Kenya Breweries Limited v Jilk Construction Company Limited (Miscellaneous Civil Application E782 of 2021) [2021] KEHC 382 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)

Neutral citation: [2021] KEHC 382 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E782 OF 2021

A MABEYA, J

DECEMBER 17, 2021

BETWEEN

KENYA BREWERIES LIMITED ..... APPLICANT

AND

JILK CONSTRUCTION COMPANY LIMITED ..... RESPONDENT

RULING

1. This is a ruling on the Originating Summons dated 7/9/2021 which was brought under sections 14(3), (5) & (7) and 17(6) of the *Arbitration Act*, sections 1A, 1B, 3, 3A & 63(e) of the *Civil Procedure Act* and Rule 3(1) of the *Arbitration Rules* (1997). It seeks the following orders:-

    a) "This Honourable Court be pleased to set aside QS Mutinda Mutuku's ("the Arbitrator") award on the application for recusal or withdrawal of the arbitrator dated 15th March 2021 and delivered on 9th August 2021 ("The Recusal Award").

    b) This Honorable court be pleased to uphold and grant the challenge seeking orders for recusal or withdrawal of the Arbitrator in the arbitration between Jilk Construction Company Limited and Kenya Breweries Limited on 14th September 2020 ("The Recusal Application").

    c) This Honourable court be pleased to set aside the Arbitrator's award on the Application challenging the jurisdiction of the Arbitrator dated 14th September 2020 ("Jurisdiction Application").

    d) The Honourable court be pleased to find that the Arbitrator lacks Jurisdiction to hear and determine any and all matters arising out of and related to stand alone Purchase Orders.

    e) The Honourable court be pleased to set aside the Arbitrator's award for costs in the Recusal Award and jurisdiction award.

f) This Honourable Court be pleased to make such further orders as are fit and just in the circumstances; and

g) The Respondent bear the costs of this application".

2. The Summons is based on the grounds on face of it and is supported by affidavits sworn on even date by the applicant's Legal Director NADIDA ROWLANDS and JOHN MULIKA MBALUTO, an Advocate and a Partner in the Law Firm of Oraro & Company Advocates. There is also a Further Affidavit of NADIDA ROWLANDS sworn on 3/11/2021. In opposition, the respondent filed a replying affidavit sworn on 5/10/2021 by its Chief Executive Officer, ENG. SAMMY MAINA KAMAU.

3. The background to the matter is that, sometime in 2017, the applicant decided to refurbish its brewery plant situated in Kisumu vide a project dubbed "Project Nafasi" ("the said project"). Pursuant to three Joint Building Model Agreement and Conditions of Contract for Building Works ("JBC Contracts") and various Purchase Orders, the applicant engaged the respondent to execute various packages on the Project.

4. In the course of execution of the said project, a dispute arose between the two whereby the respondent invoked the dispute resolution mechanism under Clause 45 of the JBC Contracts. This resulted in the appointment of QS MUTINDA MUTUKU by the Architectural Association of Kenya (AAK) on 19/2/2020 as the sole arbitrator of the said dispute.

5. In the course of the arbitral proceedings, the applicant filed two applications dated 14/9/2020 before the Tribunal. One was for the recusal and withdrawal of the Arbitrator for lack of independence, impartiality and bias ("the recusal application") and the other challenging his jurisdiction to hear and determine claims arising from a series of Purchase Orders regarded as stand-alone contracts ("the jurisdiction application"). The Tribunal dismissed both applications with costs vide two awards dated 15/3/2021 but published on 9/8/2021. It is those awards that precipitated these proceedings.

The applicant's case.

A. The Recusal Award

6. The applicant contended that following his appointment, the Arbitrator invited the parties for an online preliminary meeting on 10/6/2020 during which the applicant's Advocate requested the Arbitrator for a declaration of no conflict. In response, the Arbitrator indicated that in the course of his professional career, he had worked and interacted with a wide range of people including the respondent with whom he worked on a project as a consultant. The Arbitrator also disclosed that he was acquainted with and had interacted in various social circles with persons that worked with both the applicant and its Advocates but there were no circumstances that would affect his impartiality or independence.

