

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCOM2018/0099

BETWEEN:

CONSTRUCTION & INDUSTRIAL EQUIPMENT LTD.

Claimant

and

NATIONAL INSURANCE CORPORATION

Defendant

Appearances:

Ms. Renee T. St. Rose for the Respondent/Claimant

Mr. Deale Lee and Mr. Callistus Vern Gill for the Applicant/Defendant

2019: June 19

2020: February 4, 20

JUDGMENT

- [1] **ACTIE, J.:** Before the court are two applications filed by the defendant. This first application filed on the 9th January 2019 seeks a declaration that the court has no jurisdiction to hear the claim at this time and/or that the Court should not exercise its jurisdiction to hear the claim. The second application filed on 13th February 2019, seeks an order for an extension of time for the filing of the first application filed on the 9th January 2019 and to deem the notice of application as properly filed. The applications are dismissed for the following reasons.

Factual Background

- [2] The claimant (CIE) and the defendant (NIC) entered into a written contract on 22nd April 2016 in which CIE undertook to execute works in connection with the Vieux Fort Administration Complex Project. NIC terminated the

contract effective 19th December 2016. On 19th August 2017, the Engineer issued a Final Payment Certificate certifying the amount payable to CIE to be in the sum of \$9,529,9 64.09. It was a term of the contract that NIC would pay CIE, among other things, the amount due under the Final Payment Certificate within 56 days of receipt.

- [3] By letter dated 13th October 2017, the Director of NIC wrote to the Engineer acknowledging receipt but stated that he was not in agreement and did not accept the final payment certificate. The letter alleged that the amount certified by the Engineer included work which did not form part of the contract and which would not have been approved by NIC as a variation thereby increasing the contract price.
- [4] By letter dated 8th November 2017, the Director of NIC wrote to the Managing Director of CIE requesting an urgent meeting for an amicable resolve in keeping with clause 20.5 of the contract. CIE failed to attend the conciliation meeting resulting in NIC issuing a notice of intended arbitration in a letter dated June 1, 2018.
- [5] On 6th December 2018, CIE filed a claim form and statement of claim against the "NIC" for the sum of \$10,126,827.30 together with interest and costs.
- [6] NIC filed an acknowledgment of service on 4th January 2019, together with a notice of application for a declaration that the Court has no jurisdiction to hear the claim and/or that the Court should not exercise its jurisdiction to hear the claim. On 13th February 2019, NIC filed a second application for an extension of time to deem the notice of application filed on 4th January as properly filed.
- [7] On the 23rd January 2019, CIE filed a notice of opposition stating that NIC had submitted to the court's jurisdiction and that there is no dispute to be determined by arbitration.

- [8] The court will consider the first application in keeping with the dicta of Barrow J. in **St. Kitts Nevis Anguilla National Bank Ltd. v Caribbean 6/49 Limited** where he states that It is proper procedure for applications to be dealt with in the order that they are filed.

The First Application

- [9] NIC's application disputing the court's jurisdiction is brought pursuant to rule 9.7 of the **Civil Procedure Rules** which provides:

- (1) "A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.
- (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
- (3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence."

- [10] In relation to the argument that there is a dispute to be referred to arbitration, NIC states that clause 20.6 of the contract provides that any dispute between the parties on a decision of the Engineer, which has not been made final is to be referred to arbitration. The applicant argues that under the terms of the contract the Arbitrator is given wide powers and jurisdiction as follows "**to open, review and revise any certificate, determination, instruction, opinion, decision or valuation of the Engineer relevant to the dispute**".¹

- [11] Counsel for the NIC contends that arbitration clause in general, except where it otherwise provides, allows an Arbitrator to disregard or in other words set aside a certificate and points to the court attention the reading from the text of **Hudson's Building and Engineering Contracts**.² Counsel NIC cites **Crestar Ltd v Carr**³, to further bolster his argument that the arbitration clause in this case empowers the Arbitrator to "open up, review and revise" any certificate

¹ Applicant's skeletal arguments filed 22nd March 2019 at sub-paragraph 8.1

² 11th Edition Vol at 788 sub-paragraph (a)

³ [1987] 37 B.L.R. 118

issued pursuant to the terms of the contract between the parties. Counsel posits that the Engineer's certificate is not final and binding.

