



**In re Application for Appointment of an Arbitrator (Miscellaneous Application E28 of 2022) [2022] KEHC 13294 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13294 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E28 OF 2022  
OA SEWE, J  
SEPTEMBER 20, 2022  
IN THE MATTER OF THE ARBITRATION ACT, 1995  
AND  
IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF AN ARBITRATOR  
BETWEEN  
HENPOINT (K) LIMITED ..... APPLICANT  
AND  
ROOFINGS KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The notice of motion dated March 7, 2022 was filed by Henpoint (K) Ltd, the applicant herein, under sections 4, 11 and 12 of the *Arbitration Act*, No 4 of 1995 as amended by Act No 9 of 2009, seeking that a declaration/order be made that there are valid arbitration agreements between the parties herein that do not disclose the appointing authority of the arbitrator in case of a dispute; and that the court does make an order directing the chairperson/vice chairperson of the Chartered Institute of Arbitrators, Kenya chapter, to appoint an arbitrator to handle and determine the dispute between the parties herein through arbitration. The application also prayed that the costs of the application be provided for.
2. The application was premised on the grounds that the applicant entered into two agreements on December 9, 2019 for civil and drainage works to be carried out simultaneously on the respondent's premises at Uwanja wa Ndege galvanized steel factory; and that, although the applicant carried out the works as per the specifications in the agreements, the respondent refused to make payments for the same despite several discussions and correspondence. The applicant further averred that, since the arbitration clauses in both the agreements did not specify the arbitrator's appointing authority, the parties are unable to have their dispute referred to arbitration; and therefore that it is in the interest of justice that the instant application be allowed and the orders sought granted.



3. The application was supported by the affidavit of the applicant's managing director, Mr Henry Oduor Otieno, to which he annexed copies of the agreements for civil and drainage works as well as correspondence exchanged by the parties to buttress the applicant's assertions. They were marked annexures "HOO-1" to the supporting affidavit. The applicant also exhibited a copy of the response it received from the chairperson of the chartered institute of arbitrators (marked annexure "HOO-4") by which he declined to appoint an arbitrator in respect of the subject dispute on the ground that the appointing authority was not clearly stated in the arbitral agreements.
4. Further, it was averred at paragraph 9 of the supporting affidavit that some of the applicant's suppliers have moved to court seeking payment for goods supplied in respect of the subject works; and therefore that adverse judgments may, sooner rather than later, be given against the applicant, thereby exposing it to financial ruin. It was consequently the prayer of the applicant that the application be allowed in the interest of justice to pave way for expeditious resolution of the dispute between the parties.
5. In response to the application, the respondent relied on the affidavit of its chief executive officer, Andrew Fleming. Mr Fleming averred, at paragraph 4 of his affidavit that, under article 10 of the civil works and drainage works agreements, all disputes between the parties were to be resolved in accordance with the "...rules of the Kenya Arbitration Association", yet there is no such body in Kenya. The respondent further averred that the arbitration clauses in the subject agreements are incomplete as they do not state the appointing authority, the number of arbitrators or the procedure of appointment. It was therefore the assertion of the respondent that the instant application is premature in so far as the applicant has not fully exhausted the procedure for appointment of arbitrators as provided for under the Arbitration Act. He consequently prayed that the application be dismissed.
6. Directions were then given herein on March 21, 2022 that the application be canvassed by way of written submissions. While Ms Ngigi for the respondent filed her written submissions dated June 10, 2022 on June 13, 2022, Mr Odundo, learned counsel for the applicant appears not to have complied, as his written submissions are not on the file.
7. In her written submissions, Ms Ngigi proposed the following issues for determination:
  - (a) Whether there are valid arbitration agreements;
  - (b) Whether the court should appoint an arbitrator or direct the chairman of the Chartered Institute of Arbitrators Kenya to do so; and,
  - (c) Whether the application is premature?
8. Counsel conceded that the parties entered into works agreements which also contained arbitration clauses as per article 10 thereof. She however submitted that, in so far as the arbitral clauses provided that all disputes between the parties be resolved through arbitration in accordance with the rules of a non-existent Kenya Arbitration Association, the same are vague and unenforceable. She relied on Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited (Interested Party) (Petition E001 of 2021) [2022] KEHC 48 (KLR) in urging the court to find that the application is untenable in the circumstances. Counsel submitted that this court cannot be called upon to infer or presume that the arbitration institution referenced is the Chartered Institute of Arbitrators, Kenya Chapter.
9. It was further the submission of Ms Ngigi that, since the parties did not agree on the appointment of an arbitrator, or the applicable procedural rules, including the choice of seat, language and the choice of law, no basis has been made for the court to direct the chairman/vice chairperson of the Chartered Institute of Arbitrators, Kenya chapter. She submitted that the court cannot impose an