7. Following the disclosure, the applicant's Advocates indicated that they needed to seek further instructions from their client after which they would advise the Tribunal on the applicant's position on the matter. When the applicant was notified about the Arbitrator's disclosure, it took the view that the same constituted a potential conflict of interest since the Arbitrator had not provided details of his relationship with the parties.

8. In the circumstances, the applicant requested for a written declaration of no conflict as well as the identity of the individuals working for the applicant and its Advocates whom the Arbitrator was acquainted to or had interacted with socially.

9. The Arbitrator responded by a letter dated 25/6/2020 wherein he referred the applicant to item No. 9 of the Tribunal's Direction Order No. 2 and No. 18 of the minutes of the preliminary meeting of 10/6/2020. This was in respect of his independence and impartiality.

10. Dissatisfied with the response, the applicant made a second request to which the Arbitrator responded on 20/7/2020 stating that he was a quantity Surveyor in a project in which the respondent was a contractor. He further reiterated that he had interacted in social circles with persons who worked for the applicant and the applicant's Advocates as a golfer but emphasized that that was as far as he would go in explaining the matter.

11. According to the applicant, the information provided by the Arbitrator in the second letter was insufficient to enable it take a considered view on the Arbitrator's appointment. As such, the applicant wrote to the Arbitrator on 18/8/2020, through its Advocates expressing its concerns on the disclosures. That it had made internal inquiries among its staff but none acknowledged to have either known or having interacted with the Arbitrator.

12. In this regard, further information was requested, of the identities of the names the individuals who worked with the applicant's Advocate that the Arbitrator was acquainted to and the specific details of the consultancy engagement that the Arbitrator had undertaken with the respondent.

13. By a letter dated 24/8/2020, the Arbitrator invited the parties to a second online meeting on 1/9/2020. In that meeting, he stated that he had conclusively dealt with the matter in item 9 of the Order for Direction No. 2 and his letter of 20/6/2020. He however, revealed that the mutual client with the respondent to whom he had alluded to was Mwalimu Sacco. He sought to know whether a Mr. John Mbaluto worked at the applicant's Advocate's offices but did not confirm that Mr. Mbaluto was the person he had interacted with. JOHN MULIKA MBALUTO Advocate swore an affidavit in which he stated that the Arbitrator was neither known to him personally nor had he been acquainted with him.

14. In view thereof, the applicant's Advocates once again requested the Arbitrator to provide a written direction or order on the matter since the applicant's inquiries had disclosed that the Arbitrator was sub-contracted by the respondent in the Mwalimu Sacco Project. That the Arbitrator and the respondent's principal were members of the same church and a private Members Club. The Arbitrator declined to do so stating that, he had already dealt with the matter conclusively and that the applicant was to be guided by item No. 18 of his Order for Direction No. 2 which referred to challenges to the jurisdiction of the Arbitrator. He therefore directed the applicant to file a formal application regarding the matter within 14 days.

15. During a meeting held on 1/9/2020, the Arbitrator directed the applicant's Advocates to arrange for only one advocate from the advocates firm to deal with correspondence with the Tribunal. The applicant's Advocates agreed to consider the matter internally and advise the Arbitrator on the advocate in the firm in whose name all correspondence to the Tribunal would be written notwithstanding that such correspondence may be signed by any other advocate from that office.

16. Thereafter, the Arbitrator issued Order for Direction No. 4 which incorrectly indicated that the applicant's Advocates had agreed to retain only one advocate at their firm to deal with all correspondence and engagements with the Tribunal and the respondent. In answer, the applicant's Advocates wrote to the Arbitrator expressing their concerns and requested for an amendment of the record of the proceedings.

17. The Arbitrator convened a third online meeting on 9/10/2020 in which the respondent's Advocates requested that the recusal application be heard and determined prior to the Jurisdictional Challenge.

The Arbitrator declined but in his Order for Directions No. 5, he incorrectly indicated that the decision to hear and determine the two applications at the same time was reached with the consent of the parties.