- [12] Counsel in his submissions argues that the Court under section **7 of the Arbitration Act**⁴ may grant a stay where a matter is referred to arbitration. Counsel further states that in the instant case the matter has been referred to arbitration and the appointing authority has accepted the reference for the appointment of an arbitrator which would resolve all the matters in dispute between the parties more conveniently than before the Court. Counsel avers that if the Arbitrator concludes that the Engineer's decision is final and binding then it resolves the matter between the parties, or perhaps the decision would be able to be reviewed and the Arbitrator would determine what is due the respondent. On the other hand, the applicant states that if the court were to continue to hear the matter and determine that the decision was not final then it would be required to bind the parties to this contract and stay the matter pending a referral to arbitration.

- [13] In closing, Counsel states that the test outlined in **Hualon Corporation (M) SDN BHD v Marty Limited**⁵ and in the instant case warrants the grant of a stay and that the overriding objective of CPR 25.1(h) empowers the court to encourage parties to use appropriate alternative dispute resolution methods.

The Respondent's Arguments

- [14] CIE's arguments can be subsumed under two categories:
- i. That the applicant has submitted to the jurisdiction of the Court; and
 - ii. That there is no dispute for determination by arbitration.
- [15] Counsel for CIE states that under rule 9.7(5), the applicant after filing its acknowledge of service must file the application within the 28 days for filing of the defence. Where the acknowledgement of service is filed, but the application is not filed within the prescribed time then the Defendant is to be treated as having accepted the court's jurisdiction to try the claim. Further,

⁴ Cap 2.06 of the Revised Laws of Saint Lucia

⁵ BVIHC (COM) 2014/0090

counsel states that NIC did not apply for an extension of time to file its Defence.

[16] Counsel avers that NIC filed its notice of application on 9th January 2019, which is two days after the period for filing its defence. Counsel submits that the notice of application was therefore filed out of time and should be dismissed. In closing, counsel states that the NIC pursuant to rule 9.7(5) is to be treated as having accepted the court's jurisdiction to try the claim.

[17] In relation to the argument that there is no dispute for determination by arbitration, CIE states that sub clause 20.6 of the condition of contract for construction for buildings and engineering works states that "any dispute in respect of which the Engineer's decision has not become final and binding shall be finally settled by arbitration. Counsel states that CIE's claim before this Court is not a dispute contemplated by sub-clause 20.6 of the contract for resolution by arbitration as there is no dispute in respect of which the Engineer's certificate has not become final and binding. Further, counsel states that clause 14.7(c) of the contract provides that the NIC, as Employer, shall pay to CIE the Contractor, the amount certified in the final certificate within 56 days after receiving the final payment certificate. Counsel posits that there is no provision in the contract that provides for NIC to dispute the final certificate. CIE states that it has not submitted to the arbitration as it believes that there is no issue for determination by arbitration.

[18] The court will consider the first application in keeping with the dicta of Barrow J. in **St. Kitts Nevis Anguilla National Bank Ltd. v Caribbean 6/49 Limited** where he states that it is proper procedure for applications to be dealt with in the order that they are filed.

Issues

[19] The issues to be determined in the first application are:

- i. Whether the court has the jurisdiction to hear the claim;
- ii. Whether there is a dispute for determination by arbitration;
- iii. Whether the court should not exercise its jurisdiction and grant a stay.

Whether the court has the jurisdiction to hear the claim.

- [20] The dictum of Lord Collins in the Privy Council in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** ⁶ gives a clear exposition of the court's jurisdiction under rule 9.7 and states:

“Thus the provision in English CPR r.11(5) and EC CPR r.9.7(5) that a defendant who files an acknowledgment of service and does not make an application under the rule “is to be treated as having accepted that the court has jurisdiction to try the claim” is superfluous in the case of a defendant within the jurisdiction, *because there could never be any doubt that the court has jurisdiction over such a defendant.*”

- [21] The Board's decision is apposite to the case at bar as the applicant and the respondent are both entities that are incorporated and/or registered in Saint Lucia; both parties are ordinarily resident in Saint Lucia and carry out business in Saint Lucia. The subject matter of the dispute relates to construction work and/or services in Saint Lucia plus the contract was executed in Saint Lucia and the parties agreed that the applicable law to be the laws of Saint Lucia. In the circumstances there is no doubt that the court has jurisdiction to deal with matter, a point conceded by counsel for the NIC at the further hearing of the matter.
- [22] In the alternative, NIC's application is that the court should not exercise its jurisdiction on the following grounds:
- i. On the face of the claim form and statement of claim the claimant seeks payment of a final certificate of payment.
 - ii. That the filing of the claim form and statement of claim is premature as the defendant opted to exercise its right under clause 20.6 of the contract between the parties dated 22nd April 2016 to have the decision of the Engineer reflected in the final certificate of payment outlined in paragraphs 3 and 4 of the statement of claim referred to arbitration.

