



**Principal Secretary State Department of Infrastructure v Westbuild
General Contractors Limited & another (Civil Case E560 of 2021)
[2022] KEHC 44 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 44 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E560 OF 2021
DAS MAJANJA, J
JANUARY 31, 2022**

BETWEEN

**PRINCIPAL SECRETARY STATE DEPARTMENT OF
INFRASTRUCTURE PLAINTIFF**

AND

WESTBUILD GENERAL CONTRACTORS LIMITED 1ST DEFENDANT

ODHIAMBO ALUOCH 2ND DEFENDANT

RULING

1. The 1st Defendant was awarded two contracts by the Plaintiff to construct two roads; LOT1; Kyeni - Kathanjure- Karurumo Road and LOT2; Chuka - Kaanwa - Kareni Road. During the implementation of the contracts, a dispute arose between the Plaintiff and the 1st Defendant, which dispute was referred to arbitration by the 1st Defendant through its notice of 6th June 2019. The 2nd Defendant ("the Arbitrator") was appointed to resolve the Dispute. The Plaintiff filed its Statement of Claim dated 28th January 2020 while the Plaintiff filed its response to the Statement of Claim on 26th March 2020.
2. In the course of the proceedings, the 1st Defendant filed an application dated 30th July 2021 seeking to amend its Statement of Claim and file a supplementary List of Documents. The Plaintiff opposed it through its deposition sworn on 18th August 2021.
3. The Arbitrator invited submissions on the 1st Defendants application for amendment. The parties also framed the issues for the Arbitrator's determination as follows:
 - i. Whether the claimant's amendments seeks to introduce new and undeclared claims



- ii. Whether the claimant's amendments are in contravention of the consent between the parties
 - iii. Whether the application is barred by the doctrine of laches?
 - iv. Whether the separation of the claims in respect to the two contracts between the parties herein is warranted
 - v. Whether the Tribunal has the jurisdiction to grant the order sought.
4. After considering the parties' rival pleadings, submissions, and the issues for determination as framed by the parties, the Arbitrator, in his ruling dated 29th September 2021 held, inter alia, that the claims raised by the 1st Defendant had been submitted upon and counterclaimed by the Plaintiff and did not violate any known provision of the *Arbitration Act* or otherwise prejudice any party. That they did not contravene the agreement between the parties as the 1st Defendant's submissions had been filed and served as per the agreement of the parties and according to the order for directions issued by the Arbitrator and that the 1st Defendant was not guilty of laches as the disputes under various headings before the Arbitrator were those matters that the parties failed to settle under the dispute resolution clause hence the parties were allowed to make their submissions for determination by the Arbitrator. The Arbitrator further held that the separation of the two contracts was not warranted and the 1st Defendant would have to raise all the issues in the two contracts and address them as one to speed up the process and that the Arbitrator had the jurisdiction to hear and determine the dispute as submitted by the parties according to the laws of Kenya.
5. It is this decision by the Arbitrator that now forms the subject of the Plaintiff's Originating Summons dated 27th October 2021 and made, inter alia, under section 17(6) of the *Arbitration Act* and Rule 3 of the *Arbitration Rules, 1997*. The application is opposed by the 1st Defendant through the replying affidavit of its director, Wangu Mburu sworn on 23rd November 2021 and by the Arbitrator through his replying affidavit sworn on 22nd November 2021. The Plaintiff and the 1st Defendant have also filed written submissions in support of their respective positions.

The Application

6. The Plaintiff asks the court to determine whether the Arbitrator has jurisdiction to hear and determine the newly introduced claims by the 1st Defendant and whether these claims are properly before the Arbitrator and in compliance with the procedural requirements enshrined in the contract between the parties and the notice on arbitration of 6th June 2019. Therefore, the Plaintiff urges the court to issue orders that:
1. THE court does issue an order that the honourable arbitrator lacks jurisdiction to hear and determine newly introduced claims under the following headings;
 1. Extension of Time Claim
 2. Prolongation costs claims
 3. Application of Liquidated Damages
 4. Withheld Retention Money
 5. Payment of returned IPC's
 6. Unlawful Termination of the contract



7. Illegal recalling of Guarantees
 8. Supervisor's Representative competency
 9. Payment of Interest and Penalties
2. THE Court be pleased to make any further orders as it deems fit and just in the circumstances.
 3. THE Defendants / Respondents bear the Costs of this Suit.
7. The Plaintiff disputes the Arbitrator's jurisdiction to hear and determine the newly introduced heads of claims by the 1st Defendant as the notice of arbitration had only indicated two matters under dispute which had been contractually followed up by the 1st Defendant in accordance with Article 68 of the contract; testing of bitumen content and deductions of measured works in the Interim Payment Certificate.
 8. The Plaintiff avers that the newly introduced claims are premature because they do not comply with the provisions of dispute resolution provisions of the agreement therefore the Arbitrator lacks jurisdiction to hear and determine the dispute. Further, that the newly introduced claims offend Article 68 of the General Conditions for works and contract entered by the parties and the provisions of the Arbitration Act.