18. The applicant's Advocates wrote to him disputing the correctness of the said Order. He once again without consulting or obtaining the Claimant's view on the matter, forwarded to the parties a revised version of the said Order which correctly reflected the online proceedings of 9/10/2020.

19. On the basis of the foregoing, the applicant has listed eleven grounds of appeal and now contends that it is apprehensive that the Arbitrator will not fairly determine the dispute based on the evidence and arguments to be adduced before him and seeks his removal from his position as such.

B. The Jurisdiction Award

20. On this, it is the applicant's case that out of the twenty-six (26) work packages awarded to the respondent in the said project, seven (7) were part of the following JBC Contracts: -

    a) JBC contract dated 31/10/2017, whose scope was for external civil works at a contract price of Kshs. 106,737,485/- (exclusive of VAT) to be paid through Purchase Order. Nos. 4903247946 and 4903267623.

    b) JBC contract dated 1/2/2018, whose scope was for Water, Ducting, and MCC Slabs Works at a contract price of KShs. 86,362,507/- (exclusive of VAT) to be paid through Purchase Order No. 4903289337.

    c) JBC contract dated 27/3/2018, whose scope was for architectural works at a contract price of KShs. 149,150,126/- (exclusive of VAT) to be paid through Purchase Order No. 4903315989.

21. It contends that the parties mutually amended the terms of the above JBC Contracts vide two letters of amendment to incorporate four additional JBC scopes of work as follows: -

    a) Letter of amendment dated 23/4/2018 incorporated the following works: -

        i) change order 005 at a contract price of KShs. 38,435,659/- to be paid through Purchase Order No. 4903298313;

        ii) boiler house, utilities area, spent grain silo civil works 009 at a contract price of KShs. 30,978,270/- to be paid through Purchase Order No. 49033133028; and

        iii) effluent drainage upgrade 010 at a contract price of KShs. 33,841,360.00 to be paid through Purchase Order No. 4903313017.

    b) Letter of amendment dated 25/4/2018 incorporating change order external services 0016 at a contract price of KShs. 59,300,000/- to be paid through Purchase Order No. 4903338353.

22. The above eight purchase orders, collectively referred to as JBC Purchase Orders, were in respect of a total sum of Kshs. 504,016,179.26.

23. The applicant contends that it awarded subsequent work packages to the respondent solely based on local purchase orders (hereafter "Stand-Alone Contracts") which were separate agreements with distinct terms and conditions from those under the JBC Contracts. That the Stand-Alone Contracts are governed by Standard Terms and Conditions of Purchase which are attached to every Purchase Order and were entered into vide twenty-one stand-alone purchase orders totaling the sum of Kshs. 865,793,327.63.

24. Its case therefore is that, pursuant to Clause 45 of the JBC Contracts, the parties agreed that in the event of any dispute, and in the absence of agreement on a sole arbitrator, the Architectural

Association of Kenya (AAK) would appoint an arbitrator to hear and determine any dispute arising therefrom. On the other hand, that it had been mutually agreed that any dispute arising from the Stand Alone Purchase Orders should be resolved by an arbitrator appointed by the Chartered Institute of Arbitrators ("CIARB").

25. In this regard, it is the applicant's contention that the matters arising from the Stand-Alone Purchase Orders did not fall within the jurisdiction of the Tribunal. The applicant is therefore aggrieved by the dismissal of its Jurisdictional application and has raised several grounds of appeal against that decision.

The respondent's case

26. The respondent contends that the Originating Summons as filed is a non-starter, a waste of judicial time, scandalous and otherwise an abuse of the very intent and purpose of not only the arbitral proceedings but also the tenets of the Constitution on expeditious disposal of ADR mechanisms. That it has been brought with the sole aim of delaying the arbitral proceedings.

27. That in the course of execution of the original Contracts, the applicant added different packages of work thereto without signing any separate Contract. That works commenced on different dates as per the dictate of the site conditions and as directed by the applicant's Project Manager. That the contract durations also varied without any fixed completion dates being recorded which had led to the dispute between the parties.