arbitrator on the respondent where there was no agreement between the parties as to the appointing authority or the number of arbitrators. In her submission, to do so would be tantamount to re-writing the arbitral contract for the parties. Counsel relied on *Danki Ventures Limited v Sinopec International Petroleum Services Limited* [2014] eKLR and *Wanjala & 2 others v Registrar of Companies & 2 Others; Okoa Finance Limited* (supra) to augment the submission that the court can only intervene in the appointment of an arbitrator if the arbitral agreement provides for such appointment; and only after failure by either party to comply with the agreement.

10. On whether the application is premature, Ms Ngigi made reference to sections 11 and 12 of the *Arbitration Act* to underscore the submission that the arbitration process is consensual; and that it remains in the hands of the parties to appoint the arbitrator. She argued that the court can only intervene if it is demonstrated that the respondent refused to participate in the appointment of an arbitrator; which, in her submission, is not the case herein. Counsel cited *Magdalene M Mjomba & 3 others v Information and Communications Technology Authority; Chairman Chartered Institute of Arbitrators (Interested Party)* [2021] eKLR and *Pitstop Technologies Limited v Dynamic Branding Ventures Limited* [2020] eKLR in urging the court to find that the instant application is premature and therefore ought to be dismissed with costs to the respondent.

11. I have carefully considered the application, the averments in the supporting and replying affidavits as well as the submissions made by learned counsel for the parties. There is no dispute that the disputants entered into two agreements, namely, a civil works agreement and a drainage works agreement, both dated December 9, 2019. Copies thereof were annexed to the applicant's supporting affidavit and marked annexure "HOO-1". In each case, the parties covenanted, at clause 10 thereof, that:

"All disputes herein shall be resolved in accordance with the rules of the Kenya arbitration association."

12. Hence, there is no dispute that the parties entered into a valid arbitral agreement, thereby making it resolutely clear that any disputes arising between them in connection with the two works agreements be resolved by way of arbitration. As was aptly stated by the Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR:

"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."

13. A perusal of the correspondence exchanged between the parties between January 2020 and December 2020 (annexed to the supporting affidavit as annexure "HOO-2" a to g and annexure "HOO-3", clearly show that upon completion of the works by the applicant, a dispute arose on payment in that, whereas the applicant demanded payment for extra works allegedly done, the respondent was of the posturing that it had fully paid the applicant for the works agreed on and performed. Accordingly, the applicant issued notice of its intention to refer the dispute to arbitration *vide* its advocate's letter dated December 14, 2020 thus:

"...We have discussed with our client and they totally disagree with the contents of your letter and as such have no option but to refer the dispute herein to arbitration as provided for in article 10 of the contract works agreement..."



14. This decision was arrived at after numerous attempts by the parties to reach an amicable settlement had failed. The annexures further show that on October 16, 2021, the applicant approached the chartered institute of arbitrators with a request for the appointment of an arbitrator; and that that request was turned down on the ground that the arbitral agreement was not explicit as to the appointing authority. The communication to the parties from the chartered institute of arbitrators dated October 21, 2021 reads:

“...The clause is silent on the appointing authority.

