REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. E001 OF 2020 (O.S)

IN THE MATTER OF AN APPLICATION BY CUBIC BUSINESS SOLUTIONS FOR THE APPOINTMENT OF AN ARBITRATOR PURSUANT TO SECTION 12 OF THE ARBITRATION ACT

IN THE MATTER OF A DISPUTE ARISING FROM THE CONTRACT BETWEEN CUBIC BUSINESS SOLUTIONS AND SPECTRE INTERNATIONAL LIMITED DATED 26TH JANUARY 2015

IN THE MATTER OF SECTION 12 OF THE ARBITRATION ACT 1995 AND RULE 3 (1) OF THE ARBITRATION RULES, 1997 LAWS OF KENYA

BETWEEN

CUBIC BUSINESS SOLUTIONS.....APPLICANT

VERSUS

SPECTRE INTERNATIONAL LIMITED.....RESPONDENT

RULING

The issue for determination before me is whether or not the Court should direct that the dispute between the parties herein should be heard and determined by a Single Arbitrator to be appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya).

1. The Applicant, **CUBIC BUSINESS SOLUTIONS** has asked the Court to order that the dispute be referred to arbitration. The reason for that request was that the Respondent, **SPECTRE INTERNATIONAL LIMITED**, had ignored the requests from the Applicant, to have their dispute referred to arbitration.

2. In answer to the application the Respondent filed Grounds of Opposition in which it cited the following three reasons for opposing the application:

> ***"1. The arbitration clause is vague and incapable of enforcement by the Parties or by the court.***
>
> ***2. Without prejudice to the foregoing, reading into and/or adding any clause into the agreement would be ultra vires the court's powers and a violation of the sanctity of contract.***
>
> ***3. There is otherwise no provision in the Arbitration Act that can cure the invalidity of the arbitration clause.***
>
> ***The same is in any event invalid and unenforceable."***

3. It is common ground that between the Applicant and the Respondent there was a *"Contract For Transportation of Molasses"*, dated 26th January 2015.

4. It is further common ground that **Clause X** of the said Contract made provision for **"DISPUTE SETTLEMENT"**, in the following terms;

> ***"(i) Parties shall first endeavor to amicably settle disputes or difficulties or differences or misunderstanding that may arise out of or in connection with the agreement.***
>
> ***(ii) Any dispute or controversy or disagreement arising out of or in connection with this agreement which cannot be settled amicably between the parties within thirty days (30) after the commencement of the amicable settlement negotiations, shall be***

finally settled by arbitration."

5. The Respondent pointed out that that clause did not contain a procedure for the appointment of arbitrators. Indeed, the clause also did not specify the number of arbitrators who would be appointed in the event of a dispute.

6. It was, therefore, the Respondent's submission that that arbitration clause was incapable of operationalization or enforcement by the court.

7. The Respondent submitted that the powers of the court, to appoint arbitrators was limited to instances where the procedure for such appointment was clearly ascertainable.

8. In the absence of very specific procedures for the appointment of a specified number of arbitrators, the Respondent submitted that there was no valid arbitration clause upon which the court could invoke its powers under **Section 12** of the **Arbitration Act**, so as to be able to appoint an arbitrator.

9. It was the Respondent's further submission that under **Section 6 (1) (a)** of the **Arbitration Act**, the court was not bound to refer a matter to arbitration if the arbitration agreement was null and void, inoperative or incapable of being performed.

10. The court was told by the Respondent that if it were to order that an arbitrator be appointed under the current arbitration clause, that action would be ultra vires the powers of the court, and would also be contrary to the principle of the sanctity of contracts.

11. The Respondent placed reliance upon the following words of the Court of Appeal in the case of **NATIONAL BANK OF KENYA LIMITED Vs PIPEPLASTIC SAMKOLIT (K) LIMITED & ANOTHER [2002] E.A. 503**;

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

12. It is indeed well settled that the court cannot, even by invoking equity, assist any party to a contract from the unreasonable impact or effect of the terms of the contract to which he is a party.

13. If the court were to excuse a party from any of the terms of the contract, on the grounds that such terms were unfair, that would constitute the re-writing of the contract.

14. In this case, my understanding is that neither of the parties have sought to be excused from any of the terms of the contract.

15. I do therefore agree with the Respondent that;

"…. parties must be held to the strict terms of their contracts, and that courts should be slow to re-write the terms of contracts unless a vitiating factor is proven."

16. In this case the contract in issue has a provision for dispute resolution. The parties made a conscious decision that if a dispute arose between them, they would first attempt to find an amicable settlement.

17. The parties further agreed that if they failed to find an amicable settlement, through negotiations, the dispute would be settled by arbitration.

18. To my mind, and in line with what the Respondent has pointed out, it is that specific term of the contract which the court is required to enforce. I therefore have a legal obligation to refrain from re-writing the contract.

