



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCCMISC /E 1204/2020

SENSEI LIMITED.....APPLICANT

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....RESPONDENT

RULING

#### **Introduction**

1. Vide an application dated 4<sup>th</sup> November 2020 expressed under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act,<sup>[1]</sup> Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 10 of Arbitration Act (herein after referred to as the Act) and Article 159 (2) (c) of the Constitution and all other enabling provisions of the law, Sensei Limited (herein after referred to as the applicant) prays that this court appoints Mr. Nyagah B. Kithinji, an Advocate of the High Court of Kenya, a Quantity Surveyor and a Fellow of the Chartered Institute of Arbitrators to act as a Sole Arbitrator in this dispute.

2. In the alternative, the applicant prays that this court empowers the Chairman of the Chartered Institute of Arbitrators Kenya Branch to appoint an Arbitrator to adjudicate the dispute herein. Lastly, the applicant prays that the costs of this application be borne by the Respondent.

#### **The grounds relied upon**

3. The applicant states that on 2<sup>nd</sup> August 2012 the parties herein entered into a contract for the completion of Suam Dam Kitale, Tender No. ADC/17/2011/12. It states that a payment dispute arose during the pendency of the contract and was formally declared and communicated to Respondent vide a letter dated 9<sup>th</sup> January 2018. Further, the applicant states that the parties had a meeting on 29<sup>th</sup> January 2018 in which they agreed on a raft of measures aimed at resolving the dispute amicably. However, the applicant states that due to the Respondent's failure to resolve the dispute, the applicant terminated the contract vide a letter dated 21<sup>st</sup> March 2018 in line with Clauses 11 and 12. That, at the point of terminating the contract, its claim as at 28<sup>th</sup> February 2018 was **Kshs 14,508,608.71**.

4. The applicant states that on 11<sup>th</sup> March 2018, the Respondent wrote to the applicant disputing the aforesaid figures arguing that the sum due to the applicant was **Kshs. 2,900,000/=**. The applicant states that its efforts to settle the dispute through the first and second tier of dispute resolution provided for under Clause 14 of the Contract which are use of best endeavors in good faith and Mediation were in vain.

5. Additionally, the applicant states that it has completely exhausted the first and second tiers of dispute resolution as provided for under the contract without any results, hence, the dispute is ripe for escalation into the third and last tier of dispute resolution as provided for under clause 14 of the contract which is Arbitration.

6. The applicant also states that the Arbitration Clause under the Contract is silent on the appointing authority and therefore it is important that this court intervenes and issues the orders sought in order to ensure that substantial injustice is not occasioned against applicant. Further, the applicant states that under the aforesaid agreement, parties herein agreed to refer disputes to arbitration which is contractual undertaking by parties to settle disputes out of the court and with the help of an arbitrator. Lastly, the applicant states that this court has the power to appoint an arbitrator where one of the parties fails and/or obstructs the appointment.

#### **Respondent's grounds of opposition**

7. In its grounds of opposition, the Respondent states that the dispute resolution clause provides that Parties shall attempt to resolve any dispute in the following order; namely, Negotiation; Mediation and Arbitration.

8. The Respondent states that there have been no attempts to resolve the dispute through negotiation or mediation, and, that, the prayer to refer this dispute to arbitration prior to exhausting the first two mechanisms is prejudicial to the Respondent, and, that the High Court has no power to act an appointing authority capable of appointing a mediator and/ or arbitrator independently. Further, the applicant states that by proposing the appointment of Mr. Nyagah B. Kithinji as sole arbitrator, the applicant is attempting to usurp the powers the Court as an appointing authority. Lastly, the Respondent states that the unilateral nomination of Mr. Nyagah B. Kithinji as arbitrator may be prejudicial to the Respondent.

### **Applicant's Advocate submissions**

9. Mr. Tanui, the applicant's relied on *Heritage Consultants Ltd v Permanent Secretary, Ministry of Regional Development*<sup>[2]</sup> which referred to the *Blacks' Law Dictionary*<sup>[3]</sup> definition of a dispute as: - "A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other" and submitted that a dispute has arisen in this case. Additionally, he cited *Mavrommatis Palestine Concessions (Greece v. Great Britain)*<sup>[4]</sup> in which the Permanent Court of International Justice (PCIJ) defined a dispute as "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

10. To fortify his argument, he cited the ICJ's Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania<sup>[5]</sup> as "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations." He also cited the ICJ in the above decision in which it stated- "...for there to be a dispute, there had to have been some form of communication as between the parties, which lead to an impasse or disagreement, hence a dispute arising. A dispute would still be deemed to arise, notwithstanding one party's inactive participation in the communication, as in the present circumstances of this suit."