28. The respondent contends that after the preliminary virtual meeting of 10/6/2020, the applicant's Advocates embarked on a heated exchange with the Arbitrator through various correspondence. This not only dragged the commencement of the arbitral proceedings but culminated with the filling of the two applications. In its view, the applicant has not proved any justifiable doubts touching either directly or indirectly on the Arbitrator's impartiality and or independence

29. That the applicant's insistence on detailed disclosure of the parties and the nature of the contract undertaken by the Arbitrator about 3 years ago on the alluded project is not only impractical, unrealistic but also contravenes and or offends the very confidentiality clauses associated with such works and or engagements. It further contends that the issue of whether or not the Arbitrator has interacted in social circles with any member of the applicant's Advocates'

30. It has not been demonstrated how such social interactions if at all they exist, will affect the Arbitrator's independence and or impartiality.

31. The respondent concludes that the further letter of amendment dated 12/6/2019 incorporated the extra packages that the applicant now alleges were not part of the JBC Contracts. To the respondent therefore, the Originating summons lacks merit and should be dismissed with costs.

32. In rejoinder, the applicant contends that there was obvious and notable reluctance on the part of the Arbitrator to provide a declaration of no conflict of interest. That the Arbitrator cannot rely on a contractual confidentiality obligation to fail to discharge his statutory obligation to provide the full particulars of the relationship he has with the respondent, or as a defence or reason for non-disclosure of this information. That the Arbitrator's conflict of interest regarding his previous relationship with the respondent cannot be "balanced" by an allegation of equal past interaction with members of the applicant's Advocate's firm.

ISSUES FOR DETERMINATION

i. Whether the Applicant has made out a case for the removal of the Arbitrator in the Arbitral proceedings; and

ii. Whether or not the Arbitrator has jurisdiction to hear and determine claims arising from the twenty-one "stand-alone" purchase orders.

33. On the first issue, the applicant is challenging the Arbitrator for alleged lack of independence and impartiality. Section 13(3) of the *Arbitration Act* ("the Act") provides:-

> "(3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so."

34. In *Modern Engineering v Miskin 15 BLR 82*, Lord Denning stated: -

> "The proper test to apply when considering whether to order removal was to ask whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion ... The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if the arbitrator is allowed to continue with this arbitration at least one of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying "I have not had any fair hearing".

35. In Zadock Furnitures Limited and Another v Central Bank of Kenya [2015] Eklr, Gikonyo J observed: -

> "The grounds for removal of arbitrator are set out in section 13(3) of the *Arbitration Act*, but the one which is relevant to this application is ... only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence... The words ''only if'' and ''justifiable doubts'' are important in a decision under section 13(3) of the *Arbitration Act* and the arbitrator recognized that fact. The words suggest the test is stringent and objective in two respects: a) the Court must find that circumstances exist, and those circumstances are not merely believed to exist; and b) those circumstances are justifiable; this goes beyond saying that a party has lost confidence in the arbitrator's impartiality into more cogent proof of actual bias or prejudice. The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the Court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was real likelihood of bias."

36. In *West Park Limited v Villa Care Limited & Another [2020] eKLR*, Majanja J. observed that: -

> "... the test adopted by the Act is stringent. It is intended to weed out frivolous allegations not founded on facts. The application must be based on the circumstances that exist and those circumstances must be justifiable. This test is in consonance with the prevailing legal formulation for the test for recusal of judicial officers emerging from our superior court where the courts have held that the test is not subjective based on the feelings or belief of the parties aggrieved but of a reasonable person with knowledge of the facts in issue."

37. Bearing the above in mind, the question then is whether a reasonable person with the knowledge of the facts in issue, looking at the grounds raised by the applicant, will have the impression that circumstances

exist that give rise to justifiable doubts as to the Arbitrator's impartiality and independence. The grounds raised by the applicant in its pleadings and submissions are that: -

a) the Arbitrator had failed to make a full and frank disclosure of his relationship with the parties;

b) the Arbitrator displayed open bias by attempting to limit the applicant's right to legal representation; and

c) the Arbitrator displayed open bias by issuing procedural directions that were wrongly passed off as consent orders.