19. Nonetheless, the Respondent expressed the view that the arbitration clause was so vague as to be incapable of enforcement.

20. In my considered opinion, the arbitration clause is not vague. I so find because it categorically states that if the parties failed to find an amicable settlement through negotiations, the disputes, or difficulties or differences shall be finally settled by arbitration.

21. In effect, even the question about whether or not the arbitration agreement was enforceable, ought to be finally settled by arbitration.

22. My said finding is premised, in the first instance, from the express wording of the arbitration agreement itself. The said agreement makes reference to;

"disputes or difficulties or differences or misunderstanding that may arise out of or in connection with this agreement."

23. Obviously, if there is no specified procedure for appointing the arbitrator, that may be construed as a difficulty arising out of or in connection with the agreement.

24. In **KENYA AIRPORTS PARKING SERVICES LTD & ANOTHER Vs MUNICIPAL COUNCIL OF MOMBASA, HCCC NO. 434 OF 2009**, Kimaru J. held as follows;

"It is this court's view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement."

25. If the arbitration clause would not be rendered invalid by an assertion of unlawfulness, I hold the view that the alleged vagueness of the arbitration clause herein would definitely not render the said agreement invalid.

26. As the arbitration clause provides the mode for the resolution of disputes, I find that I have no alternative but to give effect to it, in accordance with the contract to which the parties herein are party.

27. Pursuant to the provisions of **Section 11 (1)** of the **Arbitration Act**, parties are free to determine the number of arbitrators.

28. And **Section 11 (2)** of the **Arbitration Act** stipulates that if parties failed to determine the number of arbitrators;

> ***"…….. the number of arbitrators shall be one."***

29. Therefore, although the parties herein did not specify the number of arbitrators, the law makes it plain that in such an instance there shall be one arbitrator.

30. Pursuant to **Section 12** of the **Arbitration Act**, parties are free to agree on a procedure of appointing the arbitrator or arbitrators. By necessary implications, that means that it is not mandatory that the procedure for the appointment of the arbitrator be provided for in the arbitration agreement.

31. The statute expressly mandates the High Court to appoint an arbitrator.

32. In my considered opinion, the Court has an inherent power to make such orders or to give such directions as may be necessary for the ends of justice.

33. As the parties herein had expressly agreed to have disputes resolved through arbitration, I find that it is necessary for the Court to make such orders or to give such directions as would give effect to the terms of the contract.

34. By making such orders or by giving such directions as would give effect to the terms of the contract, the court would not be re-writing the terms of the said contract. Indeed, the re-writing of any terms of a contract would be inconsistent with the obligation to enforce the contract.

35. In my considered opinion, the court can only give such orders or directions as would facilitate the implementation of the contract.

36. In the case of **LEOPARD ROCK MICO LIMITED Vs COUNTY GOVERNMENT OF MERU, MISC. CIVIL APPLICATION NO. 24 OF 2019**, Mabeya J. expressed himself thus;

> ***"As I already stated, the Lease contained an arbitral clause. Section 12 of the Arbitration Act, 1995 provides for the appointment of arbitrators. It is clear from the Lease that it had an arbitral clause (arbitration agreement). The only thing the clause did not specify is the appointing authority. Since a dispute has arisen, I hold that the arbitral clause has kicked in. That since the parties did not concur on the appointment of a single arbitrator, the application is meritorious.***
>
> ***Accordingly, I allow the application. I direct the Chairperson of the Chartered Arbitrators of Kenya to appoint a single arbitrator within 14 days of this order, to determine the dispute between the***
>
> ***applicant and the respondent ……..."***

37. The orders given in that case served to facilitate the implementation of the contract.

38. In the case before me, the Respondent expressed the view that the court ought not to appoint an arbitrator.

39. If an arbitrator was not appointed, the parties would be unable to give effect to the agreement between the said parties, that their preferred forum for resolution of disputes was arbitration.

40. In order to facilitate the actualization of the arbitration agreement I direct as follows;

> ***(i) The dispute shall be determined through arbitration.***
>
> ***(ii) The parties shall, within the next 14 days, appoint the sole arbitrator.***
>
> ***(iii) If the parties fail to agree on the person to be appointed as the arbitrator, the***
>
> ***Applicant shall, within 14 days from the lapse of the first 14 days (in order (ii) above) proceed to appoint the sole arbitrator.***

(iv) In order to attain an element of

objectivity in the appointment of the arbitrator, the applicant shall liaise with the Chairperson of the Chartered Institute of Arbitrators, Kenya.

41. Finally, as costs ordinarily follow the event, and because I find no reason to warrant a deviation for that edict, I order that the Respondent will pay to the Applicant, the costs of the application dated 14th October 2020.

DATED, SIGNED and DELIVERED at KISUMU This 21st day of January 2021

FRED A. OCHIENG

JUDGE