11. Counsel submitted that the applicant declared dispute vide a letter dated 9<sup>th</sup> January 2018 (**Annexure 'SL 43'**) in line with clause 14 of the Contract, and that at a meeting held on 29<sup>th</sup> January 2018 to resolve the dispute amicably it was agreed that the Respondent would discuss the matter internally and advise the applicant in two weeks' time on whether the project terminates or continues (see **Annexure No. "SL 44"**), but the dispute was never resolved, as a consequence, the applicant terminated the contract on 21<sup>st</sup> March 2018 (see Annexure "SL 45"). Counsel stated as at that point, that the outstanding amount was **Kshs. 14,508,608.71**, but vide its letter dated 11<sup>th</sup> March 2018 the Respondent claimed that the amount due was **Kshs 2,900,000/=**

12. Mr. Tanui submitted that the matter is ripe for escalation into the third and last tier of dispute resolution as provided for under clause 14 of the contract which is **Arbitration**. However, counsel submitted that the Arbitration Clause is silent on the appointing authority and therefore it is necessary that this court intervenes and grants the orders sought in order to ensure that substantial injustice is not occasioned to the applicant.

13. He referred to Clause 14 of the contract which provides that parties shall use their best endeavors in good faith to resolve any dispute that may arise. He cited *Douglas Kipchumba Rutto v Kenya Anti-Corruption Commission & 8 others*<sup>[6]</sup> which cited the *Black's Law Dictionary*, definition of Good faith as- "...encompasses, among other things, an honest belief, absence of malice and the absence of design to defraud or seek unconscionable advantage." He submitted that the Respondent's deliberate unresponsiveness, lack of cooperation, and deliberate silence since 9<sup>th</sup> January 2018 to 12<sup>th</sup> November 2019 has defeated every sense of good faith.

14. Mr. Tanui submitted that the second tier of the dispute resolution under the agreement was invoked by the applicant vide a letter dated 12<sup>th</sup> November 2019 (Annexure no '**SL 50'**) in which the applicant requested for mediation process and gave the Respondent a period of 14 days to reply. He counsel submitted that the applicant proposed the appointment of either the Institute of Engineers of Kenya or the Institute of Quantity Surveyors to mediate the dispute between the parties there was no response.

15. Additionally, counsel submitted that on 7<sup>th</sup> February 2020, the applicant formally wrote to the Chairman of the Chartered Institute of Arbitrators Kenya Branch and copied to the Respondent requesting him to appoint an arbitrator to adjudicate the dispute between the parties. However, on 25<sup>th</sup> February 2020 the Chartered Institute of Arbitrators Kenya Branch wrote to the applicant and copied the Respondent acknowledging receipt of the Applicant's letter dated 7<sup>th</sup> February 2020 stating that the Dispute Resolution Clause in the agreement was silent on the mode of appointment of an arbitrator.

16. Further, counsel submitted that a second attempt to revert back to mediation failed after the Respondent failed to respond or submit a counter proposal. He submitted that efforts by the Institute of Institute of Quantity Surveyors to have Respondent submit to the mediation failed. Also, counsel submitted that the applicant proposed the appointment of **Mr. Nyagah B. Kithinji, an Advocate of the High Court of Kenya, a Quantity Surveyor and a Fellow of the Chartered Institute of Arbitrators** to act as a sole arbitrator in the dispute and requested the Respondent to respond within 14 days from the date of the request but the 14 days lapsed without any response.

17. Mr. Tanui submitted that the Respondent frustrated the applicant's attempt to have the dispute resolved through the first and the second-tier mechanism provided in the contract. He cited Article 159 (2) (c) of the Constitution and urged the court to allow the application. He also relied on *Victoria Furnitures Limited v Zadok Furnitures Systems Limited*<sup>[7]</sup> which held *inter alia* that the court has the power to appoint an arbitrator where one of the parties fails and/or obstructs the appointment and that the court's hands have been strengthened by the Provisions of Article 159 (2) (c) of the Constitution which enjoins the court to be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

### **Determination**

18. It is basic law that the general approach on the role and intervention of the court in arbitration in Kenya is provided for in section 10 of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. This section restricts the jurisdiction of the court in preemptory terms to only such matters as are provided for by the Act. The section epitomizes the recognition of

the policy of party's "autonomy" which underlie the arbitration generally and in particular the Act.