Having reviewed your request, it is at the discretion of the parties to review the clause and resolve in writing on the appointing authority. Failure of the parties to mutually agree on the above, you may seek assistance of the court to vest such appointing authority on the chairman of chartered institute of arbitrators...”

15. In the light of the foregoing, the single issue arising for determination is whether, in the circumstances, the court should intervene and either appoint an arbitrator or direct the chairman of the Chartered Institute of Arbitrators Kenya to do so.

16. To begin with, it is manifest that in the two arbitral agreements, reference was made to a non-existent Kenya arbitration association. Thus, counsel for the respondent cannot be faulted for her posturing that the parties did not have a meeting of the minds as to the applicable law. But even assuming that the parties had in mind the Chartered Institute of Arbitrators, Kenya chapter, the governing legislation and rules would be the *Arbitration Act*, No 4 of 1995 and the rules made thereunder. Section 10 of that Act is pertinent. It stipulates that:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

17. Appointment of arbitrators is provided for in section 12 of the *Arbitration Act*. It provides thus in sub-section (2):

“The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—

- a. In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
- b. In an arbitration with two arbitrators, each party shall appoint one arbitrator; and
- c. In an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

18. Where there is a stalemate, sub-sections (3) to (9) of section 12 of the *Arbitration Act* are explicit as to the applicable procedure. They provide that:

(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) —

- (a) has indicated that he is unwilling to do so;
- (b) fails to do so within the time allowed under the arbitration agreement; or
- (c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly



appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

- (4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —
    - (a) make the required appointment; and
    - (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
  - (5) 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.
  - (6) 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.
  - (7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
  - (8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.
  - (9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.”
19. It is imperative that parties agree either on the arbitral tribunal or the appointing authority; and that where, as here, the parties seek the intervention of the court in realizing their common objective, the applicant must demonstrate that efforts were made to comply with the applicable procedure set out in the *Arbitration Act* and the rules thereunder and failed. I therefore agree entirely with the position taken by Hon Majanja, J in *Wanjala & Others v Registrar of Companies & Others and Okoa Finance Limited* (supra) that:
- “...the Arbitration Act proceeds from the position that the arbitration process is consensual and court intervention is only necessary to assist the parties carry out their stated intention crystallized in the arbitration agreement. Hence section 12 of the Arbitration Act dealing with appointment of arbitrators, does not supplant the parties’ right to appoint or prescribe the mode of appointment of the arbitrator but only sets out a default procedure for the court to intervene should the parties either fail to comply with the contractual provisions for appointment of an arbitrator. The court can only intervene in matters appointment if the agreement provides for appointment and either party fails to comply with the agreement. In this case, the arbitration clause does not provide for appointment of an arbitrator or process for such appointment hence the court cannot re-write the parties’ agreement by taking upon itself to appoint an arbitrator.”
20. In this instance, the first step was for the parties to either agree on the arbitrator or the appointing authority; failing which the applicant ought to have resorted to the elaborate procedure set out in



section 12(3) to (9) of the Arbitration Act before approaching the court. There is no indication at all in the correspondence relied on by the applicant that it complied with those provisions, or that it progressed the matter in terms of the advice given by the chief executive officer of the chartered institute of arbitrators *vide* the letter dated October 21, 2021 (marked Annexure “HOO-4” to the supporting affidavit).

21. It is manifest then that the instant application is premature; having been filed before exhausting the procedure set out in section 12 of the Arbitration Act. The doctrine of exhaustion was aptly captured by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 thus:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

22. Likewise, in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal restated its position thus:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The *ex parte* applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

23. For the foregoing reasons, the application dated March 7, 2022 is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF SEPTEMBER 2022**

**OLGA SEWE**

**JUDGE**