⁶ Ibid at page 17, paragraph 68

- iii. That the arbitration proceedings have not been concluded as the parties have been engaged in the process of selecting an Arbitrator.
- iv. The expectation is that the sole arbitrator will be appointed soon and the matter can be addressed and settled at arbitration obviating the need for the court to intervene.

[23] NIC's application for the stay is made pursuant to 9.7A. The simple response is that Rule 9.7A deals with the procedure for applying for a stay where the defendant is served out of the jurisdiction. This is inapplicable to the case at bar. It is also noted that the application was not made under the Court's case management powers pursuant to rule 26.1(2) (q). However, even though no application for a stay was filed whether under the Arbitration Act or under the courts case management powers, counsel for NIC in his skeletal arguments still requested a stay of proceedings and relied on the dicta in **Hualon Corporation (M) SDN BHD v Marty Limited**⁷ and alternatively under the court's inherent jurisdiction.

[24] The Court of Appeal in **Addari v Addari**⁸ in relation to an application for leave to appeal application states the court's inherent jurisdiction to stay proceedings is such a fundamental one that it will not normally be displaced by express powers to grant a stay. The Court has the inherent jurisdiction to grant a stay where the parties have agreed that their dispute should be referred to arbitration and the dispute is one contemplated under the arbitration clause.

Whether there is a dispute for determination by arbitration

[25] The issue to be determined is whether there is a dispute for arbitration. The applicant relies on Clause 20.6 of the contract as amended that provides ***"unless settled amicably, any dispute in respect of which the Engineer's decision has not become final and binding shall be settled by arbitration"*** (my emphasis underlined).

.....

⁷ BVIHC(COM)2014/0090

⁸ BVIHCVAP2005/002

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion, decision or valuation relevant to the dispute.

- [26] Webster JA (ag) in the Court of Appeal decision in **JENNY LINDSAY Dba JENNY LINDSAY & ASSOCIATES V SIMEON FLEMING**⁹ at Paragraph 35 states -

“Ousting the Court’s Jurisdiction

It is axiomatic that one of the main aims of arbitration, as with other forms of alternative dispute resolution, is to transfer the power to resolve disputes into the hands of the parties’ chosen representatives – arbitrators, mediators or experts.¹⁰ The courts have shown an increasing tendency to uphold the parties’ choice of alternative dispute resolution, especially arbitration. The courts have gone as far as to uphold arbitration agreements that oust the court’s statutory jurisdiction provided that the arbitrator has the power to grant the relief that is claimed.¹¹ ***The starting point is to determine whether the dispute falls under the arbitration clause.” (my emphasis)***

- [27] It is necessary to examine the entire contract in order to determine whether upon its true construction the dispute relating to the Final Payment Certificate issued by the Engineer falls within the open- up, review and revise power given to the arbitrator in Clause 20.6 of the contract.
- [28] Clause 15 of the contract provides the circumstances in which the employer (NIC) may terminate the contract. NIC terminated CIE’s pursuant to sub-clause 15.5 of the contract and for payment to be made pursuant to clause 19.6. Sub clause 19.6 deals with optional termination, payment and release. Upon such termination the Engineer is required to determine the value of the work done at the date of the termination and to issue a payment certificate.

⁹ AXAHCVP2015/0006

- [29] Clause 3.5 of the contracts provides for “determinations” made by the Engineer and reads:

“Determinations

Wherever these conditions provide that the Engineer shall proceed with this sub clause 3.5 to agree or determine any matter, the Engineer shall consult with each party in an endeavour to reach an agreement, if agreement is not achieved, the Engineer shall make a fair determination in accordance with the contract, taking due regard of all the circumstances. The Engineer shall give notice to both Parties of each agreement or determination with supporting documents. Each party shall give effect to the agreement or determination unless and until revised under clause 20 (claims, disputes and arbitration).”

- [30] The court notes the “determination” by the Engineer under clause 19.6 is not referable to sub clause 3.5 unlike, for instance, subclause 15.3. Sub-clause 15.3 states where a termination is made by the employer under clause 15.2, the Engineer shall proceed in accordance with Sub clause 3.5 to agree or determine the value of the works. The language in sub clause 15.5 under which NIC as employer terminated the services of CIE is totally different as it fails to provide for “determination” for payment subject to the sub clause 3.5 which takes any dispute arising to be settled under clause 20 (claims, disputes, arbitration). The court is of the view that any determination made by the Engineer under clause 19.6 becomes final and binding and is not subject to arbitration.

