REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLN. NO. 548 OF 2019

TEAM CONSTRUCTION LIMITED.....APPLICANT

VERSUS

CARNATION PROPERTIES LIMITED.....RESPONDENT

RULING

1. Before me for determination is the applicant's chamber summons dated 19th August 2019 as amended on 28th August 2019.

The prayers pending the courts determination are as reproduced hereunder:

> iv. THAT the Honourable Court be pleased to set aside the arbitral tribunal's ruling dated 24th April, 2019 and delivered on 24th July, 2019 and find that the Arbitral Tribunal has no jurisdiction to adjudicate upon the Respondent's claim in the arbitration between the parties.
>
> v. THAT the Honourable Court be pleased to stay the orders made by the Honourable Arbitrator Patrick S. Kisia ordering the applicant to pay costs of the ruling dated 24th April, 2019 to the Respondent herein.
>
> vi. THAT the Honourable Court be pleased to stop and terminate the arbitration proceedings before the Honourable Arbitrator Patrick S. Kisia for want of jurisdiction.
>
> vii. THAT the application be allowed with costs to the applicant.
>
> viii. Any other relief that this Honourable Court may deem fit to grant.

2. The application is premised on the grounds stated on its face and the depositions made in the supporting affidavit sworn by *Ashifa Alibhai*, a director in the applicant's company. The applicant principally challenges the ruling made by the sole arbitrator *QS Patrick Kisia* on 24th July, 2019 in which he held that he had jurisdiction to entertain and determine the arbitral proceedings commenced before him by the respondent on grounds that the proceedings had not been commenced within the timelines contemplated in the contract executed by the parties.

3. The applicant advanced its position that the arbitrator erred in his finding that the email of 1st November 2017 constituted sufficient notice to commence the arbitral proceedings since it was not a written notice as prescribed in the contract and it did not request the applicant to submit to arbitration or to concur in the appointment of an arbitrator within 30 days; that the notice which complied with clause 45.1 of the contract was the one dated 26th June 2018 which was issued after the timelines agreed by the parties in clause 45.3 had expired and that therefore, the arbitrator lacked jurisdiction to adjudicate on the dispute; that consequently the arbitration proceedings should be terminated.

4. The application is opposed through a notice of preliminary objection dated 9th September 2019 and a replying affidavit sworn on even date by *Ramesh Gami*, a director of the respondent.

In the notice of preliminary objection, the respondent attacked the competence of the application on grounds *inter alia* that it was premised on the wrong provisions of the law; that it was bad in law since it challenged the arbitrators ruling on an application which questioned the validity the respondent's claim yet under the law, only a ruling on an arbitrator's jurisdiction can be challenged in the High Court; that the application has been presented through a fatally flawed and defective procedure and lastly; that the amended chamber summons was filed after the expiry of the 30 days allowed by the law.

5. In the replying affidavit, the deponent supported the arbitrator's ruling and urged the court to find that the application was filed in bad faith for the sole purpose of delaying and frustrating the progress of the arbitral proceedings; that the application amounted to an abuse of the court process and it ought to be dismissed for lack of merit.

6. By consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed.

7. I have carefully considered the application, the affidavits filed in support and in opposition thereto as well as the notice of preliminary objection. I have also considered the rival submissions made on behalf of the parties and the authorities cited. Having done so, I find that save for the contest regarding the notice that declared the dispute between the parties and whether or not the arbitration proceedings were commenced within the timelines prescribed in the contract, the facts leading to the arbitration proceedings are not disputed.

8. From the pleadings and submissions filed by the parties, it is clear that on 16th June 2015, the respondent, *Team Construction Limited* which was the applicant in the arbitral proceedings was contracted by the applicant (the respondent in the arbitral proceedings) to carry out construction works at a contractual sum of KShs.34,631,487.50 on its property known as LR No. 1870/14/189 off Mpaka Muthithi Road (Allay's Centre) in Westlands, Nairobi. The respondent successfully completed the works on or around 5th July 2016. The final account was issued on 29th June 2017 which revised the contract sum to Kshs.37,462,482. Based on the final account, the architect issued the final certificate on 29th September 2017 and though served on the applicant, the applicant failed to pay the amounts specified therein as well as other payments which had been certified as due in previous certificates.

9. Under the contract executed by the parties titled "Agreement and Conditions of Contract for Building Works", any dispute or difference arising from the performance of the contract was to be resolved through arbitration. The arbitration agreement was contained in clauses 45.1, 45.2, and 45.3 of the contract. It provided an elaborate procedure of declaring disputes if any arose between the parties, the appointment of an arbitrator and the timelines within which arbitration proceedings would be commenced.

10. It is apparent that when the applicant was served with the final certificate and it failed to honour a demand for payment of all the outstanding sums under the contract, the respondent declared a dispute. Upon request, the President of the Architectural Association of Kenya appointed *QS Patrick S. Kisia* as the arbitrator to adjudicate on the dispute.

11. Soon after the commencement of the arbitral proceedings, the applicant filed an application which basically questioned the arbitrator's jurisdiction on grounds that the proceedings had not been commenced within the timelines prescribed in their contract. After considering the parties' respective arguments, the arbitrator found that the respondent's claim had been instituted within the time prescribed in the contract and that he therefore had jurisdiction to hear the dispute. This ruling by the arbitrator is what triggered the instant application.

12. Before considering the merits or otherwise of the application, I must first deal with the key preliminary points raised by the respondent challenging the competence of the application as filed. The respondent asserted that the application was incompetent and incurably defective as it was premised on the wrong provisions of the law and secondly, it was made by way of a chamber summons as opposed to an originating summons as required by *Rule 3 (1)* of the *Arbitration Rules of 1997* which stipulates as follows:

> **"Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date."**

13. While I agree with the applicant's submissions that *Section 17* of the *Arbitration Act* (the Act) which allows an aggrieved party to challenge an arbitrator's ruling on jurisdiction does not specifically prescribe the procedure of approaching the High Court, *Rule 3 (1)* of the *Arbitration Rules* which makes specific reference to *Section 17* of the *Act* expressly provides that such applications should be made by way of originating summons.

14. Although I agree with the applicant's submissions that the wrong citation of the law on which an application is premised cannot make an application incompetent where the prayers sought are clear, my take is that where the law provides a specific procedure for approaching the court, that procedure ought to be followed. However, failure to abide by the stipulated procedure especially where the procedure is prescribed in subsidiary legislation as opposed to the Parent Act, in my view amounts to an irregularity which goes to the format of the application and not its substance.

15. I make the above finding even after considering the holding of the court in the persuasive authority of ***Eutychus Muthui V Apolo Nteere M'ambutu & 2 Others, [2009] eKLR*** which was referenced by the respondent because in my opinion, the court's holding in that authority is not applicable to the facts in the instant application. In that case, the plaintiff had sought to institute a suit through a chamber summons which is not the case in this application. The applicant in this case seeks to challenge a ruling on jurisdiction made by an arbitrator and given the nature of the orders sought, it is my view that failure to follow the prescribed procedure does not go to the jurisdiction of the court. In any event, failure to abide by the prescribed procedure would amount to a procedural technicality which the *Constitution of Kenya 2010 at Article 159 (2) (d)* urges courts not to lay much emphasis on and to instead embrace substantive justice.

16. Regarding the claim that the amended chambers summons was time barred for having been filed after the expiry of the 30 days prescribed under *Section 17* of the *Act*, the court record shows that the amended chamber summons was filed with leave of the court on application by the applicant who needed to correct an error regarding the naming of parties in the application. The initial chamber summons had been filed within the time allowed by the law and consequently, the respondent's argument that the amended chamber summons was filed out of time cannot be sustained.

17. The above finding also applies to the respondent's argument faulting the validity of the affidavit supporting the amended chamber summons on grounds that the law does not allow amendment of affidavits. I wholly agree with this proposition by the respondent because affidavits amount to evidence and are not capable of amendment. In this case however, the purported amendment was not an amendment as such since the applicant apparently reproduced the the affidavit which had been filed in the initial chamber summons and titled it amended

affidavit after re-ordering the names of the parties. The applicant ought to have filed a completely fresh affidavit with the correct parties to support the amended chamber summons. A look at the affidavit shows that the applicant did not make any amendment to the evidence deponed to in the affidavit and in my opinion, the affidavit does not offend the Civil Procedure Rules.

18. Given the foregoing, I am satisfied that the amended chamber summons forms a good basis for articulation of the applicant's complaint. It is thus my finding that the amended chamber summons and its supporting affidavit are properly before the court and they are not incurably defective as submitted by the respondent.

19. Turning now to the merits of the application, I find that the contractual clauses which formed the basis of the applicant's contention that the arbitrator lacked jurisdiction to entertain the dispute were clauses 45.1 and 45.3.

20. Clause 45.1 states as follows:

> **"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…"**

Clause 45.3 is apparently a proviso to clause 45.1 and it stipulates as follows:

> **"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."**

21. The applicant's case before the arbitral tribunal and before this court is that the notice given by the respondent which met all the requirements specified in clause 45.1 was the one contained in the letter dated 26th June 2018 which was issued long after the expiry of 90 days from the date the dispute arose; that the arbitrator erred in his finding that the respondent's email of 1st November 2017 constituted the notice envisaged under clause 45.1 of the contract and thereby arrived at the erroneous conclusion that he had jurisdiction to entertain the dispute.

22. The respondent on the other hand supported the arbitrator's finding that the email of 1st November constituted proper notice of the dispute as contemplated under clause 45.1 and that since the dispute arose on 11th October 2017 being the last day on which the applicant was supposed to have honoured the final certificate served on it by the respondent, the arbitration proceedings had been commenced within the timelines agreed by the parties.

23. In addition, the respondent relying on the authorities of ***Kenya Airfreight Handling Ltd V Model Builders & Civil Engineers (K) Ltd And Investment Ltd V Trident Builders Co Ltd, [2017] eKLR*** contended that there was no standard format for notices envisaged under clause 45.1 and 45.3 as what was critical was not the format but whether the objective and purpose of the clause (notification of a dispute) had been met within the prescribed time.

24. Though the applicant did not disclose to the arbitrator when in its view the dispute between the parties occurred, my reading of the written submissions filed by both parties reveal that both parties are in agreement with the arbitrator's finding that the dispute occurred 14 days after the date the applicant was served with the final certificate on 27th September 2017. The arbitrator therefore adopted 11th October 2017 as the date on which the dispute occurred.

25. The above date was arrived at by the arbitrator out of his interpretation of clause 34.5 which only provided for the time within which the respondent would be entitled to payment of sums stated in interim certificates served on the applicant. The clause in my view does not say or suggest that non-payment of the amounts due on interim or final certificate would amount to a dispute. The subsequent clauses namely clause 34.6 and 34.7 confirm this position by providing that non-payment or late payment of sums due under the contract would only attract payment of simple interest over and above the principle amount.

26. The law is that he who alleges must prove. Having alleged that the notice issued by the respondent was time barred, the applicant had the burden of proving when the dispute occurred. From the correspondence exchanged between the parties, it is apparent that even after the email of 1st November 2017, the parties continued cordial communication regarding the applicant's non-payment of outstanding monies due to the respondent resting with the letter dated 12th April 2018.

27. The letter of 12th April 2018 was the last correspondence written to the applicant by the respondent notifying it of the total sums due under the contract as of that date. The letter was referred to by the respondent in its subsequent letter dated 26th June 2018 in which its advocates indicated that the respondent was *"unable to continue waiting indefinitely for payment"* and that the respondent had decided to commence legal action by referring the dispute for arbitration. In my view therefore, the matters that gave rise to the dispute were the contents of the letter dated 12th April 2018. It is important to note that this letter constituted the last communication that was addressed to the applicant by the respondent before the notice in the letter dated 26th June 2018 was issued. This is the letter in which the dispute between the parties was declared for the first time.

28. Turning to the contest regarding whether the email of 1st November 2017 constituted a proper notice under clause 45.1 or whether the required notice was issued vide the letter dated 28th June 2018, I agree with the applicant that the email of the 1st November 2018 did not constitute a notice as envisaged by clause 45.1. In my opinion, the email constituted a general demand for payment notwithstanding the fact

that it expressed the respondent's general intention to invoke the dispute resolution mechanism under the contract. Of particular significance, the email did not request the applicant to submit to arbitration or to concur with the appointment of an arbitrator within 30 days. These were essential elements of the notice contemplated in clause 45.1 of the contract.

29. I agree with the proposition of the law as espoused in the authorities cited by the respondent to the effect that where parties had not specified the form of notice required to put in motion the commencement of arbitration proceedings, any notice that fulfilled the objectives and purpose of the clause requiring notice would be sufficient if it was done within the prescribed time. In this case however, the parties had specifically contracted on the form of notice that was required to notify either of them the existence of a dispute requiring arbitration.

30. The aforesaid elements were missing in the email of 1st November 2017 but were present in the letter dated 28th June 2018 which in my considered opinion constituted the notice contemplated under clause 45.1 of the contract. The notice was issued about 86 days after 12th April 2018 which as I stated earlier is the date on which the respondent gave its final account to the applicant which formed the basis of the subsequent declaration of a dispute by the respondent. It is thus my finding that the arbitration proceedings were commenced within the timelines stipulated under clause 45.3 of the contract.

31. In view of the foregoing, I have come to the same conclusion as the arbitrator albeit for different reasons. It is thus my finding that the arbitrator had jurisdiction to adjudicate on the dispute lodged before him by the parties and his finding to that effect is hereby upheld.

32. For all the foregoing reasons, I find that the amended chamber summons dated 28th August 2019 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 19th day of December, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Ozwara holding brief for Ms Mbiti for the applicant

Mr. Otieno holding brief for Mr. Wananda for the respondent

Mr. Kibet: Court Assistant