a clause in a contract may be severed off if doing so will not alter the nature of the agreement or clause. In *Lee v The Showmen's Guild of Great Britain* (*supra*) Denning LJ remarked, in pertinent part, thus:

"If parties should seek, by agreement, to take the law out of the hands of the Courts and put it into the hands of a private tribunal, without any recourse at all to the Courts in case of error of law, then the agreement is to that extent contrary to public policy and void: see *Czarnikow & Co Ltd vs Roth Schmidt & Co* (1922) 2 KB 478, 488 ..." (emphasis supplied)

Whether or not severence is possible in a particular case is clearly a matter for the trial court as in some cases to come to a decision it might call for the examination of facts and evidence in general. Section 6(1) of the Arbitration Act, 1995, under which the respondent's application for stay of the appellant's suit was brought provides as follows:

"6(1) 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 files any pleadings or takes any other step in the proceedings, 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 infact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

Whether or not an arbitration clause or agreement is valid is a matter the Court seised of a suit in which a stay is sought is duty bound to decide. The aforequoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.

The superior court dealt, in part, with the issue regarding the validity of the arbitration agreement, and more specifically the question whether the repeal of the Arbitration Act, cap 49, Laws of Kenya, which was to govern the arbitral proceedings between the parties, rendered the arbitration agreement null and void. That Court did not however, deal with the issue the appellant's counsel raised in the appeal, namely, whether, in view of the fact that clause T (c) of the arbitration agreement, which *prima facie*, tends to oust the jurisdiction of the Courts, the agreement is not rendered invalid for being against public policy. This latter issue may not be decided here without prejudicing the pending application for stay in view of the wording of section 6(1) of the 1995 Act. The said section envisages that all the issues a court is called upon to consider before a decision are dealt with at the same time. A piecemeal approach to the application, I think, is inappropriate, expensive and may in some cases be prejudicial to either party.

I think that once an application under section 6(1) of the Arbitration Act, has been made it is incumbent upon the judge seised of the matter to deal with it as a whole, to discover whether any of the legal impediments set out in the section exist as to disentitle the applicant to a stay. Determination of some of the issues which were raised call for the examination of the evidence. It is for that reason that I think that the appellant should not have raised the three points it did, *in limine,* but should have made them part of its grounds for opposing a stay as the three grounds are an integral part of the issues the Court is obliged to consider and rule on in an application under that section. A finding as to whether or not there exists a dispute capable of being referred to arbitration cannot in my view be the subject matter of a preliminary objection. Likewise the finding one way or the other whether an arbitration agreement is inoperative or incapable of being performed also requires an examination of the evidence. It is my view that the learned judge erred in allowing the appellant to raise the three points *in limine.* That is the more so because on the authority of the case of *Mukisa Biscuit Co v West End Distributors* [1969] EA 696, a preliminary point raises purely points of law. Law JA observed at p 700 that:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or

which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit." And Newbold P at p 701, observed that:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues."

Having come to the foregoing conclusion, I eschew any attempt at expressing any view touching on the merits of the application. I also do not find it necessary to consider the various other authorities which were cited as they touch on the merits or otherwise of the application for stay. In the result, I would dismiss the appeal with costs to the respondent. I would not however certify costs for two counsel.

O'Kubasu JA. I have heard the advantage of reading in draft the judgment of Tumoi and Bosire JJ A. I agree with the reasoning and conclusion of Bosire JA more so since this is an interlocutory appeal and hence this court should confine itself to the issues limited to this appeal. Hence, I would dismiss the appeal with costs to the respondent.

Tunoi JA. Niazsons (K) limited, the appellant and the plaintiff in the suit, is a limited liability company incorporated in Kenya under the Companies Act Cap 486 Laws of Kenya. It caries on the business of civil engineers and contractors and as it is apparent from this litigation it specialises in road works. The respondent is a foreign entity incorporated in the Peoples' Republic of China and duly registered under the same Act. It is one of the major civil engineers in the country.

