H. Young & Company (E.A) Limited v Lagoon Investments Limited (Civil Suit 236 of 2019 & E773 of 2021 & Miscellaneous Suit E895 of 2020 (Consolidated)) [2022] KEHC 175 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)

Neutral citation: [2022] KEHC 175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 236 OF 2019 & E773 OF 2021 &
MISCELLANEOUS SUIT E895 OF 2020 (CONSOLIDATED)

A MABEYA, J

FEBRUARY 25, 2022

BETWEEN

H. YOUNG & COMPANY (E.A) LIMITED ..... APPLICANT

AND

LAGOON INVESTMENTS LIMITED ..... RESPONDENT

RULING

1. This is a ruling in respect of the applicant's Originating Summons dated 25/10/2019 in HCC No. 236 of 2019, the Notice of Motion dated 26/6/2020 in MISC E895 OF 2020 and the Originating Summons dated 23/8/2021 in HCC No. E773 of 2021. The three matters are consolidated with HCCC No. 236 of 2019 being the lead file.

2. In the Originating Summons in HCCC No. 236 of 2019, the applicant sought answers as to whether an injunction should issue to restrain the arbitral proceedings between the parties pending before Hon. P. M. Kamaara, Arbitrator and whether the appointment of the said Arbitrator should be set aside. The final order sought was for a permanent injunction against any arbitral proceedings between the parties in respect of the agreement dated 2/9/2016.

3. In the Motion dated 26/6/2020 in HCC No. E895 of 2020, the applicant sought orders that the Arbitrator's Award dated and delivered on 28/5/2020 on the applicant's objection to the appointment of the single Arbitrator be set aside. Further, it also sought that the appointment of Hon. P. M. Kamaara, Advocate as arbitrator in the matter between the parties on the agreement dated 2/9/2016 be set aside.

4. As regards the Originating Summons dated 23/8/2021 in HCC No. E. 773 OF 2021 (0S), sought for; a declaration that there is no Agreement and/or Arbitration Agreement between the parties; a declaration that the arbitral proceedings instituted before the arbitrator, R. M Kamaara by the respondent, a company incorporated in Samoa, are filed by an entity which lacks the requisite locus standi to invoke the arbitration clause as it has no privity of contract with the applicant under the agreement for appointment of contractor's representative dated 2/9/2016.

5. There were two other orders to the effect that the Arbitrator, R. M. Kamaara lacks jurisdiction to take cognizance of and/ or deal with the arbitral proceedings referred to him and a permanent injunction against any/or further arbitral proceedings before him.

6. The applications were supported by the affidavits of Veronica Njoki Sworn on 25/10/2019, and Joseph Schwarzman sworn on 26/6/2020 and 23/8/2021, respectively.

7. The applicants case was that the agreement forming the basis of the arbitral proceedings is unenforceable in law, it is uncertain, vague and ambiguous on the forum and appointing authority for the arbitrator. That it lapsed on 26/2/2017 and that the dispute forum set out in the agreement does not exist.

8. The applicant further contended that it had objected to the appointment of the arbitrator but he gave an award on 28/5/2020 upholding his appointment. That the applicant was opposed to the speed at which the arbitrator was appointed. That the agreement stipulated that the applicable laws are those of England while the arbitrator applied the Kenyan Law and that the applicant was apprehensive that the circumstances leading to the appointment of the arbitrator might make him impartial.

9. The respondent vehemently opposed the applications through the following: -

    a) Preliminary objections dated 2/12/2019 and 27/9/2021.

    b) Replying affidavit of Eunice Lumallas sworn on 2/12/2019.

    c) Preliminary objections dated 28/10/2020 and 1/2/2021, respectively.

    d) Replying and Further affidavits of Mr. Anthony Wahome sworn on 16/9/2020, 8/12/2020, 8/12/2020 and 27/9/2021, respectively.

    e) The grounds of opposition dated 16/9/2020.

10. The respondent's case was, inter-alia, that, the Court lacked jurisdiction to entertain the matter by virtue of section 10 of the Arbitration Act ("the Act"). That the Arbitrator was properly appointed by the Chairman of the Chartered Institute of Arbitrators. That the arbitrator had already ruled on his jurisdiction. It also contended that the issues raised by the applicant could be properly raised before the arbitrator.

11. A brief background to the dispute is that the parties entered into an agreement dated 2/9/2016 ("the agreement"). The same was in respect of some tendering by the Kenya Electricity Generating Company Limited (Ken Gen). A dispute arose from the agreement which prompted the respondent to invoke the arbitral clause therein and to institute arbitral proceedings.

12. The applicant opposed the appointment of the arbitrator and the continuation of the arbitral proceedings which resulted in the filing of these three matters.

13. The Court has comprehensively considered all the pleadings and the contestations of the respective parties. The issues for determination are whether there is a valid and an enforceable arbitral agreement

between the parties; whether the arbitrator was validly appointed, and finally, whether the respondent is a party to the agreement dated 2/9/2016 and therefore has the requisite locus standi to institute and sustain arbitral proceedings in respect thereof and whether the award of 28/5/2020 should be set aside.