- [31] Further, the court notes that sub clause 14.11 of the contract deals with the Final Payment Certificate to be issued by Engineer for the value of the work done. Sub clause 14.11 provides a two-tier process where the contractor has provided its final statement for the Final Payment Certificate. The clause provides that where there is disagreement with the final statement issued by the contractor for the Final Payment Certificate, the Engineer may require further information from the parties. If, however following discussions, it becomes apparent that a dispute exists then the Engineer shall issue an interim payment certificate for the amounts agreed and the dispute is to be referred to clause 20.5. Clause 20.5 provides for the amicable settlement of disputes and if settled in my view would be binding for the purposes of the final payment certificate. Where the parties fail to settle the dispute amicably settle

their dispute, then sub clause 20.6 will be engaged for arbitration. Clause 14.11 also provides for the Engineer to make a fair determination of the final payment certificate should the contractor fails to submit the final statement of completion. Again, it is to be noted that the Engineer's "determination" is not referable to clause 3.5 to engage clause 20.

[32] I am of the view that NIC's argument that the Final Payment Certificate is not binding and therefore should be referred to arbitration does not comport with the procedure outlined in subclause 14.11 or 19.6. Also as indicated earlier, the "Engineer's determination" in clause 19.6 and/or 14.11 is not made referable to 3.5 so as to engage clause 20.

[33] It was the intention of the parties based on the wording "unless final and binding" was intended for disputes that were current and on-going during the construction works, determinations, decision or interim payments certificates. The intention behind this clause was to settle all on-going disputes at arbitration before the Engineer makes any final decision. Moreover, in interpreting the word "final" using a literal approach, I find that the clause could not have been envisaged for any decision that was rendered "final". Therefore, the moment the Engineer presented the final certificate the agreement to settle all disputes by arbitration became of no effect.

[34] NIC through one of its officers filed a supplemental affidavit dated 19th February 2019, which states the relief that the applicant is seeking from arbitration inter-alia as follows:

- i. Whether the said final certificate included work which did not form part of the Contract and which had not been approved by the applicant as a variation as required by sub-clause 3.1 of the applicable conditions.
- ii. Alternatively, whether the final certificate included work which did not form part of the Contract; increased the contract price and had not been approved by the applicant.

- [35] The contract granted the Engineer wide discretionary powers with respect to supervision, evaluation and progress of the works. Clause 3.1, as amended, provides for variations and/or adjustments of the contract. Variations to the work schedule were allowed within the limits which the parties themselves agreed under the contract. Any variation had to be determined by the Engineer after obtaining specific approval of the Project Manager, before taking action on proposed variation which would increase the actual value of the contract. The Engineer is also required to consult with the employer's representative before taking action on an application for final certificate in consultation with the Project Manager appointed under the contract. The clause further provides that whenever the Engineer exercises specified authority for which the Employers' approval is required, then, (for the purposes of the Contract) the Employer shall be deemed to have given approval.
- [36] Having regard to the strict terms of the contract it appears that NIC objections to the Final Payment Certificate are matters relating to the conduct or default of its own employees/agents who are third parties to the contract. The Engineer and Project Manager had the responsibility for the approval of variations and/or adjustments to the works carried by CIE under the contract. The employees/agent being third parties to the contract are not bound by the arbitration clause.
- [37] CIE's claim before the Court is for the payment of monies due and owing pursuant to a final certificate of payment. The resolution of the disputes now being raised between the parties to the contract and/or employees can all be determined by the the court rather than allowing a multiplicity of actions.
- [38] The court is also of the view that even if a stay was granted in these proceedings it will not necessarily resolve or determine the dispute between the parties as the applicant submits. I am of the view that this matter is best suited for the court who is empowered to open up and review the Final Payment Certificate and to deal with all other issues which may arise under the claim. A stay will not be appropriate ***"if the other proceedings will***

not even bind the parties to the action stayed, let alone resolve all the issues in the case to be stayed.” as stated in **Klöckner Holdings GmbH and another v Klöckner Beteiligungs GmbH¹²** . I therefore find that this court is best suited to deal with this matter justly and conveniently.

[39] The applicant in its skeletal arguments submitted that the Court will grant a stay of proceedings where the contract makes provision for arbitration and one of the parties has referred the matter to arbitration. The implication of this is that a stay is almost automatic once there is a provision and a referral for arbitration.

