



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 85 OF 2017

LALJI MEGHJI PATEL & CO. LTD.....PLAINTIFF

VERSUS

PCEA FOUNDATION.....DEFENDANT

RULING

1. The matter came up for confirmation:

a. the status of arbitration process.

b. further directions.

2. Mr. Osundwa, counsel for the plaintiff after giving a brief history of the matter, pointed out that counsel for the Defendants, Mr. Mbaka, having come on record had pointed out an anomaly in that court order of Justice Njoki Mwangi delivered on 23rd July, 2018. He agreed with Mr. Mbaka, but because they had complied and proceeded before an Arbitrator, requested that:

a. the arbitration having failed, they be given a hearing date in the matter and the matter be expedited since the contractors had sought financing from the bank and the bank was on their back.

b. in the alternative, the plaintiff's counsel sought that the court direct, that the matter be heard by the Arbitrators where the parties had appeared and taken directions in the event the court does not wish to hear them.

3. Mr. Mbaka, counsel for the Defendant responded by saying that when he came into the matter, he perused the file and noted that while there was a valid court order made by Justice Njoki Mwangi on 23rd July, 2018, referring the matter for arbitration, there was a problem in order No. 2 which had referred the same to Certified Arbitrators of Kenya, which is unknown.

4. He then went on to state that the dispute being a construction agreement, the same is governed by an Agreement which was signed by the parties on 19th January, 2012 (Document 1 on the defendant's list of documents). He pointed out that in this agreement it is clear how the parties were to settle disputes between them, so that whatever award that would be arrived at by the arbitrator who had been appointed, may be subject to challenge.

5. According to Mr. Mbaka, he pointed out this error to the Arbitrator, who then wrote a short ruling divesting herself of jurisdiction to arbitrate the matter.

His prayer to court is that they let order amended so that they appear before a proper body as agreed by the parties.

6. Mr. Osundwa responded to this by saying that the defendant's counsel had not shown which prejudice they would suffer if the matter proceeded before the arbitrator who had been appointed, fees paid and parties appeared before her for directions. He felt that this was a delay tactic and said that the bank was on his client's back and were most likely to sell their properties.

7. He then beseeched court to order that the matter be concluded within 30 days if they were to be referred to another arbitrator or they be given a hearing date and respondents be directed to file a response.

8. Having listened to counsel for both parties in their submissions to court, I find the issue to be determined is whether or not to allow an amendment of order No. 2 of the orders made on 23rd July, 2018 by Hon Justice Njoki Mwangi.

9. I have considered the issue and find that whichever way one looks at it, a Judge properly directing him or herself to it would arrive at the same decision. What is in issue cannot amount to a review of the order as there is no new issue that has been raised other than having the name of a body which is to appoint an arbitrator in the said order No. 2 amended.

10. I have read through the Agreement between the parties dated 19th January, 2012 referred to herein and confirm the existence of Clause No. 45:1 which prescribed the manner in which disputes between the parties were to be dealt with. This clause clearly stipulated that:

“In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitration shall be appointed by the chairman or Vice chairman of the Architectural Association of Kenya, on the request of the applying party.”

11. The dispute herein touches on the substance of the agreement, which can only be canvassed in accordance with the said agreement. And so this Clause ousts the jurisdiction of this court and the court cannot be made to rewrite an agreement/contract for the parties on how they were to have the disputed arising between them resolved.

12. In line with the overriding objectives under Section 1B and 3B of the Civil Procedure Act, instead of wasting precious judicial time, allow the amendment of Order No. 2 of the orders of 23rd July, 2018 so that:

a. the matter be and is hereby referred to Arbitration before an Arbitrator appointed by the Chairman of the Architectural Association of Kenya in accordance with the provision of Clause No. 45:1 of the Agreement between the parties made on 19th January, 2012.

b. the appointed Arbitrator will thereafter give directions with regard to the proceedings and timelines for hearing and determination.

c. the case to be mentioned on 29th April 2019 for the counsel to update the court.

Ruling DELIVERED, DATED and SIGNED this 28th day of February, 2019

D. CHEPKWONY

JUDGE.

IN THE PRESENCE OF:

Mr. Tindika, counsel holding brief for Mr. Osundwa counsel for the plaintiff.

Mr. Mbaka counsel for the defendant.

Court Assistant; Beja