



REPUBLIC OF KENYA



**Muthoka v Twiga Construction Limited (Commercial Arbitration Cause E075 of 2022)  
[2023] KEHC 18153 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18153 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E075 OF 2022**

**DAS MAJANJA, J**

**MAY 26, 2023**

**BETWEEN**

**PETER WAMBUA MUTHOKA ..... APPLICANT**

**AND**

**TWIGA CONSTRUCTION LIMITED ..... RESPONDENT**

**RULING**

1. On 7<sup>th</sup> November 2022, the Arbitral Tribunal (also “the Arbitrator”) delivered a ruling in respect of a challenge to its jurisdiction where it held that it had jurisdiction to determine the dispute (“the Ruling”). The Applicant is dissatisfied with the Ruling and now seeks to set it aside through the Notice of Motion dated 28<sup>th</sup> November 2022 made under section 17(6) of the *Arbitration Act*. The application is supported by Applicant’s affidavit sworn on 25<sup>th</sup> November 2022 and is opposed by the Respondent through the replying affidavit sworn by its director, Neelesh Hirani on 13<sup>th</sup> February 2023. The parties have also filed written submissions to supplement their arguments which together with the parties’ pleadings, I have considered in my analysis and determination below.

**Analysis and Determination**

2. It is common ground that the parties entered into a Joint Building Council of Kenya (JBC) form of contract dated 2<sup>nd</sup> October 2017 for the construction of a residential development at Muthaiga, Nairobi on Land Reference No. 214/728 (“the Contract”). It is also not in dispute that the Contract was mutually terminated by a Deed of Release and Discharge dated 7<sup>th</sup> September 2018 (“the Deed of Discharge”) and that there was a dispute with regards to the final account, which dispute was referred to arbitration at the instance of the Respondent.



3. The Applicant avers that the Deed of Discharge does not have an arbitration clause and that it did not import the arbitration clause under the Contract and as such, the Arbitrator has no jurisdiction to determine any dispute between the parties. He contends that the assumption of jurisdiction by the Arbitrator would be a serious breach of the law on party autonomy as the parties excluded the arbitration clause in the Deed of Discharge and that the Arbitrator and the court cannot re-write a contract between the parties by compelling the Applicant to resolve any dispute by an arbitral process. The Applicant maintains that a mutual termination of a contract terminates all mutual obligations of the parties.
4. On its part, the Respondent contends that while the mutual termination was to release/discharge the parties of further obligations from the Contract, it did not discharge the obligation of the parties to resolve any disputes that may have arisen from the Contract by arbitration. It points out that para. 3 (i) of the Deed of Discharge states that the provisions of the Deed of Discharge except those which are expressly stated in the Contract to survive its termination or which might otherwise have done so by implication, will terminate. Further and in addition to express provisions in the Deed of Discharge that clause 20.5 of the Contract will survive its termination, para. 1 (g) of the Deed of Discharge provides that payments to the Contractor after the Final Discharge would be in accordance with the Contract. Therefore, by dint of para. 1 (g) of the Deed of Discharge, clause 34 of the Contract, which lays out the procedure for payment and preparation of a final account, survived the termination of the Contract.
5. The Respondent therefore contends that the dispute before the Arbitrator is in respect of the final account which was subject to clause 34 of the Contract and that the Deed of Discharge did not lay out a procedure for payment and preparation of the final account. That since the dispute arose from a clause that was alive in the Contract, clause 45 of the Contract in respect of settlement of disputes was applicable by implication and that Clause 34.22 of the Contract was also recognized as the possible challenge of a final payment certificate before an arbitrator in accordance with clause 45 of the Contract.
6. In the Ruling, the Arbitrator rejected the Applicant's argument that when the Contract came to an end, then the arbitration agreement which formed part of the Contract also came to an end. The Arbitrator took the position that an arbitration clause is a collateral term in the Contract which relates to resolution of disputes and not performance and that the arbitration agreement may survive for the purpose of resolution of disputes arising under or in connection with the Contract. The Arbitrator found that the Deed of Discharge is not a 'stand-alone' contract and has a substantive nexus or connection with the Contract, with the parties' claims and counterclaims dependent on Clause 34 of the Contract. That the Deed of Discharge has its genesis in the Contract and is not a separate and subsequent contract on its own right and is therefore subject of the arbitration agreement in the Contract. The Arbitrator concluded that in light of the provisions of sub-clauses 45(1) and 45(2) of the Contract, Article 1(g) of the Deed of Discharge and sections 3, 4 and 17 of the *Arbitration Act*, the matter was properly before him.
7. It is not in dispute that under section 17(6) of the *Arbitration Act*, a party dissatisfied by the ruling of an arbitral tribunal that it has jurisdiction may apply to the court to determine the matter as the Applicant has done. This is an independent jurisdiction conferred on the court and the court is not bound by the findings of the arbitral tribunal. The question for resolution is whether the arbitration clause in the Contract survives the Deed of Settlement. This implicates the doctrine of separability which posits that an arbitration clause/agreement is separable from the main contract and therefore survives the main contract in the event of termination or invalidity. This is reflected in section 17(1) of the *Arbitration Act* which provides:



