



AIA Architects Limited v Meru Investment and Development Corporation (Miscellaneous Civil Application E081 of 2024) [2024] KEHC 11418 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E081 OF 2024
EM MURIITHI, J
SEPTEMBER 26, 2024**

BETWEEN

AIA ARCHITECTS LIMITED CLAIMANT

AND

MERU INVESTMENT AND DEVELOPMENT CORPORATION RESPONDENT

RULING

1. By Originating Summons under certificate of urgency dated 13/6/2024 brought under Sections 12, 13, 14 & 19 of the *Arbitration Act* 1995, Rule 3 (1) of the *Arbitration Rules 1997*, Order 46 Rule 2 of the *Civil Procedure Rules* and all enabling provisions of the law, the Applicant seeks:
 1. That leave be granted for the Respondent/Applicant to institute this instant Application out of time.
 2. That pending the hearing and determination of this Application this Honorable Court be pleased to stay the proceedings between the parties herein in the Arbitral tribunal.
 3. That this Honorable Court be pleased to set aside the appointment of the sole Arbitrator Stanley Kebathi in the Arbitration matter between the parties.
 4. That leave be granted for the Respondent/Applicant to participate in the appointment of an independent and impartial Arbitral Tribunal.
 5. That in the alternative to prayer 3 herein above this Honorable court be pleased to appoint an independent and impartial arbitrator to hear and determine the dispute between the parties.
 6. That costs of this application be in the cause.



2. The application is supported by the grounds on the face of it and an affidavit sworn by Angelo Kiogora Gitonga, the acting Managing Director of the Applicant, on even date. He avers that vide an award dated 11/6/2013, the Claimant/Respondent was awarded Tender No. CGM/RFP/010/2014 for the provision of consultancy services for the design and construction supervision of a fifteen-storey office block building in Meru town, consequent to which the parties duly executed the Contract dated 20/11/2015. On 17/2/2023, the Respondent sued the Applicant before the Arbitral Tribunal seeking general damages for breach of Contract and Ksh. 147,462,894.50. The stalling of the project was occasioned by matters beyond the Applicant's control as the transfer of the property where the construction was to take place could not be effected. The Respondent, without their involvement and/or consent appointed one Stanley Kebathi as the sole Arbitrator to handle the dispute between the parties. He is advised by his advocates that parties ought to be afforded the opportunity to constitute an independent and impartial arbitral tribunal to guarantee a fair and just determination of the dispute. It is a constitutional right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body. The Applicant stands to suffer irreparable harm if an independent and impartial Arbitrator is not appointed for the hearing and determination of this matter.
3. The Respondent opposed the application vide a replying affidavit sworn by Gitobu Evans Kinyua, its Director on 26/2/2024. He urges that when the dispute from the consultancy engagement arose between the parties, he amicably tried to resolve it in accordance with Clause 7 of the Contract to no avail. When no meaningful progress was imminent, the Respondent instructed the firm of M'Limbiine & Mungai Advocates to demand the settlement of the outstanding sum on account of professional consultancy fees. That demand of 18/1/2021 precipitated no response and the Claimant/Respondent, vide a letter dated 16/2/2021 invoked Clause 7.2 of the Contract notifying the Applicant of the intended arbitral proceedings.
4. In its response dated 23/2/2021, the Applicant indicated that the matter was under discussion between the Respondent and the relevant department of the County Government of Meru. Unfortunately, there was no substantial progress with the talks held between the parties herein for more than a year, which necessitated the Respondent's Advocate to issue the letter dated 11/5/2022 to the Applicant referring to the failed negotiations and advising that it was proceeding to institute arbitration proceedings in line with Clause 7.2 of the Contract. The Applicant remained mute on the issue of appointment of an arbitrator which prompted the Respondent's Advocate, vide the letter dated 27/5/2022 to request the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint the arbitrator herein, upon payment of the appointment fees of Ksh. 20,000.
5. It is noteworthy that the Applicant was copied in all the correspondences herein and it made no effort to challenge the appointment of the arbitrator within the prescribed timeline of 15 days as per Section 14 (2) of the *Arbitration Act*. The Applicant, through its Advocate Isaac Kazungu of Okubasu Munene & Kazungu Advocates confirmed that it had consented to the appointment of Mr. Stanley Kebathi as the sole arbitrator at the Preliminary meeting of the arbitral proceedings held on 6/12/2022. The Respondent proposed possible arbitrators, save for the arbitrator herein to hear and determine this dispute vide its letter of 11/5/2022 addressed to the Applicant, which clearly shows that the Applicant fully participated in the arbitral proceedings. He terms the application as an afterthought filed without following the provisions of the Act in order to prevent the Respondent from having a fair and reasonable opportunity to present its case.
6. The counsel for the parties urged orally in court their respective positions on application based on the affidavit evidence and a ruling was reserved.