[40] I am of the view that a stay of proceedings is not an automatic mechanism as the applicant seeks to posture where there is a provision for arbitration and where there is a referral by a party to determine the dispute by arbitration. Even if there is no stay, the court will be able to exercise all its ordinary powers to decide the issues of fact and law which may be brought before it and to give effect to the rights and obligations of the parties under the contract.

[41] For the forgoing reasons NIC's application for a stay refused. The Court is best suited in the circumstances to deal with all the possible issues that may arise under this claim.

The Second Application

[42] Having concluded that the court is best suited to deal with the matter it then puts to rest the second application filed for the extension of time. However, for completeness I will deal with the application.

[43] The second notice of application is for an extension of time pursuant to rule 26.1 (2) (k) which states that the court may ***“extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed”*** .

¹² [2005] EWHC 1453 (Comm) at paragraph 21 (v)

- [44] NIC in its skeletal arguments filed 22nd January 2019 contends that the delay in filing its application for an order under rule 9.7(3) is minimal at it has promptly filed an application for an extension of time to file the notice of application. It submits that the court should grant the extension of time to ensure that disputes are to be determined in the forum that was agreed to by the parties.
- [45] In the alternative, NIC states that based on the authority of **Texan Managements Limited et al v Pacific Electric Wire & Cable Company Limited**¹³, a court can, at any time, grant an application for a stay and an application to decline to exercise its jurisdiction.
- [46] NIC's application for the extension of time and to deem the notice of application properly filed lists the following as the grounds of the applications:
- i. That the failure to comply was not intentional;
 - ii. That there is good reason for the failure in that the application by Vern Gill Chambers to be registered to use the Electronic Filing System of the court was delayed by the passage of the Christmas holidays and was only concluded after the intervention of the Court IT Administration the 3rd January 2019, allowing with the knowledge of Counsel for the Claimant for the filing of the Acknowledgment of Service on the 4th January 2019. The Notice of application was filed on Wednesday, following the weekend.
 - iii. There has been general compliance with the rules.
- [47] Counsel for CIE in her skeletal arguments in reply submits that while the court has a discretion to extend the time for compliance of any rule, where a party is seeking to vary the court's timetable after the date has passed such party must apply to the court under rule 27.8 (4). The said rule provides that where the application is made after the date for compliance with the rules, the party must apply for an extension of time and relief from sanctions. Counsel submits that

¹³ [2009] UKPC 46

the “sanction” for non-compliance in this instant case can be implied as that the party is to be treated as having accepted the court jurisdiction to try the claim. While that may be so, the Privy Council in **Texan Management Limited**¹⁴ stated that this is not conclusive as the court has the power to extend the time in which to file an application:

“.....A defendant served within the jurisdiction who has reasons for applying for a stay on forum conveniens grounds at that time should normally make the application under EC CPR r.9.7/English CPR Part 11. It is doubtful whether failure to make such an application in time means that the defendant has conclusively accepted that the court should exercise its jurisdiction, but that will not normally matter because the court has a power to extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed: EC CPR r.26.1(2)(k). It has been held that even though English CPR r. 11(5) (EC CPR r.9.7(5)) contains a provision deeming the defendant to have accepted the jurisdiction of the court, the court has power to extend the period in EC CPR r.9.7(3) retrospectively after the period for defence has expired: *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch), [2006] ILPr 129, at [46] (a case of service outside the jurisdiction).”

[48] I agree with counsel for CIE submission on the application and interpretation of the rule 27.8 (4) in this instant matter. I note that NIC’s notice of application does not include an application for relief from sanction, however, the grounds of the application were fashioned to suit an application for relief from sanction. The Court of Appeal in **Prudence Robinson v Sagicor General Insurance Inc.**¹⁵ stated as follows:

“[13] The third ground of appeal alleges that the judge erred by taking a piecemeal approach to CPR 27.8(4) and granting relief from sanction when a corresponding application for extension of time had never been made despite the passage of over four years.

[14] It appears to me that there is much force in this ground. As pointed out by Ms. Faisal, an application for extension of time should have been made alongside the application for relief from sanctions. This is so as the respondent was seeking to vary the dates given for complying with certain case management orders after the date given for compliance had expired. I agree. It is noteworthy that the judge himself

¹⁴ Ibid at page 19, paragraph 73

¹⁵ SLUHCVP2013/0009 at page 8, paragraph 13 to 15

recognised in his ruling that the Sagikor must now file an extension of time to file the witness summary.