17. Competence of arbitral tribunal to rule on its jurisdiction
  - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to existence or validity of the arbitration agreement, and for that purpose –
    - (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
    - (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.
8. The Applicant is adamant that the separability doctrine is not applicable to the circumstances of this case. It cites the decision of Pall JA., in *Kenya National Trading Corporation Limited v Compania Mercantil Del Café SA* [1997] eKLR where the learned judge took the view that where a subsequent agreement does not contain an arbitration agreement, then one cannot invoke an arbitration clause that existed in the expired agreement. The Applicant adds that the court must be guided by the fundamental principle that the courts should not rewrite contracts for the parties or imply terms that were not part of the contract. He cites *Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki* [2018]eKLR and *Rufale v Uman Manufacturing Co.* [1918] LR 1KB 592 to support this proposition. The Respondent cites *Adopt A Light Limited v Magnate Ventures Limited and 3 Others* [2009]eKLR and *Elite Earthmovers Limited v Machakos County Government and Another* [2020] eKLR where the court upheld the doctrine of separability.
9. I take the position that whether the doctrine of separability applies depends of the circumstances of the case. After all, what the court is required to do is to give effect to the intention of the parties as expressed in the contract documents. Thus, whether the arbitration agreement survives termination and discharge in this case depends on a reading of the documents before the court.
10. Did the Deed of Discharge extinguish all provisions of the Contract as advanced by the Applicant? Definitely not. A reading of the Deed of Discharge reveals that it contained some saving provisions that kept the Contract alive including clause 1(g) which provides that “payments to the Contractor after the Final Discharge will be in accordance with the JBC Contract” and clause 3(i) which provides that “Upon Final Discharge: the provisions of the JBC Contract except any which are expressly stated in the JBC Contract or which might otherwise have done so by implication, will terminate. The surviving provisions will continue to full force and effect. For avoidance of doubt, sub-clause 20.5 of the Conditions of the Contract (forming part of the JBC Contract) shall survive the termination of the JBC Contract and shall also apply to this Deed.”
11. The dispute before the Arbitral Tribunal relates to payments due to the Respondent. These payments as stated above in the Deed of Discharge were to be done in accordance with the Contract. Clause 34 of the Contract deals with payment. Clause 34.22 anticipates that arbitration is available and it provides that, “Unless a written request to concur in the appointment of an Arbitrator shall have been given under Clause 45.0 of these conditions by either party before the final certificate has been issued, or within thirty days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of the contract (whether by arbitration under clause 45.0 of these conditions or otherwise) .....” This means that in a dispute as to payment, Clause 45.0, the arbitration clause is alive because it is contemplated directly by Clause 34 or by implication since it is provided for.
12. I therefore come to the conclusion that upon termination of the Contract, the arbitration agreement did not ipso facto come to an end. I hold that the parties in the Contract and the Deed of Settlement



had the intention to settle all their disputes by way of arbitration which has an independent existence and legal force separated from the Contract.

**Disposition**

13. The challenge to the Arbitral Tribunal lacks merit. The Applicant's Notice of Motion dated 28<sup>th</sup> November 2022 is dismissed with costs to the Respondent. The costs are assessed at Kshs. 70,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Gachuhi instructed by Kaplan and Stratton Advocates for the Applicant.

Mr Khizi instructed by Nyagah B. Kithinji and Company Advocates for the Respondent.