This is about the fourth time this matter is coming to this court, twice as an appeal and twice as an application so, the facts giving rise to the dispute are well known to us. The claim arises from a sub-contract agreement made between the parties in writing and dated 12th May, 1996, whereby the appellant undertook to execute road works of 52 kilometres stretch of the Garsen-Hola road from km 223 at Garsen upto km 171 towards Hola direction. The appellant avers that it having fully observed and fulfilled all the terms of the sub-contract the respondent despite demands made and notice of intention to sue having been issued, has failed, neglected or refused to pay the sums demanded or to admit liability. Therefore, on 8th February, 1999, the appellant filed a suit in the High Court of Kenya at Nairobi seeking judgment in respect of sums certified as payable to it by the respondent under a road-building contract and special damages in the sum of Shs 115,161,458/93 as well as a sum of Shs459,946,413/00 or such other sums as may be determined by the court. It also sought an injunction in respect of breach of the terms and conditions of sub-contract agreement.

The respondent entered appearance on 16th February, 1999, and on the same day applied by a notice of motion for stay of proceedings pending reference to arbitration in terms of an arbitration clause contained in the contract between the parties. The notice of motion was later amended to be a chamber summons.

When the application came for hearing before Onyango Otieno J Mr. Billing, for the appellant, raised a three pronged preliminary objection grounded mainly on the construction of clause T of the sub-contract agreement which refers to arbitration. The clause reads as follows:-

"T. Arbitration

(a) All disputes and differences in connection with this Sub-contract and with the execution thereof, shall be first settled between contractor and sub-contractor by friendly and amicable negotiation. If no settlement can thus be reached, the disputes and differences shall be submitted for arbitration

(b) Either the contractor or the sub-contractor is plaintiff, the arbitration shall take place in Nairobi, Kenya, and be conducted by the Institute of Engineers of Kenya. The procedural law and rules for arbitration shall be the Arbitration Act, Chapter 49 of the Laws of Kenya. The appointment of the arbitrator shall be by the Chairman of the Institute of Engineers of Kenya.

(c) The award or decision of the Institute of Engineers of Kenya shall be accepted as final and binding for both the contractor and the sub-contractor and neither the contractor or the sub-contractor shall seek recourse to a law court or other authorities to appeal for revision of the decision.

(d) All arbitration expenses shall be borne by the losing party."

Mr Billing submitted; firstly, that the respondent in filing the application seeking reference to arbitration it had taken steps in the proceedings and therefore under section 6(1) (a) of the Arbitration Act, 1995 (the Act) it was precluded from seeking a reference to arbitration; secondly, that there is no dispute to be referred to arbitration as the appellant had filed a request for judgment as no defence was lodged within the prescribed time; and, thirdly, that clause T aforesaid is null and void because it relied on a repealed Act.

Mr Wena, for the respondent, attacked the preliminary objection largely basing his arguments on the decision of *Joab Henry Onyango Omino v Lalji Meghji Patel & Co Ltd* Civil Appeal No 119 of 1997 (unreported) which held that: -

"When an application under section 6(1) of the Act is made by a party to arbitration agreement, it is incumbent upon the court to which such an application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement for if it does, then it is for the opposing party to show cause why effect should not be given to the agreement. Indeed, once parties to an agreement have chosen to determine their disputes or differences through a domestic forum other than resorting to the ordinary courts of law, that choice should not only be brushed aside."

Mr Wena submitted further that in view of the stay application the appellant was not entitled to judgment in default of defence. It mattered not that section 6 of the former Arbitration Act had been repealed. The learned judge in a reserved ruling overruled the preliminary objection and the appellant being dissatisfied has lodged this interlocutory appeal. When the appeal was called to hearing Mr. Billing sought leave to file supplementary record of appeal incorporating an amended memorandum of appeal. The newly introduced paragraph reads as follows:-

"9. The learned judge erred in failing to give interlocutory judgment in favour of the appellant against the respondent in the sum of Ksh 609,727,755.87 together with the interest thereon."

The new prayer is in the same terms. As Mr Miller did not oppose the supplementary record of appeal and the amendment, the same were duly admitted as part of the record of appeal.