38. On the ground that the Arbitrator failed to make a full and frank disclosure of his relationship with the parties, it is not in dispute that at the very first preliminary meeting, the Arbitrator made certain disclosures. From item 9 of the Order for Direction No. 2 of the minutes of the preliminary meeting of 10/6/2020, it is clear that he categorically disclosed that two years prior to the present arbitration, he had worked in a project with the Claimant. That they had distinct roles, to wit, Quantity Surveyor and Contractor, respectively. At the second online meeting on 1/9/2020, the Arbitrator disclosed that the Project alluded to was the "Mwalimu Sacco Project".

39. In this Court's view, the disclosure was in compliance with section 13(1) of the Act which requires a person who is approached for appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

40. The applicant disputes the veracity of the Arbitrator's disclosure and alleges that, its independent investigations had revealed that the Arbitrator was subcontracted by the respondent to carry out re-measurements and was paid by the respondent for the said role. For that reason, the applicant contends that the Arbitrator's relationship with the respondent constitutes a disqualifying conflict of interest. The applicant further alleges that its inquiries disclosed that the Arbitrator and the respondent's principal were members of the same church and Members Club namely CITAM Valley Road and United Kenya Club, respectively.

41. There was no evidence that was produced to prove those allegations. The general rule is that he who alleges must prove. The applicant alleges that the Arbitrator had been appointed by the respondent to do re-measurement and was paid by the respondent. No evidence of the same was presented. As set out in the authorities cited above, the court will not act on sheer speculation and conjecture. The test being objective, positive and cogent evidence is required before a court can remove an Arbitrator under section 13 (3) of the Act.

42. In any event, in paragraph 6.15 of the Recusal Award, the Arbitrator categorically stated that he has never been a member of either the Church or Members Club alluded to by the applicant. Further, that he was also not aware that the respondent's CEO was a member of either that church or club.

43. In the Court's view, mere membership of a Church or private Members Club cannot be taken to be the circumstances alluded to under section 13(3) of the Act. It must be shown that such membership had caused the party and the arbitrator to be so close that a reasonable person would most likely think the arbitrator might not be independent.

44. In item 9 of the Order for Direction No. 2 of the minutes of the preliminary meeting of 10/6/2020, the Arbitrator revealed that he had interacted in social circles with persons working with both the applicant and its advocate. However, he confirmed that there were no circumstances that would affect his impartiality or independence in the matter.

45. The applicant has disputes this disclosure and suggests that that was an attempt by the Arbitrator to cover up his relationship with the respondent because none of its employees nor its advocates' employees had admitted to having interacted with the Arbitrator.

46. In this court's view, nothing turns on the fact that none of the applicant's and/or its advocate's employees had admitted to having had any interaction whatsoever with the Arbitrator. What matters is that the Arbitrator fulfilled his duty of disclosure as required of him under section 13(1) of the Act. He categorically clarified his interaction with those persons would not in any way affect his independence.

47. What the applicant makes of such disclosure is therefore neither here nor there especially in the face of unsupported and unsubstantiated allegations of partiality or bias. Something more is required if a reasonable person is to read bias, prejudice or partiality in the circumstances. In the Court's view therefore, no justifiable doubts have been raised as to the Arbitrator's impartiality and independence.

48. The second ground is that the Arbitrator displayed open bias by attempting to limit the applicant's right to legal representation. The applicant took issue with item no. 8 of Order for Directions No. 4 of the second meeting of 1/9/2020. This reads: -

> "The Respondent's legal team retains one advocate to engage on this matter and all correspondences, engagements with the tribunal/claimant would be through him/her"

49. The applicant claims that this was an attempt to limit its right to legal representation since its advocates never consented to a proposal to that effect by the Arbitrator during the meeting. This is so because, the applicant was being represented by the firm of advocates as opposed to a single advocate.

50. To begin with, it is the applicant's right to be represented by a multitude of advocates in the proceedings if it so wishes. It is also common ground that when the applicant's advocates in their letter of 11/9/2020 informed the Arbitrator that the said direction did not reflect what transpired during the online meeting, the Arbitrator immediately issued an Amended Order No. 4 correcting the issue.

