REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

MISCELLANEOUS APPLICATION NO. 136 OF 2017 (O.S)

IN THE MATTER OF ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT (CAP 21) LAWS OF KENYA

AND

IN THE MATTER OF THE GOVERNMENT CONTRACTS ACT

AND

IN THE MATTER OF ARBITRATION OVER PROPOSED NYS ENGINEERING INSTITUTE RUARAKA W.P ITEM NO. 01 NB JOB NO. 09961

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS TO DISMISS THE ARBITRATION PROCEEDINGS

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

VERSUS

N.K. BROTHERS LTD.....1ST RESPONDENT

QS ONESMUS M. GICHURI, ARBITRATOR.....2ND RESPONDENT

STEG CONSULTANTS.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

By an Originating Summons and Notice of Motion filed on 15th March 2017 brought under **Order 46 CPR, Section 17(6) of Arbitration Act & Rule 3 of Arbitration Rules 1997 & Section 3 A of CPA** and supported by Affidavit of Kennedy O. Asinuli, the Applicant herein sought the following orders:

a) That this Court be pleased to set aside the appointment of the QS ONESMUS M. GICHUIRI, as arbitrator in the matter between N.K. Brothers Ltd and National Youth Service, Ministry of Public Service, Youth and Gender Affairs of the Government of the Republic of Kenya.

b) That this Court be pleased to grant a permanent injunction against any or any further proceedings of the arbitral proceedings referred to QS ONESMUS M. GICHUIRI, as arbitrator in the matter between N.K. Brothers Ltd and National Youth Service, Ministry of Public Service, Youth and Gender Affairs of the Government of the Republic of Kenya.

c) That any such further and other orders as the Court may deem just and expedient to grant.

The 1st & 3rd Respondents jointly filed on 2nd June 2017 Statement and Grounds of Opposition under **Order 51 Rule 14(1) (c) CPR** opposed the application as misconceived and are an abuse of Court process. That the application is a mechanism to prejudice, delay and frustrate arbitration proceedings and intended spirit of Alternative Dispute Resolution mechanisms.

BACKGROUND OF THE CASE

On 6th December 1989, N. K Brothers Limited (hereinafter referred to as "**the 1st Respondent**") was awarded a construction contract by the Office of the President, Permanent Secretary Provincial Administration and Internal Security, for the construction of National Youth Service Engineering Institute Staff Houses (hereinafter referred to as **"the Project")** on parcel of land known as **Land Reference Number 7878/2** (hereinafter referred to as **"the Site").**

By letter of 7th June 1990, the appointed project architect, on behalf of the Departmental Representative **(D.R.)** of the Project handed possession of the Site to the 1st Respondent to commence construction with immediate effect.

The 1st Respondent mobilized all necessary materials and resources and commenced construction on the site. No sooner had the 1st Respondent begun works, than a dispute arose regarding the boundaries and ownership of the Site between the Central Bank of Kenya and National Youth Service Engineering Institute & Secretarial College.

By letter of 12th April 1991, National Youth Service advised the 1st Respondent to demobilize and remove its equipment and/or plant from the Site and further vacate the Site until the dispute regarding the ownership of the Site is resolved.

By letter of 25th August 1997, the Chief Architect on behalf of the Permanent Secretary, Provincial Administration and internal security agreed on a settlement proposal with the 1st Respondent. The settlement was for breach of contract, which caused hired/purchased plants, tools, equipment that were idle on site and loss of profit. This was after the 1st Respondent vacated the site due to ongoing ownership wrangle by NYS and **CBK** the amount was reduced to of **Kshs. 30,197,579.60** from **Kshs. 52,039,762.70**, the 1st Respondent's initial claim.

By letters dated 18th September 1988 & 3rd September 2001, the1st Respondent accepted the proposed settlement of claim. Despite the parties having agreed on a settlement proposal, the National Youth Service failed and/ or neglected to pay the 1st Respondent the said monies.

Consequently, the 1st Respondent through its representative, Steg Consultants (hereinafter referred to as "**the 3rd Respondent"**) wrote to the Association of Architects of Kenya on 30th June 2106, requesting for the appointment of an Arbitrator .