- [15] Rule 27.8 deals with variation of case management timetable. Rule 27.8(3) provides that a party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date. Rule 27.8(4) states that a party who applies after that date must apply for (a) an extension of time; and (b) relief from any sanction to which the party has become subject under these Rules or any court order.”

- [49] The following **Civil Procedure Rules** are relevant in considering an application for an extension of time:

“Variation of case management timetable

27.8 (4) A party who applies after that date must apply for –

- (a) an extension of time; and
- (b) relief from any sanction to which the party has become subject under these Rules or any court order.

Relief from sanctions

26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

- (a) made promptly; and
 - (b) supported by evidence on affidavit.
- (2) The court may grant relief only if it is satisfied that –
- (a) the failure to comply was not intentional;
 - (b) there is a good explanation for the failure; and
 - (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
- (3) In considering whether to grant relief, the court must have regard to –
- (a) the effect which the granting of relief or not would have on each party;
 - (b) the interests of the administration of justice;
 - (c) whether the failure to comply has been or can be remedied within a reasonable time;
 - (d) whether the failure to comply was due to the party or the party’s legal practitioner; and
 - (e) whether the trial date or any likely trial date can still be met if relief is granted.
- (4) The court may not order the respondent to pay the applicant’s costs in relation to any application for relief unless exceptional circumstances are shown.”

- [50] Counsel for CIE submits that the Court must satisfy itself that the requirements of rule 26.8 are met before it considers whether to grant the relief. Also, counsel submits that NIC has not provided the court with a good explanation for the failure.
- [51] In considering rule 26.8, it is noted that NIC's notice of application for an extension of time was made on 13th February 2019, some 37 days after the time limit for the filing of a defence had expired. I am of the view that the application for an extension of time was not made promptly in accordance with rule 26.8 (1) (a).
- [52] NIC in its affidavit in support outlining its explanation for the late filing was due to the delay in the registration of the court's electronic filing system during the court's Christmas vacation. It is to be noted that NIC was registered on 3rd January 2019 and was able to file its acknowledgment of service on 4th January 2019. The notice of application could have been filed on 3rd January 2019 or before the 7th January 2019 deadline. The electronic filing system allows parties to file remotely without any time restriction or physical presence at the High Court. I am of the view that there was a lapse on the applicant's part whether inadvertently or otherwise and blame cannot be attributed to the delay in the registration court's electronic filing system.
- [53] Therefore, pursuant to rules 26.8(2) (a) and (b), I find that the applicant's failure to comply was not intentional, however, I do find that the applicant has not provided a good explanation for its failure to file its notice of application within the prescribed time as it had sufficient time after it was registered to file its application.
- [54] In considering rule 26.8 2 (c), I am of the view that the applicant has not generally complied with other rules. The applicant filed its acknowledgement of service on 4th January 2019, the deadline for filing being 20th December 2018. Also, as stated above, the applicant's application for an extension of time did not include an application for relief from sanction and was not made promptly.

The applicant's lack of compliance with rules is fatal to its application for an extension of time.

[55] Accordingly, for reasons advanced above, the notice of application filed 9th January 2019 for a declaration that the Court has no jurisdiction to hear the claim and/or that the Court should not exercise its jurisdiction to hear the claim is dismissed. The notice of application filed on 13th February 2019 for an extension of time to deem the notice of application for a declaration that the Court has no jurisdiction to hear the claim properly filed is dismissed.

[56] As indicated before the application was not made pursuant to the Arbitration act. The court have all the powers to apply the provisions of the contract to decide the multiplicity of issues of facts and law which may arise. The court will then determine the extent to which, if at all, either party was in breach of the contract and to determine what sums, if any, are due to be paid.

ORDER

[57] In summary and for the reasons advanced above, I make the following orders and directions:

- a. That the notice of application for an order that the Court has no jurisdiction to hear this claim and/or that this court should not exercise its jurisdiction to hear this claim is dismissed.
- b. That the notice of application for a declaration that the court has no jurisdiction at his time to hear claim be extended to deem the notice of application properly filed is dismissed.
- c. The applicant, NIC shall file and serve a defence within twenty- one (21) days from the date of delivery of this judgment.
- d. The respondent, CIE is at liberty to file and serve a reply to the defence 14 days after the date of service of the defence.
- e. By consent, costs are to be agreed.

[58] I thank all Counsel and the parties for their helpful submissions and patience in this matter.

**Agnes Actie
High Court Judge**

By the Court

Registrar