The 1st Defendant's Reply

9. The- 1st Defendant opposes the application on the ground that the Plaintiff did not raise the issue of the Arbitrator's jurisdiction to hear any issue in the proposed amended Statement of Claim and merely opposed the application for amendment on the basis of Article 68.2 of the subject contracts.
10. The 1st Defendant submits that the Arbitrator was never asked to determine whether or not he had jurisdiction to hear the amended Statement of Claim and that the same was also not raised once the amended Statement of Claim was filed and served upon the Plaintiff. The 1st Defendant holds that the Plaintiff's application is premature and incompetent as an appeal lodged to this court on the issue of jurisdiction can only be lodged after the issue has been raised and the Arbitrator has rendered a decision on the same. It maintains that the Arbitrator has jurisdiction to hear and determine its amended Statement of Claim.
11. The 1st Defendant's further submits that amendments may be allowed notwithstanding that its effect may add or substitute a new cause of action if the new cause of action arises out of the same facts as long as it determines the real question in controversy and avoids a multiplicity of suits. The 1st Defendant stresses that all the said claims are within the jurisdiction of the Arbitrator contrary to the averments in the Plaintiff's deposition.
12. As regards Article 68.1 of the contract, the 1st Defendant provides that parties should make all efforts to resolve issues amicably giving a maximum period of 120 days from the other party's request and that Article 68.2 provides that if the other party does not respond or fails to reach consensus then the process is considered to have failed and Article 68.4 allows a party to refer the dispute to an arbitral tribunal. The 1st Defendant states that it made all efforts to amicably settle the dispute to no avail and it was thus constrained to refer the matter to arbitration and that an aggrieved party under Article 63 of the contracts may claim for damages which may be general or liquidated.

The Arbitrator's Reply



13. The Arbitrator contends that the Plaintiff does not have a case against him and is only trying to delay the conclusion of the tribunal matter. He denies that the 1st Defendant sought to introduce new undeclared claims as alleged by the Plaintiff and that this is well explained in his determination. He maintains that he has jurisdiction to hear and determine any application by the parties which is within the scope of the dispute between the parties to the arbitration by the Arbitration Act and as agreed by the parties and thus his actions are not improper, illegal and ultra vires as alleged.

Analysis and Determination

14. From the issues I have highlighted, I consider that the main issue for the court's determination is whether the Arbitrator has jurisdiction to determine the new issues he admitted and allowed to be introduced in the 1st Defendant's amended Statement of Claim.
15. The issue before the Arbitrator was whether he ought to allow the amendment. Under section 24(3) of the Arbitration Act, "Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it." In considering whether to allow the amendment or not, the parties framed the issues I have set out in para. 3 above. It is therefore not in dispute that the Arbitrator has jurisdiction to deal with and consider whether the 1st Defendant was entitled to amend the Statement of Claim along the proposed lines. Once the application for amendment was allowed, the issues raised in the amendment became live issues for consideration.
16. The present application is brought under inter alia section 17(6) of the Arbitration Act which provides that:
 - (6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.
17. The scope of the aforesaid provision was summarized by Onguto J., in West Mount Investments Limited v Tridev Builders Company Limited ML HCCC No. 230 of 2016 (O.S) [2017] eKLR who stated that in dealing with an application under section 17(6), the court determines the issue afresh and in its original jurisdiction and that the court is to consider four substantive issues; first, whether there is a valid arbitration agreement, second, whether the arbitral tribunal is properly constituted, third, whether matters have been submitted to arbitration in accordance with the arbitration agreement and fourth, whether the matters submitted to arbitration fall within the scope of the arbitration agreement.
18. It is not in dispute that there exists a valid arbitration agreement under the contracts that are enforceable and that the 1st Defendant exercised and invoked this arbitration provision when it served the notice of the dispute dated 6th June 2019. There is also no dispute that the Arbitrator is properly constituted. The point of departure and controversy appears to be the whether the issues he admitted for determination fell within the matters contemplated in the arbitration agreement and whether the 1st Defendant ought to have raised another notice of dispute as provided by Article 68 of the contract before seeking to amend its Statement of Claim.
19. Following what I have stated, once the Statement of Claim is admitted and the Response to the Statement of Claim filed, the issue for determination including the issues of jurisdiction will crystallise and fall for determination by the Arbitrator. To call upon this court to consider the jurisdiction outside the Response to the Amended Claim would be premature as the issue of jurisdiction will still be a subject of determination from the parties' claim and defence.



20. In conclusion, I find and hold that the Arbitrator had the jurisdiction and discretion to consider and allow amendment of the Plaintiff's claim. This decision is not amenable to consideration by the court under section 17(6) of the *Arbitration Act*. The issues of jurisdiction are now within the province of the Arbitral Tribunal to deal with as part of the allegation in the Statement of Defence. To hold otherwise would amount to the court taking over the jurisdiction of the Arbitral Tribunal and determining the Plaintiff's case apriori. I reject this entreaty.

Disposition

21. I dismiss the Plaintiff's Originating Summons dated 27th October 2021 with costs to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Bett, Senior State Counsel instructed by the Office of the Attorney General for the Plaintiff

Mr Mugambi instructed by John N. Mugambi and Associates Advocates for the 1st Defendant.

Ms Ajiambo instructed by Ajiambo Luande and Company Advocates for the 2nd Defendant.