On appeal before us, three main grounds of appeal were urged on behalf of the appellant. Its first and major contention is that clause T aforesaid is void in that it was an attempt to oust the jurisdiction of the court ie to prevent there being any appeal or application under the Act or to set aside the award. To support hid argument Mr Billing relied on the decision of this court in *Tononoka Steels Limited vs Eastern*

and Southern Africa Trade and Development Bank, Civil Appeal No 255 of 1998 (unreported) and he referred to the following passage in the judgment of Lakha JA :-

“It appears from this that the respondent in the instant appeal, the original defendant, instead of pleading as it did in paragraph 7 of the defence that the Kenya Court had no jurisdiction and that the suit accordingly should be dismissed for want of jurisdiction, should have made an application under section 6 of the Arbitration Act , 1995 for a stay of proceedings. No such application was made in this case. The respondent followed a wrong procedure and it is manifest from the record that section 6 of the Arbitration Act was not referred to by counsel and is not referred to by the learned trial judge in his ruling. Indeed, it was not mentioned in the arguments on this appeal, but being a matter of jurisdiction is clearly one which should now be taken. If an application had be made at the proper time under section 6 it seems probable that the Court would have been satisfied as to the requisite matters set out in the section and would have made an order staying the proceedings . As however, no such application was made, I am of the opinion that the order made should be quashed.”

Mr. Miller argued that clause T aforesaid offended no known provisions of law and did not in any way oust the jurisdiction of the court. Moreover, under section 35 of the Act, recourse to the High Court against arbitral awards has been provided; and, in any case, he averred, even if he was wrong the offending clause is severable from the rest of the clause without rendering the sub-contract inoperative on the aspect of arbitration.

The fundamental point which is being urged on behalf of the appellant is that such an agreement as contained in clause T aforesaid ousts the jurisdiction of the court and is therefore void. The respondent’s case, in effect, principally hinges on the said clause T.

Ordinarily, such an arbitration clauses simpliciter does not oust the jurisdiction of the court. But, if it purportedly attempts to do so, it would be contrary to public policy. In *Lee vs The Showmen’s Guild of Great Britain* [1952] 2QB 329 Romer LJ said

“ The courts jealously uphold and safeguard the *primafacie* privilege of every man to resort to them for determination and enforcement of his legal rights. As an example of this, it has been held that any attempt by a testator to divert from the courts the power of deciding questions of construction that may arise on his wills and vesting that power in his executors instead will fail... on the ground that they are contrary to public policy.”

Romer LJ also thought that it may well be that the same considerations of public policy would act as a fetter on attempts to oust the jurisdiction of the courts on questions of law by contractual consideration. It is discernible, therefore, as we said in the *Tononoka* case (*ibid*) that it is a well settled general rule recognised in the English courts that all agreements purporting to oust the jurisdiction of the courts are prohibited. The vital words which appear in the sub-contract clause (c) of the Arbitration clause state:

“...neither the contractor nor the sub-contractor shall seek recourse to a law court or other authorities to appeal for revision of the decision.”

These intrusive words which do not normally appear in an arbitration clause are clear and decisive. They evince, in my view, intention of the parties beyond doubt in agreeing not to resort to a court of law thus ousting its jurisdiction.

What is contended is this: the intrusive words referred to hereinabove unequivocally oust the jurisdiction of the court. The effect of clause T is to vest in the Institute of Engineers of Kenya the exclusive power of

interpreting the sub-contract between the appellant and the respondent who had contractually debarred themselves from resorting to the courts. I therefore, am persuaded by the contention and I have no hesitation in concluding that the clause seeks to oust the jurisdiction of the court. It is also my view that clause T is incapable of being severed from the rest of the clause and yet still leave intact the arbitration clause. The arbitration clause would be extinguished completely. If that is so, and I so hold, then there is ample authority of this court in the case of *Davis vs Mistry* [1973] EA 463 that the jurisdiction of the court can only be ousted by an Act of Parliament. As the clause, in my judgment, sought to oust the jurisdiction of the court, it is void and for that reason I would think that on that point the learned judge, with respect, was wrong.

Section 6(1) (a) and (b) of the Act, so far as relevant, reads:-

“6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall....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.”

The language of section 6(1) (a) and (b) upon which this appeal also largely turns, is different from that contained in section 6 of the repealed Arbitration Act, Cap 49. Having held, as I have, that the arbitration clause is void the court, in my view, ought to have refused a stay, therefore the learned judge was, with respect, in error.

Secondly, it was submitted by Mr Billing that there was not in fact a dispute between the parties with regard to the matters to be referred to arbitration and the court must therefore refuse a stay. He referred us to the certificates issued by the Engineer. I have carefully perused this certificates. It is manifestly clear that there is no identification of any dispute whatsoever arising from then nor is there any evidence as to the extent or value of any purported dispute. For example, the respondent does not challenge the validity or otherwise of certificates 2 b (which is certificate Number 21), 3 & 4 worth Shs 29, 134, 142/29 and certificate on VOP for Shs 8, 438,073/80. It appears to me, therefore, from a consideration of the available material on record that there is no evidence that the respondent:-

(a) Objected to the certificates;

(b) Disputed the certificates or any parts thereof entitling the respondent to withhold payment; or

(c) Relied on any mistake on the part of the engineer.