Analysis and Determination

7. The singular issue for determination is whether the appointment of the sole Arbitrator, Stanley Kebathi was done in strict adherence to the law.
8. It is a hallowed principle in law that the duty of the court is purely to enforce contracts between parties. The courts have no business re-writing contracts for parties. The Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR quoted with approval the persuasive case of *Housing Finance Co. of Kenya Ltd v Njuguna LLR No.1176* where the court (John Mwera J retired) held that:-

“Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract.”

9. The dispute herein emanates from the consultancy Contract voluntarily entered into and duly executed by the parties herein on 20/11/2015. The Contract is thus binding on the parties. Clause 7.1 of the said Contract provides for amicable settlement of disputes as follows; “The parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or its interpretation.”
10. Clause 7.2 of the said Contract provides for dispute settlement as follows; “Any dispute between the parties as to matters arising pursuant to this Contract that cannot be settled amicably within thirty (30) days after receipt by one party of the other party’s request for such amicable settlement may be referred by either party to the arbitration and final decision of an Arbitrator to be agreed between the parties. Failing an agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman of the Chartered Institute of Arbitrators, on the request of the applying party. The arbitration shall take place at a location as determined by the said rules. If arbitration fails or fails to produce a result agreeable by all parties, the dispute shall be settled by the Court of Jurisdiction in Kenya and under their rules for conciliation and Arbitration.”
11. A dispute ensued between the parties over non-payment of the professional consultancy fees, and a demand thereof was duly made by the Respondent vide the letters dated 18/1/2021 and 16/2/2021. In its response dated 23/2/2021, the Applicant indicated that; “The content of the matter has been noted and it is under discussion between your client (AIA) and the relevant department of the County government of Meru.”
12. When no amicable settlement of the dispute was forthcoming, the Respondent, as evidenced by the letters of 30/3/2021 and 11/5/2022 invoked Clause 7.2 of the Contract and invited the Applicant to meaningfully participate in the appointment of a sole arbitrator, in default of which the same would solely be undertaken by the Chairman of the Chartered Institute of Arbitrators. The Applicant was unperturbed and the Respondent’s letter of 27/5/2022 to the Chairman of the Chartered Institute of Arbitrators culminated in the appointment of Stanley Kebathi, as the sole Arbitrator.
13. The court finds that when negotiations between the parties herein hit a snag, the Respondent not only notified the Applicant of its intention to initiate arbitration process, but also invited it to participate



in appointment of the sole Arbitrator, failure to which the Chairman of the Chartered Institute of Arbitrators would unilaterally undertake the appointment.

14. The Applicant cannot thus be heard to say that it was not afforded the opportunity to participate in the appointment of the Sole Arbitrator, because it continually snubbed any opportunity to amicably settle the dispute and declined the invitation to submit any proposal on the appointment of an Arbitrator. Needless to state, the Arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators was not among those proposed by the Respondent.
15. It would antithetical to the very nature of arbitration proceedings, which should afford the parties a resolution of the dispute without unnecessary delay, to acceded to the request by the applicant for extension of time to file the application challenging appointment of the arbitrator. This court also entertains considerable doubt whether power exists for the court to extend time beyond the 14 days allowed for filing of the application under section 12(5) of the Arbitration Act, which provides that “Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.”. And the strict regime for the grant of extension under section 12 (6) that “The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time”, is clear indication of the need for a party to comply with, and the court uphold, the stipulation on timelines.
16. It is this court’s finding that the process culminating in the appointment of Stanley Kebathi as the sole Arbitrator herein was impeccable and beyond reproach. The Court does not find any basis upon which the provisions of sections 12, 13 and 14 of the Arbitration Act on the removal of an Arbitrator can be properly invoked.
17. The Court also considers that the Respondent/applicant is not without a remedy should the appointed arbitrator misconduct himself. There is the setting aside provisions of section 35 of the Arbitration Act, which, for instance, permits setting aside under Sub-section 2 (a) (iii) “the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case”! NO sufficient reason has been shown for the court’s interference even if it could, which is doubted, at the interlocutory stage while the arbitration proceedings are in full flight.

Orders

18. Accordingly, for the reasons set out above, this court finds that the application dated 13/6/2024 is without merit and it is dismissed.
 19. Each party will bear its costs.
 20. File closed.
- Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Kyengo for Respondent/Applicant.

Ms. Muruaki for the Claimant.