19. In simple terms, section 10 articulates the need to restrict the court's role in arbitration so as to give effect to that policy.<sup>[8]</sup> This is because the principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention

20. The intent and language of section 10 leaves no doubt that it permits two possibilities where the court can intervene in arbitration. *One* is where the Act expressly provides for or permits the intervention of the court. *Two*, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice. This position elucidated by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*<sup>[9]</sup> which observed that this judicial intervention can only be countenanced in exceptional instances.

21. The Supreme Court stated that section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Perhaps, I should stress the need, when courts are invited to intervene in Arbitral proceedings either before or during the proceedings or after to adhere to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. The import of the foregoing is that parties who resort to arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. Such instances under the Act include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction.

22. Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration processes and awards meet certain standards to prevent injustice.<sup>[10]</sup> However, by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the process of appointment of the Arbitrator and the process of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in Act, and, by necessary implication, they waive the right to rely on any further grounds of review, "common law" or otherwise.

23. In *Northwood Development Company Limited v Shuaib Wali Mohammed* <sup>[11]</sup> this court stated that the objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense, promotion of party autonomy. Court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process.

24. In *Northwood Development Company Limited v Shuaib Wali Mohammed* <sup>[12]</sup> I stated that an arbitrator's jurisdiction derives from the parties' agreement. For an arbitrator to have jurisdiction, all the following must apply: - (i) There must be a binding agreement to arbitrate. (ii) The arbitrator must have been validly appointed. (iii) There must be a dispute that the parties had agreed to arbitrate. The question before me relates to the appointment of the Arbitrator.

25. Generally, the arbitration agreement will specify the number of arbitrators and the mode of appointing the arbitral tribunal they would prefer to arbitrate their disputes. Subject to the arbitration agreement, the parties may agree on who is to arbitrate their dispute.

26. The arbitration agreement in this case provided that in the event of any dispute arising between the parties touching on any matters relating to the agreement, the parties shall use their best endeavors in good faith to resolve it and if this should fail, the parties shall refer the dispute to mediation and if this fail, then to arbitration under the rules of the Institute of Arbitrations Kenya. It also provided that the award of arbitrations shall be final and shall not be subject to appeal.

27. The applicant's case is that it attempted good faith endeavors and mediation to resolve the dispute but the Respondent frustrated the efforts. Further, the applicant stated that under the agreement, the only remaining dispute resolution mechanism is arbitration. The applicant states that the agreement did not provide for mode of appointing the Arbitrator. The Respondent's case is that the applicant has not exhausted the first two dispute mechanisms provided under the agreement. However, the Respondent's position is not backed by evidence. On the contrary, correspondence submitted the applicant demonstrates that the Respondent totally ignored the arbitration process thereby frustrating the applicant's efforts for the parties to appoint an Arbitrator.

28. Procedural dilemmas fostered by procedural flexibility may manifest early and sometimes from the very beginning of an arbitration. The appointment of the tribunal is not always straightforward or free from controversy "as any party that considers an arbitration as contrary to its interest can capitalize on every opportunity to obstruct the appointment process, or to challenge a tribunal once appointed."<sup>[13]</sup> For example, a party may refuse to appoint an arbitrator in order to obstruct the process, or a party-appointed arbitrator might refuse to cooperate to appoint the third arbitrator.<sup>[14]</sup> In such instances the crisis of arbitration is the ironical situation whereby parties who have consciously chosen arbitration in preference to litigation have often first to resort to litigation for court assistance to constitute the arbitral tribunal.

29. Within the limits of mandatory provisions of arbitration legislation, "the parties are free to concoct their own procedural recipe. They can 'legislate' for liberality of procedure or for traditional methods: they can choose great formality or great informality: they can give to the tribunal a very wide jurisdiction or a very narrow one." Within the limits of the arbitration agreement and the governing statute, the arbitrator "controls the procedure of the arbitration and is able to tailor the procedure to the needs of the particular dispute.