51. At paragraph 6.255 of the Recusal Award, the Arbitrator explained that the said direction was for purposes of good order since at least three advocates from the office of the applicant's advocates were addressing the Tribunal in correspondence. This Court is unable to see how that order limited the applicant's right to legal representation. What the Court sees is an Arbitrator who chose to take charge of proceedings before him just like a judicial officer would do in ordinary court proceedings to be certain who among the many Advocates a party has retained is in-charge of correspondence. It must have been for purposes of good order.

52. The record shows that correspondence from the firm was being written by different advocates. In any case, it has not been shown that the applicant suffered or was to suffer any prejudice as a result of the erroneous record. In the end, the Court is unable read any bias whether open or otherwise in the action taken by the Arbitrator.

53. The 3rd ground was that the Arbitrator displayed open bias by issuing procedural directions that were wrongly passed off as consent orders and that the parties had consented to the hearing and determination of recusal application and the jurisdictional challenge at the same time.

54. The applicant's advocates raised this inconsistency in their letter of 16/9/2020. The Arbitrator responded by issuing an Amended Order for Direction No. 5 upon revisiting the audio recordings. The Amended Order correctly indicates that the parties took divergent positions on whether the two applications could be heard and determined separately and the Tribunal directed that if parties fail to agree on the same, it would rule on the two applications concurrently which is what it did.

55. In the Court's view, the applicant has not demonstrated that it suffered any prejudice as a result of the misdirection. Further, it has not been demonstrated that the misdirection was driven by any deliberate and improper motive on the part of the Arbitrator.

56. The determination of the two applications concurrently did not prejudice any of the parties but was rather necessary for the timely and expeditious disposal of the dispute. It suffices to state that parties resort to Arbitration because it is a speedier and more flexible method of dispute resolution unlike litigation. (See *Mistry Jadva Parbat Company Limited v Grain Bulk Handlers Limited [2012] eKLR* and *Kenya Pipeline Company Limited v Kenya Oil Company Limited & Another [2015] eKLR*). It will therefore be unfair to allow parties to delay arbitral proceedings without a justifiable cause.

57. In view of the foregoing, the Court holds that the applicant has not demonstrated that the Arbitrator was biased in the manner he conducted the arbitral proceedings so as to warrant his removal. A reasonable person looking at these allegations objectively would not have the impression that there is a danger of bias.

Whether the Arbitrator has jurisdiction to determine the twenty-one "stand alone" purchase orders.

58. Section 17(6) of the Act provides: -

> "(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter."

59. In *West Mount Investments Limited v Tridev Builders Company Limited[2017] eKLR*, Onguto J. observed: -

> "... where the arbitral forum determines that it has jurisdiction then any party aggrieved may apply to the High Court to decide the matter of jurisdiction. It must be pointed out that the High Court determines the issue a fresh and in its original jurisdiction. The language of Section 17(6) of the Act does not point to an appeal or review of the arbitral forum's decision. It is an application lodged under Rule 3 of the Arbitration Rules 1997 through an originating summons returnable before the judge in chambers with a specific question as to jurisdiction stated.
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> As already pointed out, the application to the High Court under Section 17(6) the Act is not an appeal. The court must then in considering the matter exercise an original jurisdiction and is not beholden to any findings of fact by the arbitral tribunal. The court is to evaluate the evidence, assess it and make its own conclusion while relating the same to the arbitration agreement which the court is also to construe independently. Even if it was to be deemed that an application under Section 17(6) of the Act is an appeal, it would still be a first appeal and the High Court would still be under an obligation to re-evaluate and consider all the evidence and material laid before the arbitral tribunal and make its own conclusions: see Selle v Associated Motor Boat Company [1968] EA 123 and Ramp Ratua & Company Ltd v Wood Products Kenya Ltd CACA No. 117 of 2001.
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> In my view, for any application under Section 17(6) of the Act the court is to consider four substantive issues.First, is whether there is a valid arbitration agreement? Secondly, is whether the arbitral tribunal is properly constituted and, thirdly, whether matters have been submitted to arbitration in accordance with the arbitration agreement. Finally, is whether the matters submitted to arbitration fall within the scope of the arbitration agreement".

