REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

MISC. APPLICATION NO. E129 OF 2021

BETWEEN

CHARLES MIGICHI MUNGAI practicing as CLARION ARCHITECTS.....APPLICANT

AND

MULTIMEDIA UNIVERSITY OF KENYA.....RESPONDENT

RULING

1. The facts giving rise to the present application are not in dispute and are follows. The Applicant is the Principal Architect of the firm of *Clarion Architects*. By a letter dated 3rd December 2007, he was pre-qualified for provision of Architectural Consultancy Services by the Respondent's predecessor (Kenya College of Communications Technology). By a letter dated 12th February 2008, the Respondent appointed him to render Architectural Consultancy Services in relation to the renovation of various buildings and structures situated at its Mbagathi Campus.

2. The Applicant accepted the engagement by his letter dated 25th February 2008 by indicating that the terms of reference for the renovations would be in accordance with the provisions of the ***Conditions of Engagement and Scales of Fees for Building and Civil Engineering Works, 1989 Edition***. Subsequently, and through a letter dated 25th March 2008, he stated that his engagement would now be governed by the provisions of the ***Architects and Quantity Surveyors Act (Chapter 525 of the laws of Kenya)*** consistent with the other building consultants who had also been engaged by the Respondent on the renovations.

3. The Respondent, by a letter dated 26th March 2010, terminated the Applicant's engagement. The Applicant invoked the relevant provisions of the ***Architects and Quantity Surveyors Act*** which provide for the remuneration of consultants upon termination of their services by a client and submitted Final Fee notes to the Respondent for settlement. The Final Fee notes which were sent under cover of a letter dated 28th April 2010 pertained to the consultancy services that he and his Sub-Consultants had rendered to the Respondent. After several discussions, the Applicant issued a revised Fee note to the Respondent on 15th June 2010 wherein his professional fees, excluding fees for other Consultants in the renovation project, were pegged at KES. 29,224,634.70.

4. The Applicant contends that despite numerous requests, the Respondent has not settled his fees. The Applicant's lawyers issued a formal demand letter dated 20th December 2018. The Respondent replied to it by the letter dated 23rd January 2019, wherein it sought more time to resolve the matter as it was in consultations with the Ministry of Education. Due to lack of progress on the matter, the Applicant's lawyers wrote to the Respondent the letter dated 3rd June 2019, invoking the provisions of the ***Architects and Quantity Surveyors Act*** and requesting the Respondent to concur to the appointment of an arbitrator whom the Applicant had proposed. The Applicant avers that the Respondent neither agreed nor objected to the Applicant's choice of proposed arbitrator.

5. The Applicant has now moved the court by the Notice of Motion dated 22nd February 2021 made under **Article 159(1)(c)** of the Constitution, **section 4(4)** of the ***Arbitration Act 1995***, **Clause A.7** of the **Fourth Schedule** to the ***Architect and Quantity Surveyors Act,*** **sections 1B and 3A** of the ***Civil Procedure Act,*** **Order 51 Rule 1** of the ***Civil Procedure Rules*** seeking orders, inter alia, that the dispute between the parties in relation to unpaid professional fees be referred to Arbitration for hearing and final determination and that the Chairperson of the Architectural Association of Kenya do nominate the said Arbitrator within fourteen (14) days of the Order of the Court. Further, the Arbitrator so appointed do prepare and submit the award to this Court within a period of six (6) months from the date of appointment.

6. The application is supported by the Applicant's affidavit sworn on 22nd February 2021. It is opposed by the Respondent through the undated affidavit sworn by Mumbi S. Mwihurih, the Respondent's Legal Officer. The application was canvassed by way of brief written submissions with parties advancing their respective positions.

7. As stated in the introductory part, much of the facts giving rise to this application are common ground and from the correspondence produced by the Applicant in his deposition, there is no doubt that there is a dispute on account of professional fees between the parties. The question for determination is whether this dispute ought to be referred to arbitration.

8. The resolution of this case turns on the application of **section 4** of the ***Arbitration Act*** which set out the various forms an arbitration agreement can take. It states as follows:

> ***4. Form of arbitration agreement***
>
> *(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(2) An arbitration agreement shall be in writing.*
>
> *(3) An arbitration agreement is in writing if it is contained in—*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or*
> >
> > *(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.*
>
> *(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. [My Emphasis]*

9. The Applicant argues in the affirmative and states that the parties' engagement was governed by ***Architects and Quantity Surveyors Act*** where **Clause A.7** of the **Fourth Schedule** which provides for the resolution of disputes between Consultants (Architects and Quantity Surveyors) and their clients through arbitration as follows;

> *Arbitration*
>
> *(a) Where any difference or dispute arising out of the conditions of engagement and scale of profession fees and charges cannot be determined in accordance with paragraph (a) of clause A6, it shall be referred to arbitration by a person to be agreed between the parties, or failing agreement within fourteen days after either party has given the other a written request to concur in the appointment of an arbitrator, to a person to be nominated at the request of either party by the president of the East Africa Institute of Architects.*

10. The Applicant contends that the arbitration agreement can be discerned from the series of correspondence between the parties more so, his letter dated 25th March 2008 where he stated that the parties' engagement will be in accordance with the ***Architects and Quantity Surveyors Act.*** The Applicant submits that since the Respondent never raised any objection to the same, and in reliance on the doctrine of estoppel by acquiescence, there is an implied agreement between the parties to use the provisions of the aforementioned ***Act*** to govern their engagement.