14. The agreement dated 2/9/2016 was christened 'Agreement for the Appointment of Contractor's Representative'. The same was produced before this Court by the parties. Clause 12 thereof provided: -

> " Any dispute that may arise between the parties in connection with this agreement or the compliance by any party with any provision hereof, including but not limited to, any alleged breach hereof shall be settled by an agreement between the parties in dispute. If the parties fail to reach an agreement within thirty (30) of the date on which the first correspondence was exchanged between them declaring the existence of the dispute shall be resolved by the Arbitration court of Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom in Nairobi in accordance with its rules, and conducted in the English language."

15. It is clear from the foregoing that it was the intention and clear contemplation of the parties that any dispute between them was to be referred to arbitration. The Court has read through the entire agreement. The same was not professionally crafted. The parties never involved the professionalism of an Advocate in its drafting, probably to escape paying legal fees, but the intention of the parties can be clearly discerned therefrom.

16. The opposition by the applicant is all technical. That the parties had not tried to negotiate and settle before reference to arbitration, that the forum and appointing authority was unclear in the agreement.

17. There is no dispute that a dispute had arisen between the parties. There was a demand made on the applicant before reference which it ignored. The respondent thereafter requested the Chairman of the Chartered Institute of Arbitrators to appoint an arbitrator in terms of the agreement between the parties.

18. The applicant submitted that the wording under clause 12, that is, that a dispute 'shall be resolved by the Arbitration court of Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom in Nairobi' did not intend to have any dispute referred to arbitration but to have the dispute resolved through 'arbitration court of kenya'.

19. The applicant further submitted that the wording of the said clause is so ambiguous that it is impossible to tell if the parties had truly intended to refer any dispute arising from the subject agreement to arbitration. That there is no institution known as the arbitration court of Kenya Branch at the Chartered Institute of Arbitrators of the United Kingdom in Nairobi. That in the premises, the clause was inoperative.

20. On the other hand the respondent contended that when there is an ambiguity, the courts interpret such clauses by establishing the intention of parties.

21. It is not in dispute that there is no forum known as the 'Arbitration court of Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom in Nairobi'. As already stated, the agreement was poorly drafted. However, does it mean that if the agreement was poorly drafted it is to be ignored? I don't think so. It is trite law that a court of law will always interpret a document with a view to give effect to the intention of the parties. If the intention of the parties can be discerned, a court of law will always give effect to the same.

22. In the present case, there is an institution known as the 'Chartered Institute of Arbitrators (Kenya Branch)'. It is a branch of the Chartered Institute of Arbitrators of the United Kingdom. A reasonable

interpretation of the agreement will show that this is the institution the parties intended or were referring to.

23. Therefore, this was just an error in drafting. However, it is clear that the parties intended to have any dispute be solved by the Chartered Institute of Arbitrators (Kenya Branch) in accordance with its rules.

24. On the issue of whether the arbitrator was validly appointed under the said clause, the Chairman of the Chartered Institute of Arbitrators has the mandate to appoint arbitrators and he did so.

25. In this regard, it is clear that the agreement between the parties had a valid arbitral clause and that the arbitrator was validly appointed. He has since ruled on his jurisdiction. That award is correct and has nothing to suggest that it should be set aside under section 35 of the Arbitration Act.

26. The final issue the standing of the respondent in respect of the agreement dated 2/9/2016. In the agreement of 2/9/2016, the respondent Lagoon Investments Limited, was described as a company incorporated under the laws of the United Arab Emirates with its registered office in Dubai.

27. The respondent averred that this was a mis-description, that it was actually incorporated in Samoa, with an office in Dubai, which does not interfere with the cause of action.

28. The court notes that the issue of the locus standi of the respondent was determined by the arbitrator vide his ruling of 17/8/2021. The arbitrator held at page 8 of the award that the discrepancies on the identity of the respondent could be easily rectified by the amendments sought by it on the statement of claim to describe it correctly as registered in Samoa.

29. The arbitrator having determined the issue of the identity of the respondent, the Court cannot seek to second guess him, unless as allowed by law. The court has no jurisdiction to interfere with arbitral proceedings other than through the limited confines set out in the Act. See section 10 of the Act.

30. In any case, the Court agrees with the tribunal's finding that the discrepancies on the identity of the respondent could be easily rectified by the amendment sought by it. Further, the Court is of the opinion that the applicant was fully aware of the entity it was contracting and dealing with despite the confusion as to its country of registration.

31. In this regard, the respondent is a valid party to the agreement and had the locus standi to institute the arbitral proceedings.

32. The final issue is whether the Miscellaneous Application in E895/2020 as filed by the applicant is properly before this Court. In that application, the applicant had sought to set aside the arbitrator's award which found that he had jurisdiction to hear the arbitration.

33. That application was lodged vide a Notice of Motion. The respondent submitted that the application ought to have been brought through Originating Summons as explicitly provided for under *Rule 3(1) of the Arbitration Rules.* That the application was therefore fatally flawed and ought to be struck out.

34. The Court agrees with that submission. The procedure by which a party is to approach the Court in matters arbitral is well set out in the Act. The applicant's grounds in the application were that the respondent unilaterally moved the Chartered Institute of Arbitrators to appoint a sole arbitrator without its consultation.

35. The agreement did not specify how and who was to move the Chartered Institute of Arbitrators. The Court has already made a finding that the arbitrator was validly appointed by the Chairman of the Institute as stipulated under clause 12 of the agreement.

36. There is therefore no merit in the said application. It seems to be an attempt by the applicant to obstruct and scattle the arbitral proceedings.

37. In the end the Court finds that all the applications are without merit and are hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE