REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 268 OF 2018(O.S)

THE MPESA ACADEMY LIMITED.....APPLICANT

-VERSUS-

LALJI MEGHJI PATEL & COMPANY LIMITED....RESPONDENT

JUDGMENT

1. The Applicant, The Mpesa Academy Limited is a Limited Liability Company which is wholly owned by a Charitable Trust known as The Mpesa Foundation. The Respondent Lalji Meghji Patel & Company Limited is an established building and Civil Engineering Construction company.

2. The background of this dispute is set out in the affidavit of Samuel Gitau Mwangi, which affidavit is sworn in support of the originating summons. I will reproduce the depositions not disputed by the Respondent. The deponent stated that the Applicant and the Respondent entered into an Agreement dated 5th January 2015. By that Agreement the Applicant engaged the Respondent as a main Contractor for the Construction of the first phase of the erection and completion of a modern high quality co-education and residential high school in Thika Town, called **"The Mpesa Foundation Academy."** The said Agreement incorporated the standard form **"Agreement and conditions for Contract for Building Works,"** (April 1999 Edition).

3. The said Agreement was terminated on 24th June 2016. That termination was by the Applicant, on the grounds that the Respondent had "by its gross delay, failed either to abide by the terms of the said Agreement in respect of completion of work within the contract period or to comply with the **Architect's Notice of Default**."

4. The Respondent accepted the said termination on 28th June 2016 and removed itself from site on the basis that the final account could thereafter be tabulated, agreed and settled by the parties. The deponent stated that the compilation of a Final Account was an ongoing process, which under clause 38.8, of the condition in the Agreement, required the quantity surveyor (QS) to take into account the direct expenses. That the said account was updated from time to time because the works were ongoing. Parties also engaged in various meetings to discuss the said accounts. The deponent set out, in his affidavit, the Following table representing the various amounts presented by each party as the negotiations/meetings progressed;

RESPONDENT	**FINAL ACCOUNT**	**143,822,354.44**	**07/11/2016**
QS	**FINAL ACCOUNT**	**88,365,943.25**	**15/12/2016**
RESPONDENT	**FINAL ACCOUNT**	**340,919,279.42**	**12/07/2017**
QS	**FINAL ACCOUNT**	**(330,076,152.23)**	**22/08/2017**

5. The parties Agreement had an Arbitration Clause- that is Clause 45. The Respondent variously correspondent with the Applicant whereby it discussed the ongoing parties consideration of the account and in some of those correspondence the Respondent declared disputes and requested the Applicant to concur to the dispute being referred to Arbitration. Those correspondence culminated with the Respondent's letter dated 21st August 2017 by which letter the Respondent notified the Applicant that there was a dispute which the Respondent set out as:

> "*…failure by the Quantity Surveyor to prepare a final account for that part of the work carried out by the Contractor as required*

by clause 38.4.3 of the contract within a reasonable time after the joint inspection…"

6. The Respondent wrote to the Architectural Association of Kenya (AAK), by letter dated 21st November 2017, and requested AAK to appoint an Arbitrator to determine the dispute between the parties after exchange of correspondence between the Respondent and AAK following a reference to Arbitration, AAK on 20th December 2017 appointed Mr. Tom O. Oketch as the Sole Arbitrator.

7. Following that appointment the Applicant filed an application questioning the jurisdiction of the Arbitrator. The Arbitrator after hearing that application delivered a Ruling on 3th June 2016 and dismissed the applicant's objection to this jurisdiction. It is in that background that the Applicant filed the present originating Summons as provided under **section 17 (6) & (7) of the Arbitration Act (The Act)**. Those sections provide:

"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.

7) The decision of the High Court shall be final and shall not be subject to appeal.

8. In entertaining the originating Summons this Court is not hearing an appeal from the Arbitrators decision, this Court will be exercising its original jurisdiction. In this regard I concur with the findings in the case **West Mount Investments Limited v Tridev Builders Company Limited [2017] eKLR**

"23. 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."***

ANALYSIS

9. The Applicant seeks, by the originating Summon, the determination of the following questions:

a) Was the appointment of the Honourble Arbitrator (Mr. Tom Oketch) irregular because no or no proper opportunity was given, in the sequence of events that occurred following the issuance of the Respondent's letter of notification of dispute dated 21st August 2017, for the parties to concur in the appointment of an Arbitrator?

b) Had the Respondent waived its rights (if any) to rely on the terms of its said letter of 21st August 2017 and/or to proceed to Arbitration by immediately thereafter entering into protracted settlement negotiations with the Applicant and by expressly conducting itself in such a manner as to indicate its intention to avoid Arbitration and to settle matters with the Applicant?

c) By reason of the matters aforesaid and/or in the alternative, was the Respondent stopped from asserting any alleged right to proceed to Arbitration?

d) Without prejudice to the foregoing, and in any event, were the matters referred to the Arbitral Tribunal for determination either referable to it, or fall within the scope of the arbitral provisions of the agreement entered into between the parties?

e) Did the Arbitral Tribunal have the requisite jurisdiction to adjudicate upon the matters referred to it for Arbitration?

f) Should this Honourable Court set aside and vacate the Ruling dated 4th June 2018 issued by the Honourable Arbitrator, Mr. Tom Oketch?

g) Should this Honourable Court terminate the Arbitration proceedings between the parties herein currently pending before the Arbitral Tribunal?

h) What should be the order for costs of this Originating Summons and the proceedings before the Arbitral Tribunal?

10. On the first question this Court is called upon to determine whether the appointment of the Arbitrator was 'regular'. To decipher this question it is necessary to consider the Arbitration clause. Clause 45 .1 provides in part:

"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. …. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya of by the Chairman or Vice Chairman of the Chartered Institute of Arbitrations, Kenya Branch, on the request of the applying party."

11. One of the Applicant's complain is that it was not given an opportunity to concur in the appointment of an arbitrator before the

Respondent sought the appointment by the appointing authority.

12. As stated before the Respondent, in the course of time, wrote letter declaring a dispute and thereby requested the Applicant to concur t reference to Arbitration. The first of such letter is the one dated 12th December 2016. The Respondent, in that letter stated that payment for certificate No. 18 had been improperly withheld by the Applicant and after declaring a dispute, in that regard, proceeded to states:

> *"Subsequently, we wish to request for your concurrence to submit this matter to arbitration and to appoint an arbitrator within thirty days from today as required under clause 45.2"*

13. The Respondent by its letter dated 26th January 2017 stated that the Applicant had failed to respond to its outstanding payment and again declared a dispute then stated:

> *"consequently, we wish to request for your concurrence to submit this matter to arbitration and to appoint an arbitrator within thirty days from today as enquired under clause 45.2"*

14. Again by letter dated 21st August 2017 the Respondent after declaring a dispute requested the Applicant to concur in the appointment of an arbitrator within thirty days from the date of that letter.

15. It is clear from clause 45.1 that the Arbitrator anticipated to deal with the parties dispute was one arbitrator. That clause provided for parties to concur on the Arbitrator and failing to concur that clause provided for appointing authority to appoint an Arbitrator.

16. It is plainly stated in clause 45.1 that parties are to concur in the appointment of an Arbitrator. Further section 12 (1)(c) of the Act provides:

> *"In an arbitration with one Arbitrator, the parties shall agree on the arbitrator to be agreed."*

17. In the Handbook of Arbitration practice by Ronald Bernstein it is stated:

> *"The usual practice is for the claimant to suggest a name or names to the Respondent, preferably stating a time limit within which the respondent is to agree or to make counter-suggestions."*

18. When clause 45.1 state that the party notifying the other of the dispute shall request the other party, in that notice to concur in the appointment of an arbitrator it must mean that the other party is requested to concur to the appointment of a named and specific arbitrator. It does not mean, as the respondent seemed to require, that the Applicant was to concur to the appointment of an unknown and unnamed Arbitrator. Indeed the book by Ronald Bernstein is on point in that regard, that the Respondent, in giving the Applicant notice, should have asked/required the Applicant to concur with the appointment of a specific Arbitrator. That in my view is what parties agreed to in their clause 45.1.

19. The process of appointing an Arbitrator was the subject in the case, ***Spencon Kenya Limited –vs- Harman & 2 others(2008)eKLR;*** the court in that case held:

> ***"Each party was bound by the Agreement between the parties as no provision was made for its variation. Having failed to appoint an arbitrator within 30 days and instead having continued in the attempt to appoint one breached their Agreement at the onset. Any further step taken in furtherance of the said Agreement was void. In that regard the 1st and 2nd Respondents' letter to the Chairman of the Chartered Institute of Arbitrators to appoint an Arbitrator because the parties had failed was also void. That letter further compounded the matter because it was written without the input of the Applicants. It defeated the very principle of Arbitration that the parties to the arbitration must be willing and in agreement to participate in the arbitration process. That process begins with consensus of the parties.....***
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> ***I can go even further and say that it is not the possibility that the Arbitrator may be biased that is the issue. It is the process that led to his appointment that was flawed. The 3rd Respondent, with due respect to him, had nothing he could have said that could have assisted with the determination of this application as the concern of the Court was the process adopted prior to his appointment. The entire process was flawed and the Applicant was right to come to court. The appointment of the 3rd Respondent was therefore void."***

20. The Respondent having breached the agreement, clause 45.1 led to a flawed process of appointing the arbitrator and the appointment of the arbitrator, without the concurrence of the Applicant, as envisaged in the parties agreement, meant that the appointment was void.

21. In respect to the first question in the originating summons I find and hold that the appointment of the arbitrator Mr. Tom O. Oketch by AAK was irregular because the Applicant was not given a proper opportunity, as required under clause 45.1, to concur in his appointment. The said arbitrator had therefore no jurisdiction to hear the matter because it was initiated by the respondent absent of naming an arbitrator and it cannot stand.

22. Further in my view section 12 (2)(c) of the Act, which I reproduce here below is unequivocal in declaring that where it is a case of sole arbitrator to be appointed parties must agree. That section reads as follows:

"In an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed."

23. Of course in the case of clause 45.1 if parties were unable to agree on an arbitrator it is provided that the appointing authority does proceed to make the appointment.

24. I shall proceed to consider matters raised in question 2, 3, 4 and 5 together. In those questions the Applicant has called upon the court to determine whether the Respondent waived or is stopped from proceeding to Arbitration; whether the matters referred for Arbitration were referable or fall within the scope of arbitral provisions; and whether the arbitral tribunal had the requisite jurisdiction to adjudicate on the matters referred to it.

25. By the letter dated 21st August 2017 the Respondent wrote and informed the Applicant that:

"12.0 Pursuant to clause 45.1 of the contract, we, by this letter notify you that there is a dispute which is failure by the Quantity Surveyor to prepare a final account for that part of the works carried out by the contractor as required by clause 38.4.3 of the contract within a reasonable time after the joint inspection, and request that we submit the dispute to arbitration, and to concur in the appointment of an arbitrator within thirty days of this notice.

13.0 We reiterate, as we have often times stated, that we are amenable to amicable settlement as indeed clause 45.4 of the contract provides an opportunity for parties to attempt amicable settlement of any disputes before commencement of arbitration proceedings.

14.0 Notwithstanding the provisions of clause 45.4 and 45.5 of the contract, parties may even resort to amicable settlement even after arbitration proceedings have commenced through appropriate to the arbitrator for grant of leave to allow parties to explore endeavors towards amicable settlement.

Therefore submissions to arbitration is not prejudicial to any party.

We await your response"

26. The Applicant sent by email a letter to the Respondent dated 18th August 2017 which the respondent acknowledged as having received on 21st August, 2017. By that letter the applicant informed the respondent that it had prepared the draft final accounts and invited the respondent to a meeting on 30th August, 2017 to discuss the same.

27. It is not denied by any party that after the respondent wrote the letter parties engaged in negotiations/meetings over the final accounts. The respondent's submissions is that the arbitration clause required attempt be made to settle the dispute and that in engaging in negotiation meeting, even after writing the letter, the respondent was attempting to reach amicable solutions. The respondent however submitted that it did not act in any way so as to imply that it had surrendered its right to proceed with the arbitral process.

28. The applicant submitted that by conduct of entertaining into negotiation meetings, after writing the letter, the respondent had waived its rights and was estopped from proceeding with arbitration.

29. Clause 45.4 provides that arbitration shall not commence unless attempts are first made by the parties to settle the dispute or difference amicably. This is the clause the respondent referred to as a basis it relied on entering in negotiation meetings with the applicant.

30. Although the applicant argued that the respondent waived or was estopped from proceeding with arbitration I see it slightly differently. The parties by clause 45.4 agreed they would enter in negotiations, before referring to arbitration their dispute/difference, in attempt to reach amicable settlement. The respondent wrote the letter setting out the dispute between the parties as the applicant's failure to present within reasonable time final accounts after joint inspection. Those accounts were forwarded to the respondent on 23rd August 2017, two days after the respondent's letter declaring dispute. In my view the presentation of those accounts 'flipped over' the process of the dispute. In other words from then on, in view of the negotiation meetings between the parties and their exchange of correspondence parties began to do what is provided in clause 45.4, that is attempted to reach amicable settlement. This is very obvious from the parties letters stretching from August to November 2017. It follows that the dispute declared by the letter of 21st August 2017 was nullified/vacated because parties were doing what they agreed to do to attempt amicable settlement before referring the difference to arbitration. In my view parties could not proceed to arbitration without amicably attempting to settle their difference. This was the holding in the case **NANCHANG FOREIGN ENGINEERING COMPANY (K) LTD VS EASY PROPERTIES KENYA LIMITED (2014) eKLR** as follows:

"It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the Plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant's application would automatically fail as referral to arbitration would be premature."

31. Since the parties in entering into attempt to settle the matter and that is what they agreed to do under clause 45.4 the declaration of dispute/difference could only come after failure to settle that dispute/difference.

32. But perhaps much more than that, the fact the parties meetings/negotiations and correspondence continued even after the respondent requested AAK to appoint an arbitrator it follows that there was need for fresh/new difference/dispute to be declared. This is obvious from the respondents letters of 10th November and 1st December 2017.

33. By the letter of 10th November 2017 the respondent engage the applicant with discussion on the final account and suggested what was acceptable to it and what was not, in those accounts. The applicant by its letter dated 23rd November 2017, to the respondent indicated the respondent erred to refer the matter to AAK for appointing arbitrator when there was no difference between the parties. The respondent in responding to that letter, by its letter of 1st December 2017, stated:

> ***"We reiterate that we have not abandoned the current attempts at amicable settlement but are only desirous that serious commitment be put in place to ensure speedy settlement."***

34. What the respondents letter of 1st December 2017 certainly shows is that even as at 21st November 2017, when the respondent wrote to AAK requesting the appointing of arbitrator, there was no dispute, no difference, between the parties. Dispute was defined in the case **Kenya Airfreight Handling Ltd (KAHL) v Model Builders & Civil Engineers (K) Ltd (2017) eKLR** as follows:

> "*Generally, a dispute arises where there is a claim made to a party and is either rejected or ignored after a reasonable period of time has been afforded. Once the dispute has risen it remains as a dispute until it is either resolved or abandoned. Attempts to amicably settle it do not in my view make it any less a dispute. It is still a dispute. It is not necessary for one party to say it does not agree for there to be deemed or inferred a dispute. As Templeman L.J stated in* ***Elerine Brothers –v- Klinger [1992] 2 All ER 737,1381***
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> ***"… if letters are written by the Plaintiff making some request or some demand and the Defendant does not reply, then there is a dispute. It is not necessary for a dispute to arise, that the defendant should write back and say "I don't agree". If, on analysis, what the Plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation"***.

35. Parties, upto the time the matter was referred to AAK for appointment of arbitrator were still in discussion over the issue of final accounts. This therefore shows, as the applicant stated, that the matter was prematurely referred to AAK. The matter referred to AAK did not fall within the scope of arbitral provision and accordingly the arbitral tribunal had no jurisdiction to adjudicate over the matter.

36. Having reached the determination as above it follows that the arbitrator's Ruling, of 4th June 2018, where the arbitrator found that he had jurisdiction must be set aside. Since the finding of this court is that the arbitrator, for the various reasons given above, is denied jurisdiction, it follows that his appointment by AAK will be set aside.

37. The parties arbitration clause provided that a dispute would be declared and the matter be referred to arbitration within ninety days. It has now been more than ninety days since parties were negotiating/meeting in any case as found above there was no dispute capable of being referred to arbitration. It is therefore apparent that parties are barred from referring this matter to arbitration – but as it was held in the case **Kenya Airfreight Handling Ltd** (*supra*) what is barred is arbitral process not any other mode of dispute resolution.

CONCLUSION

38. The applicant was entitled to insist as it did in bringing this matter before court, that the correct procedure of referring the matter to arbitration be followed. The applicant has substantially succeeded in its claim. It is therefore entitled to the costs of this action and the costs of the arbitration before Mr. Tom O. Oketch.

39. In the end the following are the orders of the court.

a. The arbitrator's Ruling dated 4th June 2018 is hereby set aside.

b. The arbitration proceedings before Mr Tom O. Oketch are hereby terminated.

c. The applicant is awarded costs of this suit and costs of the arbitration.

DATED, SIGNED and DELIVERED at NAIROBI this 28TH day of NOVEMBER, 2019.

MARY KASANGO

JUDGE

***Judgment Read** and **Delivered** in **Open Court** in the presence of:*

Sophie..... **COURT ASSISTANT**

.....**FOR THE APPLICANT**

..... **FOR THE RESPONDENT**