



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
JUDICIAL REVIEW NO. 47 OF 2017

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

**IN THE MATTER OF: CONSTITUTION OF KENYA 2010
ARTICLES 23, 47 AND 159 ORDER 53 RULES 1, 2, AND 3 OF
THE CIVIL PROCEDURE RULES 2010, SECTIONS 7, 8 AND 11
OF THE FAIR ADMINISTRATIVE ACT 2015, ADJUDICATION
RULES OF THE CONSTRUCTION INDUSTRY, OCTOBER 2003**

AND

**IN THE MATTER OF: ENFORCEMENT OF AN
ADJUDICATION AWARD MADE ON 15TH AUGUST, 2016**

AND

IN THE MATTER OF: DHANJAL BROTHERS LIMITED

BETWEEN

DHANJAL BROTHERS LIMITED.....PETITIONER

AND

**1. THE DIRECTOR GENERAL OF KENYA
NATIONAL HIGHWAYS AUTHORITY (DG)**

2. CHIEF ACCOUNTANT OF KENYA

NATIONAL HIGHWAYS AUTHORITY

3. PRINCIPAL SECRETARY MINISTRY OF

TRANSPORT AND INFRASTRUCTURE

4. PRINCIPAL SECRETARY

MINISTRY OF FINANCE.....RESPONDENTS

RULING

The Application

1. The application before the court is Chamber Summons dated 22nd September, 2017 and is filed by 1st and 2nd Respondents. The summons is filed pursuant to Section 6(1) Arbitration Act, Rule 2 of the Arbitration Rules and Section 3A of the Civil Procedure Act. The application seeks to enforce the following orders:

(a) That the Judicial Review application No. 47 of 2017 filed herein by the ex parte Applicant/Respondent be stayed pending its determination through arbitration as provided for in the agreement that was entered into between the parties to this suit.

(b) That the dispute between the parties be referred to arbitration.

(c) That the 1st and 2nd Respondents/applicants be at liberty to apply for such further or other orders and/or directions as this Honourable court may deem fit and just to grant in the circumstances.

(d) That the costs of this application be provided for.

2. The application is premised on the grounds set out therein among them that the construction contract between the ex parte Applicant and the Respondent, which is the subject matter of the Ex parte Applicant's application herein dated 22nd August, 2017 praying for Judicial Review, has arbitration clause which requires that if there is any disagreement the same should be referred to arbitration. The ex parte Applicant's action of moving to court is therefore pre-emptive and premature as parties should exhaust the available means of dispute resolution provided for under the contract.

The Response

3. The application is opposed by the ex parte Applicant through grounds of objection dated and filed herein on 24th October, 2017. The ex parte Applicant's case is that the 1st and 2nd Respondents' application (Chamber Summons) dated 22nd September, 2017 is based on a misconception of Rule 27 of the Adjudication Rules 2003 which is final Alternative Dispute Resolution (ADR) adopted by parties as per the contract to take advantage of Article 67.1 to 67.4 of FIDIC which was made part of the contract. The ex parte Applicant's case is that the dispute envisaged by FIDIC and defined at Articles 67.1 to 67.4 is what the adjudicator exhausted and what remains is enforcement of the award as per Rule 27 of the Rules. The ex parte Applicant's case is that Article 67.1 to 67.4 Federation Internationale Des Ingenieurs-Conseils 9(FIDIC) conditions of contract for works of civil engineering construction (4CWE) has left out the enforcement of an award open unless it took the normal arbitral route as envisaged by the Respondent/Applicant. The ex parte Applicant's case is that the application is therefore frivolous as the same is not supported by law and ought to be dismissed to pave the way for enforcement of the award. The ex parte Applicant states that its application dated 2nd day of August, 2017 is not challenged and the same should be allowed and an order of mandamus be issued compelling the Respondents to comply with

the adjudicators award made on 15th day of August, 2016.

4. On their part the 3rd and 4th Respondents supported the application while at the same time opposed the ex parte Applicant's application dated 2nd August, 2017 vide a Preliminary Objection dated 13th February, 2018 and filed on 15th February, 2018. The 3rd and 4th Respondents case is that the suit as drawn and filed does not conform with the Arbitration Act Section 36 on recognition and enforcement of an arbitration award and that the suit offends The Civil Procedure Rules 2010 (Cap 21) Order 46. The Respondents case is that the parties in their agreement had agreed that they were to settle their disputes via an arbitration process as per Clause 67 of the conditions of contract (FIDIC) and the parties never agreed to conduct or settle their disputes through adjudication or Judicial Review. Further, the Respondents state that it is mandatory for the arbitral award to be registered in court before a decree for execution to compel payment can be issued and that the suit as drawn and filed is contrary to Section 67 of the Kenya Roads Act No. 2 of 2007 since no notice was issued.