The Arbitrator, Hon. Q S Onesmus M. Gichuiri (hereinafter referred to as **"the 2nd Respondent"**) was appointed as per agreement (which is contested) and commenced arbitration proceedings. The Honorable Attorney General (hereinafter referred to as **"the Applicant")** represented National Youth Service filed Preliminary Objection before the 2nd Respondent challenging the Arbitrator's jurisdiction to hear and determine the matter. As the Arbitration Claim was time barred. In his Ruling dated 14th February 2017, the 2nd Respondent the Arbitrator dismissed the Applicant's Preliminary Objection.

Aggrieved by the 2nd Respondent's Ruling, the Applicant filed in this court an Originating Summons and Notice of Motion dated 14th March 2017.

On 31st January 2019, Counsel for the parties highlighted written submissions. The 1st and 3rd Respondent filed Submissions dated 20th July 2018 on 23rd July 2018 while the Applicant filed Submissions dated 26th July 2018 on 27th July 2018.

APPLICANT'S CASE

It is the Applicant's case as stated in Originating Summons, that there was/is no valid written contract between the 1st Respondent and the Applicant and hence there was/is no arbitration agreement between the parties. The Applicant contended that there is no existing contract between the parties in compliance with **Government Contracts Act**.

Therefore; the Applicant objected to the appointment of the 2nd Respondent as Arbitrator and to the conduct of entire arbitral proceedings. The Applicant averred that the 2nd Respondent assuming jurisdiction as sole arbitrator without the agreement of the Applicant and in the absence of a written contract and arbitration agreement, violated the provisions of **Section 3 and 4 of the Arbitration Act** which provide;

> ***Section 3 (1)*** *defines* ***"arbitration agreement" an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;***
>
> ***Section 4*** *provides;*
>
> > ***(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."

The Applicant in Written Submissions averred that the **Government Contract Act** requires that all contracts involving the Government to be signed by an authorized officer and that no government contract could be deemed to be valid without this requirement.

Section 2 of the Government Contracts Act provides;

Contracts made in Kenya for the Government

"Subject to the provisions of any other written law, any contract made in the Colony on behalf of the Government shall, if reduced to writing, be made in the name of the Government of the Colony and Protectorate of Kenya, and shall be signed either by the accounting officer or by the receiver of revenue of the Ministry or for the department of the Government concerned, or by any public officer duly authorised in writing by such accounting officer or receiver of revenue, either specially in any particular case or generally for any contracts below a specified value in his department or otherwise as may be specified in such authorization."

The Applicant relied on the decision in ***Gulf Architects vs The Attorney General, Civil Appeal Case No. 36 of 2002***, where the court held:

> ***"It is manifestly clear from section 2 of the Governments Contract Act that a contract with the Government must not only be reduced into writing but must be entered into with an authorized officer. The statute therefore prohibits contracts that are entered into with unauthorized officer…"***

The Applicant further submitted that in the absence of a valid written contract between the parties, the Arbitrator lacks jurisdiction to determine the dispute as it was held in ***Associated Architect vs Government of Andhra Pradesh and Anr (1992) Air 232***, where the Supreme Court of India held:

> ***"The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction…"***

It was the Applicant's case that the claim is statute barred as it is contrary to **Section 3 (2) of the Public Authorities Limitations Act** which provides:

> ***"No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued."***

The Applicant further submitted that the cause of action in the arbitration proceedings accrued in 1990 when the Central Bank of Kenya wrote to the 1st Respondent claiming ownership of land where the project was to be undertaken. Therefore the Project could not be completed as planned. However, the Respondent filed its Notice of Arbitration on 8th October 2014, approximately 24 years after the cause of action arose.

The Applicant supported his position by citing the case of ***Sigma Engineering Company Ltd vs The Attorney General [2011]*** **eKLR** where the learned judge held:

> ***"The plaintiff's claim became due when the client failed to settle the first certificate. No notice was issued when the cause of action arose and no leave was sought to file this suit out of time. The law clearly provides the period of limitation which should be followed unless otherwise leave is granted…"***

RESPONDENTS' CASE

The Applications were however opposed by the 1st and 3rd Respondent who relied on the following grounds of opposition:

1. The Applications in their entirety do not warrant the grant of orders sought by the Applicant and thus the Applications

are misconceived and are an abuse of the court process.

2. The Applicant's Applications are a mere mechanism to prejudice, delay and frustrate arbitration proceedings between the Applicant and the 1st Respondent.

It is the Respondents' case that the **N. K. Brother Limited** and **National Youth Service** performed their obligations in accordance to the **Ministry of Works Contract Agreement (1970)** which was then the Standard Contract, which governed all contracts between public agencies of the Government of Kenya, and contractors for public works awarded by Government.

It is the Respondents submission that the parties' conduct and performance of the conditions and obligations expressly and vividly, established a contractual relationship between themselves and further, that their conduct expressly and impliedly intended to incorporate the terms and conditions of the Ministry of Works Contract Agreement (1970). The Respondents relied on the case of ***Reveille Independent LLC vs Anotech International (UK) Limited [2015] EWHC 726*** which held that performance of a condition is an essential element of a contract and

"...that signatures of parties to a written contract is not a precondition to the existence of contractual relations, as a contract can equally be accepted by conduct..."

Therefore, it was the Respondents' submission that the Ministry of Works Contract Agreement (1970) governed and guided the parties in respect to the Project and hence, its provisions including Clause 32 which prescribes arbitration as a dispute resolution mechanism, applied to the parties.

A contractual relationship was between the parties based on the Ministry of Works Contract Agreement (1970), the 1st Respondent rightfully invoked Clause 32 so as to commence arbitration proceedings against the National Youth Service for recovery the settlement of **Kshs. 30,197,579.60.**

ISSUES FOR DETERMINATION

After considering the pleadings, submissions and evidence, I have condensed the issues for determination outlined by the parties into the following;

A) Whether the Court has jurisdiction to hear consider and determine the question of jurisdiction of /by Arbitrator.

B) Whether there was/is an existing and valid contract/arbitration agreement between National Youth Service and the N. K. Brothers Limited;

C) Whether the 2nd Respondent was validly and lawfully appointed and has jurisdiction to hear and determine the dispute between the National Youth Service and N. K. Brothers Limited;

D) Whether the claim is statute-barred and is contrary to **Section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya.**

E) Whether the 3rd Respondent should participate as party to the proceedings

F) Whether the applications are granted and permanent injunction is granted or dismissed and Arbitration proceedings continue?

i. Whether the Court has jurisdiction to hear consider and determine the question of jurisdiction of /by Arbitrator.

The Respondents claim that the Court lacks jurisdiction to hear and determine the question of limitation of time and existence or validity of an arbitration Agreement.

The Respondents relied on **Section 17 of Arbitration Act 1995** which provides;

1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose;

2) ……

3) ……..

4) ……..

5) ……

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.

A reading of the above provisions actually cited by Respondents, grant the Court jurisdiction to hear and determine the question of jurisdiction contrary to the Respondents' assertion to the contrary. If the High Court may hear an application based on Ruling on the Preliminary Objection on jurisdiction of arbitral tribunal then the jurisdiction is granted to this High Court in the instant matter.

Section 39 of Arbitration Act 1995 provides jurisdiction along the same lines and fortifies this position as follows;

> **Questions of law arising in domestic arbitration;**
>
> **a) An application by any party may be made to a Court to determine any question of law arising in the course of the arbitration;**
>
> **b) An appeal by any party may be made to a Court on any question of law arising out of the award.**
>
> **Such application or appeal as the case maybe, may be made to the High Court.**
>
> **2) On an application or appeal being made to it under Subsection 1) the High Court shall;**
>
> > **a) determine the question of law arising;**
> >
> > **b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re- consideration, or where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.**

The Arbitrator's Ruling on Preliminary Objection was delivered on 14th February 2017. The Notice of Motion was filed on 15th March 2017 within the prescribed 30 days and hence is appropriately before Court for hearing and determination.

The Arbitration Act as prescribed by **Section 10** as read with **Section17 & 39 A** grants this Court jurisdiction to hear and determine the issue of jurisdiction and existence and validity of contract.

ii. Whether there was/is an existing and valid contract/arbitration agreement between National Youth Service and the N.K.Brothers Limited.

To determine whether there is an arbitration agreement between the parties, one must establish a valid contract between them. The Applicant contended that there was no written and signed agreement between the Applicant and 1st Respondent. Therefore, there was no Arbitration Agreement.

> **What constitutes a valid contract** as from excerpts from; **Principles of Commercial Law by Kibaya Imaana Laibuta Pg 45 provides;**
>
> ***"Contracts maybe in writing, or orally, or partly orally and partly in writing or otherwise implied from the conduct of the parties or from the custom, trade usage in the particular trade or profession***.
>
> ***Validity of contract is dependent upon not only on its form and content but also factors attributable to the parties***.
>
> ***The contractual relationship is initiated by one party extending an offer to the other to accept the proposition either according to terms of offer or on such terms as the parties may eventually agree.***
>
> ***There must be consideration….a right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.***
>
> ***The mutual intention of parties to be bound in contract may be expressed in their oral or written agreement or inferred from their conduct or course of dealing in similar transaction or from custom or usage in trade or profession in which they engaged. In Commercial transactions…it will always be presumed that the parties intended to create legal relations and make a binding contract unless there are sufficient grounds to rebut the presumption".***

By letter dated 6th December 1989 Office of the President ,Permanent Secretary Provincial Administration & Internal Security wrote to M/S N. K. Brothers as follows;

> ***"…I am pleased to inform you that the Government has agreed to award you the construction job in respect of NYS Engineering Institute Staff Houses Ruaraka. This is an extremely urgent project and you are expected to contact the D.R.of the Project, that is Chief Architect Ministry of Works and NYS Director for necessary briefing to enable you commence construction work as soon as possible."***

This was the letter of offer by Applicant to 1st Respondent and was copied to both Ministry of Public Works & NYS Headquarters.

Subsequently, by letter dated 7th June 1990 from Gulf Architects, the appointed Project Architects on behalf of Departmental Representative (D.R.) of the Project was to the effect that the 1st Respondent was to take over the site and commence construction with immediate effect.

The letter was copied to Chief Architect, Chief Quantity Surveyor, Chief Structural Engineer, Chief Mechanical Engineer and Chief Electrical Engineer all of Ministry of Public Works and NYS Director, beneficiary of the Project. The letter referred to the discussion of 5th June 1990 amongst the parties mentioned which means there was an oral agreement with the 1st Respondent and relevant parties. The letter has the stamp of N. K. Brothers Ltd marked received on 11th June 1990. This signified acceptance of further terms of offer from the Applicant's client.

The 1st Respondent took out security bond and mobilized all necessary materials and resources and commenced on the construction site **Land Reference Number 7878/2**. The 1st Respondent complied with Ministry of Works Contract Agreement (1970) the standard contract which governed all contracts between Public Agencies of the Government of Kenya and Contractors for Public Works awarded by Government.

The Applicant's Client paid the 1st Respondent on 14th June 1990 Ksh 10million for works done as per the 1st certificate but Ksh 1m was withheld to be paid with the next certificate issued on works done.

Shortly, thereafter, a dispute arose between National Youth Service (NYS) and Central Bank of Kenya (CBK) over ownership of the Site which grounded the 1st Respondent's work.

On 12th April 1991, National Youth Service (NYS) wrote to N. K. Brothers Ltd that they were to demobilize and vacate the site due to the ownership of site wrangle and await its resolution.

From the conduct of the parties as shown by communication in form of correspondence and oral communication, there was intention to create legal relations between Applicant's client and 1st Respondent. The Applicant's client made an offer to 1st Respondent who accepted and went on site mobilized and set to work. The Applicant's client was to have construction of NYS staff Houses at a cost of Ksh 350 million and the 1st Respondent was to be paid for work done on presentation of certificates until completion of the project, only for the contract to be frustrated by the advent of an ownership wrangle between **NYS & CBK**.

The bone of contention is that on the one hand, the Applicant contends that there was no written and signed Agreement between NYS & NK Brothers Ltd. on the other hand the Respondents state there was a contract in terms of **Section 4(3) (b) of Arbitration Act 1995**; which provides;

> ***"an exchange of letters, telex, facsimile, electronic mail or other means of telecommunications which provide a record of the Agreement."***

Secondly, the 1st Respondent relied on the Standard Form Contract provided by Ministry of Public Works in all contracts for public agencies dealt with by Ministry of Works. When the offer was made from Office of the President vide letter of 6th December 1989, the directions were to the 1st Respondent to engage the **Project Entity NYS** and the Ministry of Public Works as facilitator and Project Entity's agent. Subsequent communication orally and by correspondence confirms the Project entity was consulted, aware and authorized construction on designated site by 1st Respondent to commence. So much so that when dispute arose between NYS and CBK by letter dated 12th April 1991 NYS wrote directly to NK Brother Ltd to demobilize and remove equipment.

The communication and conduct of parties as enumerated above confirm essentials of a valid contract; that there was privity of contract and mutual intention to create legal relations between the Applicant's client NYS and 1st Respondent NK brothers Ltd. If it were not so, what was the communication and part performance of payment based on? What was/is the nexus between the parties if not contractual relations which were enforced by the Project/Procuring entity through its agent Ministry of Works and 1st Respondent?

It is thus correct to say that there existed a valid contract between the parties as the Ministry of Works Contract Agreement (1970) meets all the fundamental elements of contract which are set out in ***Carlill vs Carbolic Smoke Ball Company [1893] 1 QB 256;*** where in spite of absence of written and signed contract the offer was made by advertisement and acceptance was signified by mainly doing the act indicated.

The Applicant stated that there was no written agreement. This Court finds there were several written letters that depicted offer, acceptance and consideration between the parties themselves or through the Project/Procuring entity's agent Ministry of Public Works. The only contention is that the Standard Form Contract, which was/is in writing, was not signed/executed by parties. The Applicant does not disclose why the client did not provide the contract for signing and cannot rely and benefit from the in advertence.

In the Case of ***Peeush Premlal Mahajani vs Yashwant Kumari Mahajan HCCC571 of 2015*** Onguto J held;

> ***"…As I understand it, one of the core functions of a signature is to indicate that the parties whose signatures are applied to the document have read, understood and agreed to the terms of the Agreement. A signature is one of the factors which prove and establish both offer and acceptance but not necessarily validity of a contract.***
>
> ***The case of Reveille Independent LLC vs Anotech International (UK) Limited [2015] EWHC 726 (Comm) established the concept of acceptance of contract by conduct. The court in that case held:***
>
> ***"The signature of parties to a written contract is not a precondition to the existence of contractual relations, as a contract can equally be accepted by conduct."***

The judge went ahead to hold:

"…. Work continued and intensified, the Defendant worked and communicated with others on the basis that a deal was in place…. so, it does not follow that there could be no acceptance by conduct before consent arrived on 7th March 2011… As I see it the claimant communicated its acceptance by conduct in early March and thereafter as the defendant recognized when acknowledging its obligation to pay. What more powerful evidence of fact that the Defendant had received notice of acceptance and, like the claimant, has performed the contract could there be?"

Therefore, although the 1st Respondent was instructed to move onsite and construct staff houses by the **NYS** agent(s)Ministry of Works, by default or design they declined , refused or neglected to provide the 1st Respondent the Standard Form Contract to sign. Yet they supervised interim works and authorized payment of Ksh 10 m for work done as per the 1st Certificate.

The Statement of Payment on Account (**Annexture 3**) is by Ministry of Public Works, Payment Voucher is signed by Officials from Ministry of Works supervising the project. The letter of 25th August 1997 to 1st Respondent on reevaluation of the claim of Ksh 52,039.762 to Ksh 30,197,579.60 was from/by Public Works, So after all the direct contact consultation and payments why would they renege the contract because they did not provide the contract for signature? How come they have not sought refund of KSh 10million if there was no contract what relationship/transaction did they pay under? The 1st Defendant did not refuse to sign contract or build the houses it is the Applicant's client that breached and frustrated the contract.

All these factors reinforce the position of an existing and valid contract between the Applicant's client NYS and the 1st Respondent NK Brothers Ltd.

C) **Whether the 2nd Respondent was validly and lawfully appointed and has jurisdiction to hear and determine the dispute between the National Youth Service and N.K.Brothers Limited;**

The Ministry of Works Contract Agreement (1970) under Clause 32 provides for arbitration in the event that a dispute arises between the Government or the Arbitration DR on behalf of the Government and the contractor. It is thus correct to say that there existed an arbitration agreement between National Youth Service and NK Brothers Ltd. The letters referred to above were from the Applicant's client disclosed agent with regard to construction of NYS staff houses on the Site, **Ministry of Public Works**. There was/is Standard Form Contract from Ministry of Public Works that is signed by Public Agencies and Contractors for construction projects for Public Entities. For whatever reason, Ministry of Public Works failed to avail the same for execution despite allowing 1st Respondent to get on site and construct until the contract ended due to Frustration of the Contract. Despite not having the Agreement/Contract signed, it is binding between NYS through Ministry of Public Works and NK Brothers LTD. There in is the **Arbitration Clause in Clause 32** which reads in part;

"Such dispute or difference shall be and is hereby referred to arbitration and final decision of such person/persons as the parties may by agreement appoint to act between them or failing agreement then to the Arbitration and final decision of a sole Arbitrator to be appointed by the President or Vice President of Architectural Association of Kenya, for the time being…"

By letter dated 23rd February 2001,(**Annexture 25**) the Managing Director Premji M. Khodaof NK Brothers LTD wrote to the Chief Architect Ministry of Public Works as follows;

"This letter is meant to put on record that you have neither prepared certificate nor communicated reason(s) for your failure to do the same.

We therefore wish to give notice under Clause 32 that a dispute has arisen on account of DR withholding certificate to which the Contractor is entitled

We subsequently give you 30 days' notice to concur in the appointment of Arbitrator as per conditions of Contract Agreement."

The same letter was copied to Permanent Secretary Provincial Administration & Internal Security Office of the President, The Attorney General, Director NYS and Chief Quantity Surveyor Ministry of Public Works.

By letter of 30th June 2016 by 3rd Respondent on behalf of 1st Respondent wrote to Chairman Architectural Association of Kenya to appoint an Arbitrator in terms of the Standard Form Contract of Ministry of Public Works disclosed agent of NYS for project of construction of NYS staff houses at the Site and 1st Respondent NK Brothers Ltd.

By letter of 6th July 2016, The Architectural Association of Kenya wrote to

Steg Consultants representing NK Brothers LTD and informed them of the Appointment of QS Onesmus Gichuiri as Arbitrator.

Having found that there was/is existing contract between the Applicant's client and 1st Respondent; they are bound by terms of the Standard Form Contract. The Contract provides, where there is a dispute; **Clause 32** of the Agreement prescribes Arbitration and in default of agreement by parties to jointly appoint an Arbitrator, one party can/may request the Architectural Association Chairman or Vice Chairman to appoint a single Arbitrator.

In the instant case, the Applicant was notified on 23rd February 2001but did not respond.

The Arbitrator was/is lawfully and validly appointed to hear the matter between the parties NYS & NK Brothers LTD.

In ***Nyutu Agrovet Limited Vs. Airtel Networks Limited [2015] eKLR*** the Court of Appeal held that:

> *"**Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about.**"*

Since the parties opted for arbitration as a dispute resolution mechanism as per the Standard Contract of Ministry of Public Works and the Arbitrator was/is lawfully appointed, the Arbitrator shall proceed with Arbitration proceedings.

D) **Whether the claim is statute-barred and is contrary to Section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya**.

Partiesadduced evidence through correspondence that there was constant and continuous communication between themselves and their disclosed agents and/or representatives and 3rd Parties from letters 6th December 1989,7th June 1990,14th June 1990, 12th April 1991, when the contract was frustrated. Thereafter there was similar avalanche of correspondence on mitigating loss/damage to the 1st Respondent by frustration of the Contract to construct NYS staff houses at Ksh 350 m due to land/site claimed by CBK as rightful owner. The exchange of correspondence was from 1991 to 2012.

On 14th January 1992 the 1st Respondent wrote to the Applicant's client Ministry of Public Works on behalf of NYS claiming loss /damage due to frustrated contract at **KSH Ksh 52,039.762**. By a letter dated 25th August 1997 Chief Architect Ministry of Public Works reanalyzed the 1st Respondent's claim to **Ksh 30,197,579.60**. The 1st Respondent accepted the revised payment as reanalyzed by letter of 18th September 1998. By 2001 the Ministry of Public Works had not responded, the 1st Respondent through his advocate wrote on 3rd September 2001 to the Ministry of Public Works demanding payment of revised sum or pursue arbitration under the standard form Contract. There were/are exchanges of numerous letters between parties on payment of revised sum and culminated with letter of 24th February 2012 from Ministry of Public Works informing 1st Respondent that the Payment Certificates of the said amount of **Ksh 30,197,579.60/-**were submitted to Pending Bills Closing Committee for verification and payment would be honored as per the Committees verification.

From 2012 after the 1st Respondent failed to receive any response one way or the other, vide correspondence in **2012-2014** finally resulted to Arbitration in 2016.

The chronology of events depicts inordinate delay, neglect and/or indifference by the Ministry of Public Works the disclosed agent of NYS on final decision with regard to assessed loss/damage of the frustrated contract between NYS & NK Brothers LTD.

Therefore, the cause of action arose from the demand of the proposed sum from **1997-2014** and arbitration commenced in 2016 2 years from the last letter of demand and notice on proceeding for arbitration. The said claim is within 3 years.

This Court points out that Ministry of Public Works the disclosed agent of NYS Project/Procuring entity have been as much to blame in delay of this matter as the other parties. A case in point is the letter dated 24th September 2003 from the Applicant to the Client concerned of no response to the Applicant's letter of 24th October 2002 on the instant ,matter and lack of proper instructions to enable the Applicant effectively deal with the matter. If this was/is the trend then, the statute limitation cannot be relied by a party that was indolent and caused inordinate delay.

For these reasons the claim though old is not statute barred, it is a claim of enforcement of the reanalyzed claim by the 1st Respondent to the Applicant's client. Time begun to run from the last letter of demand in 2016 and Arbitration proceedings begun to run in 2016.The matter is still on in 2019 due to the instant applications filed in High Court, filing of pleadings by parties, high lighting of submissions and consideration by the Court.

E) Whether the 3rd Respondent should participate as party to the proceedings.

The relationship between the 1st & 3rd Respondent is one of representative capacity by 3rd Respondent of the 1st Respondent. Although, the Applicant did not contest this fact, it is also noted that the Applicant represents both the disclosed agent Ministry of Public Works and National Youth Service the principal.

Where there is a disclosed principal an agent cannot be sued together with the said principal as upheld in ***Victor Mabachi & Anor vs Nurtun Bates Limited [2013] eKLR*** **JJA P Mwilu,P,K Kariuki& GKairu JJA.** Therefore, the 3rd Respondent should not be a party to the Arbitration proceedings as the disclosed principal 1st Respondent is already a party to the proceedings.

F) Whether the applications are granted and permanent injunction granted or dismissed and Arbitration proceedings continue?

The law on injunctions is governed by ***Giella vs Cassmann Brown Co Ltd [1973]Ea 358; & American Cyanamid vs Ethicon Ltd [1975]AC 396*** which generally provide;

The Applicant shall establish a *prima facie* case with probability of success

The Applicant stands to suffer irreparable loss which could not be compensated by an award of damages

It the Court is in doubt, the application would be determined on a balance of convenience.

From the parties' pleadings, submissions and evidence, the Applicant has not established a prima facie case. The 1st Respondent was offered contract to construct NYS houses, took out Performance bond, mobilized resources human capacity, time, funds and equipment as it was an urgent assignment and was handed over the site. 10 months later the 1st Respondent was dragged into an ownership dispute between NYS Procuring/Project entity and CBK rightful owner of the site. The contract was frustrated and NYS asked 1st Respondent to demobilize. The claim is payment the reanalyzed sum of loss/damage that 1st Respondent incurred from unforeseen contingencies and supervening circumstances the terminated the contract. The Applicant contends that the 1st Respondent has no contract with the Procuring Entity, therefore no Arbitration Agreement, irregular appointment of Arbitrator and the claim being statute barred yet pursued 24 years later. On these grounds the Court found that there was existing and valid contract between the 1st Respondent and Applicant's client NYS through its agent Ministry of Public Works. The Standard Form Contract bound parties as it is written but not signed by parties. In spite of the parties not signing as the Ministry failed/refused to have the document signed by parties the Agreement; the conduct of parties depicted intention to create legal relations and there was privity of contract between them. Finally, the claim by 1st Respondent is not time barred as the Ministry of Public Work disclosed its proposed revised sum for payment to 1st Respondent in 1997. In 2012 the Ministry claimed the proposed revised sum of **KSh**. **30,197,579.60** was with the Pending Bills Closing Committee. The outcome and/or recommendations were not communicated despite demand letters upto 2014 and Arbitration proceedings commenced in 2016.

I am satisfied from these findings that the 1st Respondent ought to pursue the claim at the choice of forum, arbitration as **Clause 32** ousts the jurisdiction of the Court to hear and determine the dispute. Consequently, a *prima facie* case has not been established to warrant grant of permanent injunction to stop Arbitration proceedings to issue.

DISPOSITION

1. The arbitration proceedings in the matter between N.K. Brothers Limited and the National Youth Service, Ministry of Public Service, Youth and Gender Affairs of the Government of the Republic of Kenya continue under the jurisdiction of QS Onesimus M. Gichuiri.

2. Each party to bear own Costs.

DATED, SIGNED & DELIVERED IN OPEN COURT ON 12TH DAY OF APRIL 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

TITO & ASSOCIATES ADVOCATES FOR 1ST AND 3RD RESPONDENTS

MS JASMINE COURT ASSISTANT