Moreover, there is no evidence on the material before this court that the respondent had invoked or relied on the arbitration clause before the suit was instituted. It is plain that if anything, the respondent in his affidavit sworn in support of its application for stay, deponed that it was only after the respondent was served with summons on 9th February, 1999, that it instructed its lawyers to set the arbitration process in motion. Most arbitration clauses usually start:

“*If any dispute or difference shall arise between the parties ... then the matter goes to arbitration.”*

The issue is what happens when there is no dispute between A and B, but B just declines to pay" This pertinent issue was adequately dealt with by the Earl of Halsbury LC in the House of Lords in the case of

London and North Western and Great Westerm Jointly Rly Cos vs J H Billington Ltd (1899) AC79 at 81 when he said:-

“That a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the County Court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to be absolutely untenable.”

If a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a screaming claim does not constitute nor raise a dispute see *The Law and Practice of Commercial Arbitration in England*, by Sir Mustill and Prof Boyd p 96.

It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a disputed calling an arbitration clause into operation. It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which an employer merely persists in not paying. As there was in my view no or any genuine dispute between the parties, a stay on the respondent’s application ought to have been rejected by the learned judge.

It was submitted by the respondent that the appellant was not ready or willing to invoke the arbitration clause upon a dispute having arisen. In other words, appellant must unequivocally elect to have the dispute decided by arbitration. But, in the instant case there is no evidence that the respondent proceeded to make any appointment of an arbitrator as provided for in the arbitration clause. It was only on 12th February, 1999, after the institution of the suit in court by the appellant, that the respondent made an appointment of two arbitrators. Such an appointment was invalid as it was contrary to the arbitration clause which provided that the appointer of arbitrators shall be the Chairman for the Institute of Engineers of Kenya.

Accordingly, the appointment made by the respondent was invalid and any award by such persons would also be invalid. There was, therefore, no valid appointment of any arbitrator under the clause when the application for stay was made. I think that willingness to arbitrate manifests itself, if the respondent does what is obliged to do in the arbitration eg make a valid appointments of the arbitrators in terms of the arbitration clause. When it does not do so at all, as here, can it then be said that the respondent was ready and willing for such an arbitration" With respect, the answer to this would, in my view, be in the negative.

The fact that an application for stay has been made, as in this case, does not mean that there is an automatic enlargement of time for filing the defence. As was said by Cockar, J (as he then was), in *LZ Engineering Construction Limited vs Municipal Council of Mombasa*, High Court Civil Case No 3986 of 1983, (unreported):

“Filing of an application for stay of proceedings does not automatically enlarge time for filing defence”.

With respect, I agree. There is no request for an enlargement of time for the filing of defence either without prejudice or in the event of the application for stay failing. In addition, there is no evidence to show that the respondent applied either to the appellant or to the court for filing one without prejudice or for an extension of time for the filing of the defence.

Nor does it appear that there is anything in the language of the summons to indicate that the respondent desired any time for the filing of the defence to be extended in the event of the application for stay being refused.

Finally, though this is an interlocutory appeal both parties have submitted on issues touching on all aspects of the suit and have actually asked and beseeched us to dispose of the appeal and the dispute between the parties conclusively. In the particular circumstances of this appeal and the case in its entirety, this court has power to do so and it cannot be said, in earnest, that it is infringing on the jurisdiction of the trial court. The appellant was entitled in law to have judgment entered for it when it made its request for it on 11th March, 1999, after the expiry of the time for filing defence on 3rd March, 1999, in terms of order VIII rule 1(2) of the Civil Procedure Rules.

Accordingly, I would allow this appeal with costs, set aside the order of the superior court given on 15th April, 1999, and enter interlocutory judgment in favour of the appellant against the respondent in the sum of Kshs 609,727,755.87 together with interest thereon. I would also order the respondent to pay to the appellant the costs in the superior court.

As the other members of the court are of a different view, the orders of the court shall be as proposed by them.

Dated and Delivered at Nairobi this 2nd day of March, 2001

P.K.TUNOI

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL