**China Road Bridge Corporation (Kenya) v DMK Construction Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Judgment:** 9 July 2004

**Case Number:** 325/00

**Before:** Omolo, Tunoi and Githinji JJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Arbitration – Reference – Party filing two suits after matter being referred to arbitration ready and*

*willing to do all things necessary for proper conduct of the arbitration – Whether desirable to maintain*

*two disparate tribunals – Section 6 – Arbitration Act of 1995.*

*[2] Civil procedure – Review – Sufficient reason to warrant review – Party obtaining order staying suit*

*pending arbitration – Party subsequently filing two suits about same subject matter – Whether order*

*staying suit pending arbitration may be reviewed – Order XLIV, rule 1(1) – Civil Procedure Rules.*

**Editor’s Summary** The respondent sued the appellant in the High Court for breach of a subcontract agreement in respect of the construction of a 26 kilometres road. The respondent claimed for general damages for breach of contract and a permanent injunction restraining the appellant from making recourse to a performance bond and an advance payment bond under the contract. The appellant entered appearance and filed an application under section 6(1)(*a*), (*b*) and (2) of the Arbitration Act seeking a stay of proceedings pending reference to arbitration in terms of an arbitration clause contained in the contract between the parties. The application was granted by the Court. However, subsequently thereafter, the appellant instituted two suits High Court civil case number 466 and 467 of 1999 against Stallion Insurance Company Limited (the Insurance Company) claiming various sums of money in respect of local and foreign portions guaranteed under the performance bond and advance payment bond. The respondent filed an application seeking review of the orders made staying the suit and referring the dispute to arbitration, on the ground that since obtaining the orders, the appellant had instituted two other suits which form the crux of the claim in the present suit and that by filing the said two suits the appellant had exhibited lack of *bona fides* as it cannot approbate and reprobate. The appellant contended that the two subsequent suits related to contracts of suretyship between it and a third party (the Insurance Company) and that the contracts created their own obligations and causes of action independent of the dispute between the appellant and the respondent. The Learned Judge held that by filing the two subsequent suits, the appellant had in effect by conduct waived their rights to rely on the arbitration clause in the subcontract as to allow them to exploit the same right would 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 were stayed to await arbitration. He found that it would be unfair and unjust to allow such a situation and proceeded to review his order staying the suit awaiting arbitration. The appellant was dissatisfied and appealed to the Court of Appeal.

**Held** – 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 for the proper conduct of the arbitration. It was not desirable to maintain two disparate tribunals (the Court and the arbitration) concurrently determining multiple suits with the same facts and law. *Collins v Cromic and another* [1964] 2 All ER 332 adopted. The Learned Judge did not err in allowing the respondent’s application for review. Appeal dismissed with costs. **Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Collins v Cromic and another* [1964] 2 All ER 332 – **A**

*R D Harbottle (Mercantile) Ltd and another v National Westminster Bank Ltd and others* [1977] 2 All

ER 862 – **C**

*Re Kitchin* CA 669 – **D**

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