60. It is common ground that each of the three JBC Agreements dated 31/10/2017, 1/2/2018 and 27/3/2018 contained an arbitral clause at Clause 45 thereof titled "Settlement of Disputes".

61. It is also common ground that a dispute arose between the parties which precipitated the appointment of the sole Arbitrator by the Chairperson of the Architectural Association of Kenya by a letter dated 19/2/2020. Consequently, the respondent lodged a Statement of Claim before seeking payment of Kshs. 2,449,889,853.81 on account of idle machinery and equipment, omitted works from the contract, amounts not certified but executed, non-certified variations, retention, supposed sub-contractors, other works/payment and loss of projected profits.

62. The bone of contention is, whether the Arbitrator has jurisdiction to hear and determine the claims arising from the twenty-one stand-alone purchase orders which were used to award and pay for additional works pursuant to a letter of amendment dated 12/6/2019.

63. It is the applicant's contention that since the Arbitrator was appointed under clause 45 of the JBC Contracts, his jurisdiction was limited to hearing and determining issues connected to the same. That he lacks jurisdiction to hear the claims arising from the Stand-alone Purchase Orders which were executed as separate contracts and not variations or amendment to the JBC Contracts. That the contemplation of the parties was that the JBC Contracts would only be incorporated to the purchase orders for the purposes of a final certificate for final valuation of works and payment consistent with payment for other contracts which had been entered between the parties.

64. It is contended that, since the dispute between the parties as raised in the Claim involves the execution of works and payment, the arbitral clause that applies is the one under which the works were carried out and paid. It is argued that the works in the stand-alone contracts were executed before the JBC terms were introduced and therefore, the arbitral clause applicable to them is clause 23.2 of the Standard Terms and Condition printed on the purchase orders.

65. In addition, the applicant submits that the letter of 12/6/2019 does not in any way mean that the arbitral clauses in the Stand-alone Contracts were automatically superseded or replaced by those in the JBC Contract. That in fact, clause 7 of the JBC Contracts as well as the provisions of subsequent deeds of variations and amendments suggest that in the event of a conflict between the provisions of the JBC Contracts and the provisions of the latter contracts amending the JBC Contracts, the provisions of latter amendments shall prevail.

66. On the other hand, the respondent maintains that the Arbitrator has jurisdiction to determine claims arising from the stand alone contracts since the letter of amendment dated 12/6/2019 incorporated the extra packages that the applicant alleges were not part of the JBC Contracts. It asserts that the parties interest was to be bound by the terms and conditions laid down in the JBC contract and in case of any dispute, they were to invoke Clause 45.2 of the said JBC contract as the sole mechanism of solving the dispute.

67. Looking at the manner in which the works were being awarded and paid, the Court is not persuaded by the contention that the stand-alone contracts were separate agreements governed by different terms and conditions. The Court's view is that the JBC Contracts entered into at the onset were overarching and captured the applicant's intention to procure building works.

68. It is glaringly evident that purchase orders were used by the applicant against all the work packages awarded right from the onset for purposes of payment and expansion of the scope of the works. It is only that the said orders were issued at different stages. It is also clear that ALL the Purchase Orders, that is, the eight JBC purchase orders and the twenty-one stand-alone purchase orders have similar terms and conditions printed on them.

69. There is no evidence to show that the parties intended that the so called stand-alone contracts connected to the letter of amendment dated 12/6/2019 would be governed by terms and conditions different from the rest. If this was the case, nothing would have been easier than for the parties to execute a varied agreement to that effect.

70. What is evident is that, the parties operated and proceeded as though they were all along governed by the JBC contracts in the execution of ALL the works in the project while funds for execution were availed using purchase orders at all stages.

71. The Court is therefore convinced that there is indeed an apparent nexus between the JBC Contracts and the stand alone contracts. The Arbitrator therefore has jurisdiction to determine claims arising from the stand-alone purchase orders. The challenge against the Arbitrator's jurisdiction therefore fails.

72. In view of the foregoing, the applicant's Originating Summons dated 7/9/2021 lacks merit and is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE