



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION- MILIMANI
MISC APPL NO.267 OF 2018
IN THE MATTER OF AN APPLICATION TO SET ASIDE
THE ARBITRAL AWARD ISSUED ON 5TH MAY 2018
BETWEEN
MC BUILDERS LIMITED.....CLAIMANT
VS
FORMULA 1 GARAGE LIMITED.....RESPONDENT
RULING

BACKGROUND OF THE APPLICATION

The Claimant/ Applicant approached the court through an Originating summons dated 8th June 2018 praying for the orders;

a. The court sets aside the arbitral award dated 5th May 2018 which dismissed the preliminary objection dated 12th January 2018 and substitute it with an order of the High court upholding the preliminary objection that sought strike out the Counterclaim dated 27th November 2017

The application was based on the following grounds that;

- a. The parties to the arbitration covenanted under the Agreement and Conditions of Contract for Building Works published by the Joint Building Council, Kenya.
- b. Clause 45.1 of the Agreement provided that for any dispute to be resolved, by way of arbitration, any aggrieved party was to mandatorily issue a notice in writing to the other party declaring the dispute. It was only after the dispute is so declared that an Arbitrator would be appointed to adjudicate the dispute.
- c. The Respondent filed a Counterclaim, in essence a dispute for determination against the Applicant; without having first issued any notice to the Applicant for declaration of the dispute for constitution of Arbitrator under Clause 45.1 of the Agreement.
- d. Clause 45.3 of the Agreement provides a limitation clause of 90 days within in which a notice of dispute is to be given from the occurrence or discovery of the matter giving arise to the dispute.
- e. The Counterclaim dated 27th November 2017 is over claims made on or about August 2014 which is beyond the 90 days hence making the Counterclaim time barred as it is was past the discovery period of 90 days.
- f. The Arbitrator was enjoined to interpret and enforce the Agreements of parties strictly and had no jurisdiction to adjudicate on the Counterclaim
- g. The Award by the Arbitrator was against public policy

The application was supported by the affidavit of the Managing Director of the Applicant who stated as follows;

The Arbitration commenced before Arbitrator and the following pleadings were filed;

Statement of Claim dated 24th August 2017 annexed as **HSK1**

Response and Counterclaim dated 27th November 2017 annexed as **HSK2**

The Applicant noted the legal deficiency and filed Notice of Preliminary Objection of 12th January 2018 annexed as **HSK3** which raised 2 issues;

- a) The Arbitrator lacks jurisdiction to entertain and/or determine the Counterclaim filed herein.
- b) The Counterclaim is time barred as it does not comply with the procedural condition set under **Section 45 of the Agreement and Conditions of Contract** for Building Works.

The Claimant prays that the said Counterclaim be struck off with Costs.

The Applicant deponed that all claims sought in the Counterclaim had been expressly averred to have occurred and been discovered in the year 2014; in any event all outside the 90 days period including the Valuation Certificate.

The Applicant deponed that the preliminary objection was argued before the arbitrator who delivered the award annexed **HSK 4** to the parties on 10th May 2018. The arbitrator failed to recognize and enforce **Clauses 45.1 and 45.3 of the Agreement** and to recognize she had no jurisdiction, which consequently renders the Applicant at a real risk of being prejudiced if the award were to be enforced.

GROUNDS OF OPPOSITION

The Respondent opposed on the 17th of August 2018 the Claimants Originating Summons based on the following grounds;

- a. That the Claimant consented that the Dispute be heard by the Appointed Arbitrator as per **Directions No.2 dated 9th June 2017**;
- b. That the Claimant consented to the filing of the Counterclaim by the Respondent as captured in **Directions No.2 dated 9th June 2017, Directions No.3 dated 17th June 2017 and Directions No.4 dated 10th October 2017**;
- c. That the Claimant is estopped by **Section 5 of the Arbitration Act** from raising the Objection dated 12th January 2018;
- d. That **Section 17(2) of the Arbitration Act** specifically precludes the claimant from raising an objection on the jurisdiction of the arbitrator after filing the Statement of Defence and Counterclaim by the Respondent;
- e. That **Section 3(7) read together with Section 24 of the Arbitration Act** makes provision for Statement of Defence and Counterclaim;
- f. The Originating Summons is misconceived and ought to be dismissed.

REPLYING AFFIDAVIT

The Respondent filed a response to the Claimants application through a replying affidavit dated 17th August 2018.

The Respondent stated that it was only after the Preliminary meeting held on 18th May 2018 did the issue of the Arbitrator's jurisdiction arise upon which an Arbitration Agreement was executed granting the Arbitrator exclusive jurisdiction in **Recital A, Recital B and Clause 3(e)** of the Arbitration Agreement.

The Respondent also averred that the Claimant had knowledge since 9th June 2017 that the Respondent intended to file a Counterclaim but never raised any objection.

APPLICANT'S SUBMISSIONS

The Applicant submitted its issues to the application in written submissions dated 26th October 2018 as follows;

1. What is the status of the award dated 5th May 2018 in law
2. What is the status in law of the Counterclaim dated 27th November 2017
3. Whether the said award is against public policy

What is the status of the award dated 5th May 2018 in law?

The Claimant submitted that it noted the legal deficiencies that necessitated the filing of the preliminary objection that sought to challenge the arbitrator's jurisdiction with regard to consideration of the counterclaim that was filed against Clause 45 of the Arbitration Agreement.

The Claimant relied on the case of *Kenya Tea Development Agency Ltd & 7 Others vs Savings Tea Brokers Ltd [2015] eKLR*, where the court submitted that,

“Accordingly, the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law...”

The arbitrator had no jurisdiction to determine the disputes that have not been declared under **Clause 45.1 and 45.3** such as the Respondents Counterclaim.

The Claimant also relied on **Section 35(2) (a) (iv) of the Arbitration Act**, and submitted that the award was issued outside the mandate of the arbitrator which was a ground for the award to be set aside.

What is the status in law of the Counterclaim dated 27th November 2017?

The Claimant submitted that the Counterclaim raised issues that arose from different circumstances that ought to have been handled differently and thus did not form part of the dispute. The Respondent never issued a notice of dispute calling upon the claimant to concur in appointing an arbitrator over the issues in the Counterclaim.

The Claimant claimed that the Respondent filed its arbitration proceedings characterized by the Counterclaim after nearly 4 years after the time bar and therefore the Arbitrator ought to have struck off the Counterclaim as the Respondent had already waived the right to raise its claim.

The Claimant relied on the case of *Kenya Airfreight Handling Ltd vs Model Builders & Civil Engineers Ltd, Misc Appl No. 548 of 2016* which decided on a similar scenario where the court held that

“...there was therefore need to ignite the arbitration clause which had a condition precedent that prior to any commencement of arbitration the applying party (in this case the Respondent) had to first notify the other party of the fact that there existed a dispute which needed resolution, ultimately by arbitration.

The court went ahead and held that;

“I must point out that in the instant case the notice under Clause 45.3 is not intended to commence arbitration, rather a second notice is anticipated under Clause 45.1. The latter notice can only be given after the expiry of at least 90 days after service of the notice under Clause 45.1.”

The Claimant also submitted that it never raised any objection to the Respondent filing of a Counterclaim but the same ought to have been pivoted on the dispute declared by the Claimant.

Whether the said award is against public policy

The Claimant submitted that the arbitral award constituted an abuse of law and process as the Arbitrator issued an award outside her jurisdiction and against the Arbitration Agreement. The Claimant relied on the case of *Kenya Shell Ltd vs Kobil Petroleum Ltd[2006] eKLR* where the Court of Appeal expressed the views of Ringera J in the case of *Christ for All Nations vs Apollo Insurance Co. Ltd (2002) EA 366* where the court held that;

“although public policy is a most broad concept incapable of precise definition.... an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

- a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or*
- b) inimical to the national interest of Kenya or*
- c) contrary to justice and morality.”*

RESPONDENTS SUBMISSIONS

The Respondent addressed the issues raised from the Claimant's application in written submissions dated 15th January 2019 as follows;

The Respondent submitted that it declared its dispute clearly in the Arbitration Agreement and equally captured the same in the Orders for Directions No. 2 from the meetings held with the arbitrator.

The Respondent relied on **Section 4 of the Arbitration Act** by stating that the jurisdiction of the Arbitrator is fettered by the arbitration agreement.

The Respondent also relied on **Sections 3(7) and section 24 of the Arbitration Act** which should be read together provides for the filing of a counterclaim. The Respondent also relied on **section 5 of the Act** and submitted that the claimant knew since 9th June 2017 that the Respondent would raise a counterclaim. The same position had been highlighted in **Orders for Directions No. 3 and 4** respectively. The Respondent also relied on **section 17(2) of the Act** that precludes the Claimant from raising a preliminary objection after the filing of Statement of Defence by the Respondent.

DETERMINATION

The court has analyzed the submissions by the parties and considered the following as the issues presented for determination;

1. Whether the Arbitrator had jurisdiction to determine the dispute between the parties
2. Whether the counter claim dated 27th November 2017 was time barred
3. Whether the court ought to set aside the arbitral award dated 5th May 2018

Whether the Arbitrator had jurisdiction to determine the dispute between the parties

In order to determine this issue, the court should satisfy itself that indeed the parties agreed on arbitration as their choice of forum in dispute resolution.

This Court is guided by **Section 3 & 4 of Arbitration Act**.

“arbitration agreement” means 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;

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.”

The Applicant relied on the following cases on jurisdiction;

Owners of Motor Vessel Lillians vs Caltex Oil (Ky) Ltd [1989] which held;

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....”

This Court relied on the Arbitration Agreement marked **SJ2** drawn by the Sole Arbitrator Silvia M. Kasanga and duly signed by parties to the dispute on all pages of the said Agreement. The said Agreement was /is annexed to the Defendant’s Replying Affidavit filed on 20th August 2018. This Court notes with concern that the Claimant /Applicant failed to disclose this Arbitration Agreement in its evidence.

Paragraph 1 provides;

“The parties agree that the dispute shall forthwith be referred to arbitration pursuant to the Rules of Chartered Institute of Arbitrators 2012, The Arbitration Act, 1995 and Clause 45 of Agreement and Conditions of Contract.”

Therefore, by virtue of **Section 4 of Arbitration Act**, there was an Arbitration Agreement that donated authority to the Arbitrator to hear and determine the dispute.

The Sole Arbitrator had jurisdiction to hear the dispute. The dispute is as outlined by the Arbitration Agreement herein below in **paragraph 6** of the **Order for Directions No. 2** which provides;

“Claimant’s outline of issues:

A dispute has arisen from the contract signed with the Respondent. The claim is for approximately Ksh 7,000,000/- That all documents to be filed have highlighted the Respondent’s case and issues clearly.

Respondent’s Outline of Issues:

That the Parties entered into a contract to construct a building. That there were numerous problems with the building alongside collapse and delays making the contract inoperable. That the Claimant left site necessitating the Respondent to get another Contractor to complete works. That the retention has not been paid to the Contractor. That there is a counterclaim of Ksh 18,000,000/-”

There is an admission by the parties on the outline of the dispute and identification of the issues as agreed in the Arbitration Agreement signed by all parties. The court therefore does not agree with the Claimant’s submission that the Respondent did not outline the issues to the dispute and they signed the above outline annexed to Arbitration Agreement. The Arbitrator therefore had the jurisdiction to determine the Notice of Preliminary Objection filed on the 12th January 2018. The Arbitrator rendered Ruling on the Objection that is the subject of the instant application.

Whether the counter claim dated 27th November 2017 was time barred

The Applicant claims that the Counterclaim by the Respondent dated 27th November 2017 made claims over alleged grievances of about August 2014 and was beyond the **90 days** as per the agreement, hence making the Counterclaim was time barred from the date of discovery.

The Arbitrator was appointed by Chairperson of Architectural Association of Kenya pursuant to request for appointment by the Claimant and on the basis of a Notice of Declaration of Dispute of 25th August 2015 issued in accordance with **Clause 45.1 of the Agreement and Conditions of Contract for Building Works published by the Joint Building Council, Kenya** provides;

“In case of 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 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 notice.”

Clause 45.3 provides;

“ Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.”

The court notes from its record that no party has produced evidence of a notice to the dispute however, it is evident from the Arbitration Agreement that both parties agreed that there was indeed a dispute that was referred to arbitration.

At **paragraph 9 of Order 2** for Directions annexed to the Arbitration Agreement signed by parties the timetable of Pleadings was as follows;

- a) Claimant to file Statement of Claim by 23rd June 2017
- b) Respondent to file Defence and Counterclaim by 21st July 2017
- c) Reply to Defence & Defence to Counterclaim filed by 11th August 2017
- d) Reply to Defence of Counterclaim filed by 25th August 2017

Clearly; the directions included filing pleadings with regard to Counterclaim. The Claimant filed Statement of Claim on 24th August 2017 and the Respondent filed Response and Counterclaim on 27th November 2017 pursuant to further dates granted by the Arbitrator for filing pleadings in Orders for Directions 3 & 4.

It is the Claimant’s position that the Respondent filed its Defence and Counterclaim filed on 27th November 2017 was filed contrary to express provisions of **Clause 45.3 of Agreement and Conditions of Contract for Building Works** published by the joint Building Society, Kenya which was incorporated in the parties Agreement vide letter dated 25th September 2013.

The Applicant contests that the Respondent filed the Counterclaim contrary to **Clause 45.1 & 3**, and did not comply with mandatory **90 days** period to lodge Notice for Arbitration from the Applicant. The Respondent failed to give requisite Notice and filed Counterclaim after the dispute arose between the parties in August 2014. It was therefore time barred. The Court cannot ignore the fact that the Defence and

Counterclaim was filed outside the ninety-day period.

The Applicant submitted that the only dispute that the Arbitrator was to hear and determine was the one declared by the Claimant/Applicant in Notice dated 25th August 2015.

The Applicant relied on the case of ;

Kenya Tea Development Agency Ltd vs & Others vs Savings Tea Brokers Limited [2015] e KLR;

“Accordingly, the jurisdiction of the Arbitrator is tethered by the Arbitration Agreement, reference and the law....”

The Applicant further buttressed this position by the case of ;

National Bank of Kenya Ltd vs Pipeplastic SamKolit (K) Ltd & Anor [2000] eKLR 112;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract; unless coercion, fraud or undue influence are pleaded and proved...”

The Applicant contended that parties were bound by the Agreement and Conditions of Contract for Building Works published by the joint Building Society, Kenya vide the letter of 25th September 2013 and subsequently the Arbitration Agreement.

This Court has considered the Preliminary Objection raised by Applicant to Arbitrator, the proceedings and Ruling by the Arbitrator and noticed again with concern that Award on Application annexed to the Applicant’s application is filed as **Pages 1,3,5,7 & 9**, thus incomplete as the even pages are missing or unexplained and therefore the content is incomprehensible as it lacks flow or sequence.

However, from the pleadings filed this Court finds that the parties were bound by contracts in terms of letter of 25th September 2013 and the Arbitration Agreement which all parties signed.

This Court concurs with the Applicant on the legal basis of jurisdiction of the Arbitrator and the contract between the parties. However, the point of departure is that by virtue of all parties signing the Arbitration Agreement agreed to settlement of the dispute arising from contract entered into vide a letter dated 25th September 2013. Both the statement of claim and Counterclaim arose from the same dispute vide the same letter that gave rise to contractual relations between parties with divergent views and claims.

The Respondent vide letter dated 28th November 2016 to Chairperson of Architectural Association of Kenya copied to Applicant objected to arbitration and the jurisdiction was in the Court system. Secondly, the Respondent put on notice that they had a counterclaim. The matter was resolved vide the Arbitration Agreement that was signed by all parties.

The Agreement waived each of the respective parties’ claims as they consented to Arbitration of the dispute. The Respondent right to claim jurisdiction of the Arbitrator and the Applicant waived right to enforce the mandatory notice of 90 days because despite notice of counterclaim vide the letter of 28th November 2016 before signing Arbitration Agreement, the Applicant/Claimant did not raise any objection. The Objection was raised after the Arbitration Agreement granting appointed Sole Arbitrator jurisdiction to hear and determine the dispute; which includes divergent claims in the dispute which relates to construction of workshop and offices on **Plot LR 209/8310**.

The Applicant relied on the case of;

Kenya Airfreight Handling Ltd vs Model Builders & Civil Engineers Ltd Misc Application 548 of 2016; where the dispute involved the following;

The Applicant contracted Respondent to undertake renovation and additional works to the Applicant’s cargo storage warehouse as per approved drawings. Work commenced on 6th February 2012, the Respondent completed works and also made good defects. A final certificate was then issued on 12th July 2013, the Respondent contested the Final certificate. The final accounts were prepared on 4th July 2013. The parties did not agree and on 27th November 2013, the Respondent notified The Applicant of Respondent’s intention to invoke Arbitration agreement in the contract. The Arbitral Forum was constituted 2 years later and the Applicant raised objection to Arbitrator’s jurisdiction on 26th October 2016 as it was not in compliance with Clause 45.1 & 45.3 of the Contract.

The Court held;

“There was therefore need to ignite the arbitration clause which had a condition precedent that prior to any commencement of arbitration the applying party had first to notify the other party of the fact that there existed a dispute which needed resolution, ultimately through arbitration....”

Based on the above principles I am enjoined to hold the Arbitrator had no jurisdiction to entertain, hear and determine the dispute....”

For the sake of clarity, the claim by the Respondent is not barred. What is barred is the arbitral process as a mode of determining the claim....The Respondent may thus very well lay his claim in Court.

I have detailed the reference to the above case as it applies to enforcement of **Clause 45** of Agreement and Conditions of Contract for Building Works published by the joint Building Society, Kenya.

However, unlike the above case, both parties herein waived their legal rights to raise the issue of jurisdiction and counterclaim respectively by signing the Arbitration Agreement where they agreed on the determination of the dispute by arbitration.

Secondly, unlike the above case, it is alleged, the Applicant left the site and the Respondent's alleged claim is of loss and damage on the ongoing construction that was rectified and project completed by another Contractor. It is prudent, practical, expedient and cost effective to resolve the dispute as consented to in 1 forum. Arbitration is the chosen forum by the parties to resolve their dispute; it is not practical for each party to the dispute to issue 90 day notice and have similar issues ventilated in 2 parallel processes of arbitration.

Clause 45:2 is instructive;

“The Arbitration maybe on construction of this Contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect; or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in Clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of the contract.”

The Arbitration Agreement and annexed instructions vide Order for Direction no 2, the Arbitrator exercised discretion by virtue of Clause 45:2 and crafted directions to include filing of Counterclaim. The parties signed the Arbitration Agreement and agreed to directions. It is after the Counterclaim was filed that the Applicant raised objection to the Counterclaim as being contrary to Notice prescribed by **Clause 45:3** of Agreement and Conditions of Contract for Building Works published by the joint Building Society, Kenya.

For the above reasons, the Defence and Counterclaim was not time barred as the requirement to comply with the **90 day** notice was waived by the Arbitration Agreement signed by all parties after, The Applicant was notified by the Respondent of the Counterclaim through copy of the letter dated 28th November 2016.

Whether the court ought to set aside the arbitral award dated 5th May 2018

The Claimant based its application on **Section 35** of Arbitration Act for the Court to set aside the arbitral award on the basis that the Arbitrator dismissed the Claimant's Preliminary objection dated 12th January 2018.

The Claimant contended that the preliminary objection herein was filed after the Statement of Defence and Counterclaim dated 27th November 2017 which was contrary to **Section 5 as read with Section 17(2) of the Arbitration Act**, that declares that a party who raises a point of law beyond a certain reasonable time has waived their right to do so.

The Claimant therefore submitted that since the Arbitrator considered the counterclaim in arriving at the arbitral award, the award was against public policy and should therefore be set aside.

Section 5 of the Arbitration Act provides ;

“ Waiver of right to object

A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.”

Section 17(2) of the Arbitration Act provides;

Competence of arbitral tribunal to rule on its jurisdiction;

“ A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.”

The court notes that the Preliminary objection was indeed raised after the Statement of Defence and Counterclaim was filed. However, the preliminary objection raised by the claimant was to oppose the filing of the Respondent's Statement of Defence and Counterclaim that the Claimant deemed to have been time barred. The Preliminary objection was reasonably filed before the arbitrator as it opposed the filing of the Counterclaim that had been time barred.

The issue for determination of this court then remains to be whether the Arbitrator in considering the preliminary objection made an award against public policy. The court notes that the analysis of evidence in the award by the arbitrator is missing from the court copy. The Award is incomplete with the even pages missing.

Section 32 of the Arbitration Act provides;

“The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an arbitral award on agreed terms under [section 31](#)”

In order to determine the issues brought by the parties under **Section 35 of the Arbitration Act**, it would have been prudent to furnish the court with a complete copy of the award of 5th May 2018.

At this stage it is impractical for this Court to make an informed decision on whether the award is against public policy and that it was contrary to law. He who alleges must prove. In this case in the absence of the complete award setting out reasons for the dismissal of the Preliminary Objection that amounts to being contrary to public policy; the Applicant has not demonstrated how the arbitral award is against public policy as was explained in the case of *[Christ for All Nations vs Apollo Insurance Co. Ltd \(2002\) EA 366](#)*. The court therefore cannot at this stage agree with the Applicant’s submission that the award offends public policy in the absence of proof through the complete Arbitral award.

DISPOSITION

- 1. The Arbitrator had/has jurisdiction to hear and determine the claim and counterclaim.**
- 2. The Notice of Counterclaim was time barred but the Applicant waived right to raise and claim the counterclaim was time-barred as the parties signed the Arbitration agreement agreed on the dispute and the authority of Arbitrator.**
- 3. The merits or demerits of the Award of 5th May 2018 under Section 35 of the Arbitration Act in the absence of provision of a complete award in terms of Section 32 of the Arbitration Act cannot be determined at this stage.**
- 4. The Applicant and/or Respondent to furnish the Court through Deputy Registrar Commercial Division a complete copy of the award of 5th May 2018 for onward transmission to the Court to enable the Court complete the Ruling within 14 days from today.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 27TH SEPTEMBER 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

COUNSEL FOR APPLICANT

COUNSEL FOR RESPONDENT

COURT ASSISTANT: JASMINE