11. The Respondent submits that there was no written agreement executed by the parties containing an arbitration clause. It maintains that none of the correspondence exhibited by the Applicant point to any arbitration agreement within the meaning of **section 4** of the ***Arbitration Act***.

12. The correspondence between the parties was as follows. After pre-qualification as one its Architects, the Respondent invited the Applicant to provide consultancy services for refurbishment works by the letter dated 12th February 2008. In response thereto, the Applicant, in his letter dated 25th February 2008 referenced, *"PROPOSED RENOVATION OF HOTEL COMPLEX, MAIN COMPLEX HALL, LAUNDRY AND DINING HALL AT MBAGATHI CAMPUS Acceptance of Award"* stated, in part, as follows:

> *Your letter PQ/CON/1/2007 dated 12th February 2008 appointing us the Architects for the above works.*
>
> *We are pleased to accept the appointment to be Architects for the works. We wish to confirm that we held a briefing meeting……*
>
> ***We also confirm that the Terms of Engagement are in accordance with the Conditions of Engagement and Scales of Fees for Building and Civil Engineering works 1989 Edition***.

13. A month or so later, the Applicant wrote to the Respondent the letter dated 25th March 2008 referenced, *"Revised Acceptance of Award"* which stated, in part, as follows:

In our acceptance of Award letter Ref: CA 255/08/001 dated 25th February 2008 we stated that the terms of engagement are in accordance with the conditions of Engagement and Scales of Fees for Building and Civil Engineering Works (1989) Edition. We have since learnt that you intend to engage us in accordance with the Architects and Quantity Surveyors Act Cap 525 (see the Quantity Surveyor Award letter Ref. PQ/CON/1/2007 – 2008 dated 10th March 2008).

We wish to revise our earlier position and now confirm that our engagement will be in accordance with the Architect and Quantity Surveyors Act Cap 525 Laws of Kenya.

14. From the letters exhibited by the Applicant, it is clear that the Applicant accepted the terms of the award, not under the terms and conditions imposed by the ***Architects and Quantity Surveyors Act*** but under the ***Conditions of Engagement and Scales of Fees for Building and Civil Engineering Works, 1989 Edition***. Having accepted the terms of the Award under his own conditions, the Applicant could not turn around a month later and re-impose fresh terms. This amounts to a fresh offer or counter-offer by the Applicant to the Respondent which, according to evidence, was not accepted.

15. In the letter dated 25th March 2008 where he purported to revise the terms of engagement, the Applicant alluded to the fact that the Respondent intended to engage them in accordance with the ***Architects and Quantity Surveyors Act*** just like it had done with other consultants such as the Quantity Surveyor. This evidence dislodges any intention by the Respondent to be bound by the ***Architects and Quantity Surveyors Act***. It also dispels that Applicant's contention that the Respondent acquiesced to his position by its silence. If the Respondent so intended, it would have expressly accepted the Applicant's revised offer in his letter dated 25th March 2008 or written to the Applicant, as it did to the other sub consultants, stating the terms of engagement upon the revised terms proposed by the Applicant.

16. **Section 4** of the ***Arbitration Act*** encapsulates the principle that arbitration is a consensual process governed by consent of the parties (see ***Goodison Sixty One School Limited v Symbion Kenya Limited*** **[2017] eKLR)**. The Respondent cannot be forced to proceed to arbitration yet it never expressly agreed to do so, at least from the parties' exchanges on record. From the material on record, I find and hold that the Applicant unilaterally introduced the reference to the ***Architects and Quantity Surveyors Act*** but this was not accepted by the Respondent hence the arbitration provisions were not incorporated into the agreement between the parties.

17. The exchange of letters referred to in **section 4(3)(b)** of the ***Arbitration Act*** must be bilateral and not unilateral. In other words, there must be a meeting of minds on the issue of arbitration as a mode of dispute settlement. I am therefore in agreement with the Respondent that there is no arbitration agreement between the parties within the meaning of **section 4** of the ***Arbitration Act*** which obliges the dispute between the parties to be referred to arbitration.

18. I dismiss the Applicant's Notice of Motion dated 22nd February 2021. I however decline to award the Respondent any costs

DATED and DELIVERED at NAIROBI this 27th day of AUGUST 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kungu instructed by A. K. Ndumu Advocates for the Applicant.

Mr Wena instructed by P. W. Wena and Company Advocates for the Respondent.