30. The court in *Nyoro Construction Company Limited v Attorney General*<sup>[15]</sup> expounded on this when it said: -

*"As a general rule, since Arbitration is based on a contract, the parties are in principle free to choose their arbitrator. They can appoint anyone with legal capacity to act as an arbitrator. Party autonomy is thus the principal controller of the appointment*

process... Alternatively, the parties can agree on appointment procedure by submitting their dispute to arbitration rules which provide for the appointment of arbitrators. In this regard, Section 11 of the Arbitration Act, No 4 of 1995, provides that, the parties are free to determine the number of arbitrators and failing such determination, the number shall be one. Similarly, Section 12 of the Act provides that the parties are free to agree on the procedure of appointment of the Arbitrator.”

31. In the event that the parties’ chosen method for selection of an arbitrator fails, the default procedure is outlined under Section 12 of the Arbitration Act. In summary: -

i. In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator;

ii. in an arbitration with two arbitrators, each party shall appoint one arbitrator; and

iii. in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

32. Section 12(3) of the Act further stipulates that where one party to an arbitration indicates that it is unwilling to appoint an arbitrator, or fails to do so within the time allowed under the arbitration agreement (and where there is no time limit under the arbitration agreement, within 14 days), then the party that has duly appointed an arbitrator may give notice to the party in default that he or she proposes to appoint the chosen arbitrator to act as a sole arbitrator.

33. Section 12 (4) provides that 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.

34. As a matter of general rule, the courts assistance in appointment of arbitral tribunal is required in instances such as provided in section 12 (4) of the Act. Section 12 (5) to (9) of the Act stipulates the extent of the courts’ power in making appointments of arbitral tribunals. It is worth noting that the jurisdiction to make appointment to arbitral tribunal is vested exclusively in the High Court of Kenya.

35. The Act acknowledges the party’s autonomy to agree on who or how to appoint the arbitral tribunal to arbitrate between them. Thus, the court appointment provided for under the Act is a default arrangement if efforts by the parties to appoint a tribunal encounter a stalemate. The High Court is enjoined in making such appointment to consider the qualifications required of the arbitrator. The court is also bound to make sure it secures appointment of independent and impartial tribunal.

36. Section 12 allows the court to appoint the arbitral tribunal, where the parties have themselves failed to do so. The decision of Ramsey J in *MAN Enterprise Sal v Al-Waddan Hotel Ltd* [16] is an illustration of the operation of that power. The importance of the case is the reaffirmation of the principle that the court is not concerned to go into arguments as to the validity or otherwise of the contract or arbitration clause, and that a good arguable case in favour of the existence of an arbitration clause will suffice.

37. Section 12 of the Act confers upon the court the power to appointment of an arbitral tribunal where the parties’ agreed procedure has failed. In the same vein, where the parties fail to provide the mode of appointment, in the event of a disagreement on the appointment of an Arbitrator, the court can intervene. In *Crowther v Rayment* [17] Andrew Smith J discussed a variety of jurisdictional questions relating to the power conferred to the court in cases of this nature. These are the existence of an arbitration agreement, whether the agreed procedure had failed and whether the clause covered the dispute and the exercise of courts discretion.

38. I am persuaded that the facts and circumstances of this case disclose a perfect case for the court to intervene. I find and hold that the applicant’s application is merited. Accordingly, I allow the Notice of Motion dated 4<sup>th</sup> November 2020 and issue the following orders: -

a. ***That*** the dispute between the parties herein shall be heard and determined by a single Arbitrator to be appointed by the Chairman of the Chartered Institute of Arbitrators Kenya to be appointed within 45 days from the date of this order.

a. ***That*** no orders as to costs.

Orders accordingly

**SIGNED AND DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021**

**John M. Mativo**

**Judge**

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[1] Cap 21, Laws of Kenya.

[2] {2013} e KLR.

[3] 9<sup>th</sup> Edition,

[4] Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 11.

[5] Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74.

[6] {2013} e KLR.

[7] {2013} e KLR.

[8] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[9] {2019} e KLR.

[10] Redfern and Hunter Law and Practice of International Commercial Arbitration 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr “Arbitration and the Courts – The UNCITRAL Model Law” (1984) 50 Arbitration 3 at 4-5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278

[11] Misc. Civil Application No. E 1200 of 2021.

[12] Misc. Civil Application No. E 1200 of 2021.

[14] Akseli O “Appointment of Arbitrators as Specified in the Agreement to Arbitrate” (2003) 20(3) Journal of International Arbitration 247-254.

[15] {2018} e KLR.

[16] {2013} EWHC 2356 (TCC)

[17] {2015} EWHC 427 (Ch).