The Background

5. Through the application dated 22nd August, 2017, the ex parte Applicant prays for an order of mandamus directed at the Respondents to comply with the directive of the Adjudicator made in favour of the ex parte Applicant to forthwith pay the ex parte Applicant contractual dues amounting to Kshs. 564,381,531 plus interests at a rate of 20.957% p.a. from 16th September, 2016 until full payment. The ex parte Applicant also seeks for costs. The ex parte Applicant's application is premised on the grounds that leave to file this motion was granted by the court on 18th August, 2017 to apply for an order of Judicial Review of mandamus directed at the Respondents jointly. The adjudicator appointed by both the 1st Respondent and the ex parte Applicant heard the matter and gave an award on the 15th August, 2016 and granted a stay of enforcement as per the rules of adjudication of the Kenya Institute of Arbitrators (Kenya Branch) in October 2003. The ex parte Applicant's case is that under Rule 27 thereof enforcement is by way of summary procedure notwithstanding further litigation. The ex parte Applicant states that it has on several occasions attempted amicable settlement to no avail.

Submissions

6. Parties filed submissions which were orally highlighted in court. I have carefully considered the submissions. In my view the issues for determination are as follows:

- (i) Whether there is an arbitral award.
- (ii) If above is true, whether the said arbitral award has been adopted as Judgment of this court.
- (iii) And if not, whether Judicial Review is the process through which the arbitral award can be realized.

(i) Whether there is an arbitral award

The fact of a contract is not disputed. That the Ex-parte Applicant and the 1st Respondent entered into an agreement by a contract in writing for construction to bitumen standard of **MARIAKANI-KILIFI (C107) ROAD** on 2nd October 2007 at a cost of **Kshs. 2,564,748,836.20** for a period of Twenty Four (24) months is not disputed. The original contract for the upgrading of the road was **Kshs. 2,564,748,836.20**. However, due to reasons beyond the control of both parties the project was appraised in April 2011 to reduce the works and end at Km 19+600 instead of the initial Km 50+000 at a contract sum of **Kshs. 1,606,612,965.00**. This was achieved through addendum to the contract arrived at via amicable settlement between the Employer (The Kenya National Highways Authority having taken over the project from the Ministry of Roads and Public Works vide Legal Notice No. 193 – Kenya Roads (Kenya National Highways Authority)(Vesting) Order 2011 which came into operation on 07/09/2007) and the Contractor. (See annexure marked **PM1a and PM1b being a copy of the form of agreement**

and the Vesting Order Legal Notice No 193 respectively). Between 27th November 2009, which was the original completion date, and 30th November, 2011 the contract period was extended four (4) times to 30th November, 2011, which became the new completion date. Section 5A Conditions of Contract Part 1, provided that the General Conditions shall be those forming Part 1 of the Conditions of Contract for works of Civil Engineering Construction, (Herein after called FIDIC Conditions of Contract) and were incorporated in the said contract as part of the agreement. **(Refer to page 34 of the Contract).** The said FIDIC Conditions of Contract provides very elaborate provisions for the settlement of disputes between the parties under Articles 67.1 to 67.4 through arbitration. The contract itself at sub-clause 67.3 and through appendix to form of tender provides for arbitration, the mode of appointment of the arbitrator and the applicable laws namely the Arbitration Laws of the Republic of Kenya. The FIDIC Conditions of Contract for settlement of disputes, clause 67.2 provides for amicable settlement of disputes as a first option, which is why the parties to this disputes started with Adjudication first. According to FIDIC Conditions of Contract for settlement of disputes, clause 67.3 provides *inter alia*: If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the contract or the execution of the works, whether during the execution of the works or after their completion or whether before or after repudiation or other termination of the contract, including any disputes as to any opinion, instruction, determination, certificate or valuation of the engineer, the matter in dispute shall in the first place be referred in writing to the Engineer with a copy to the other party. Such reference shall state that it is made pursuant to this clause. It is trite law that a court before which proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance, stay proceedings and refer the parties to arbitration. I have confirmed the existence of the agreement which I believe is valid, operable and capable of being performed and further the law of contract which is the substantive law in this case, should be used to determine and settle any dispute (if any) arising from the contract between the parties. In my view the nature of the alleged dispute encapsulated by the Ex-Parte Applicant/Respondent in this suit are matters that are and ought to be subject to the arbitration agreement. This court action is therefore preemptive and premature as the purported Adjudication award, is not final as any party to the contract can challenge the same through Arbitration as provided for under the Contract and also clause 67.3 of FIDIC. Further, the purported Adjudication Award has not even been registered with this High Court, pursuant to Section 36 of the Arbitration Act, Act No 4 of 1995 and therefore is incapable of being enforced in any proceedings as a civil claim. In my view it is in the best interest of justice that there should be a stay of the Judicial Review proceedings filed in this court by the Ex-Parte Applicant/Respondent with respect to disputes emanating from the agreement pending its settlement through arbitration as provided for in the contract. It is therefore the finding of this court that there was no arbitral award under the said contract.

7. However, to address issue No. 2, and firstly in case my position on the existence of award is wrong, and that indeed there is an award, was the same adopted as a Judgment of this court? Mr. Wachira for the 3rd and 4th Respondents ably submitted on this issue. Via correspondences exchanged between KENHA and the ex-parte Applicant **(unmarked exhibit bundled together in the affidavit of Tanraaj Daljit Dhanja)** it was agreed that the parties were to conduct an “*arbitration*” process as per clause 67 of the conditions of contract (FIDIC). However by the consent of the parties Dr. Eng. Maurice De Souza was appointed as an adjudicator to conduct the proceedings that led to an “*adjudication award*” as the jointly appointed adjudicator called it. The question then is this: was what was conducted an arbitration process? And the answer is no. The adjudicator never considered himself as conducting an arbitration but severally noted that he was conducting an arbitration award. However after a perusal of the Arbitration Act and the FIDIC conditions of contract as applicable in this case, am persuaded that what was carried out did not conform to an arbitration process. It was always referred to as an adjudication. FIDIC conditions clause 67 expressly provides for arbitration not adjudication. But even assuming for the sake of argument, that indeed there was an arbitral award, what then is the procedure for adoption of the award?

8. Section 36 of Arbitration Act on recognition and enforcement of an award provides:

“36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37”.

9. This section confirms that ex-parte Applicant did not follow the due procedure for execution of their award. In the case: **Iris Properties Ltd & Another vs. Nairobi City Council [2002] eKLR** it was held:-

“The filing of the Award and the giving of the notice of the filing of the awards precedes any application to enforce the award. The chamber summons under S. 36 to enforce the award is not therefore made in a vacuum. It is filed in the cause in which the award was filed. In the present case, no application was filed in the High court in the course of arbitral proceedings. It follows that the arbitral Award should have been filed as an independent cause with its own serial number in the Civil Register.”

10. Further, there is no provision for the execution of arbitration awards through the process of Judicial Review. For the uniformity of execution of arbitration awards internationally Kenya has enacted the Arbitration Act that is in tandem with the **UNCITRAL Model Law** provisions and the Washington Convention on the execution of Arbitration awards. What these international Conventions and the Kenyan Arbitration Act provides is a uniform process of execution as the provisions of Order 46 and not as per Order 53 in the Judicial Review. The difference is that a suit commenced via Order 46 is final and no appeal can be preferred against it while a suit as per Order 53 in the Judicial Review can be appealed. The **Model Law** is designed to assist States in reforming and modernizing their **laws** on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal. The conditions of contract (FIDIC) that were adopted by the parties are internationally practiced and used in the construction realm. They are commonly used in the donor funded construction contracts the world over. Their interpretation assumes universal standards and norms. Further there was non-compliance with Order 46 which provides for the procedure to execute the arbitral award. Specifically Order 46, rule 18 provides:

“18. (1) The court shall on request by any party with due notice to other parties enter judgment according to the award —

(a) When no application has been made within the time allowed by rule 17; or

(2) Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.”

11. It is noted that in this matter no such application was filed in court. Therefore the alleged arbitral award is not enforceable. In addition ex parte Applicant has moved to court through a Judicial Review application which is a serious procedural defect.

12. For all above reasons the Chamber Summons herein dated 22nd September, 2017 by the 1st and 2nd Respondents is allowed as prayed, and the parties herein are referred to arbitration.

13. The costs herein shall be in the arbitration cause.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 17th day of April, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Dulo for the Respondent

No appearance for Ex parte Applicant

Mr. Kaunda Court Assistant