



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 121 OF 2017

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....DEFENDANT

RULING

1. For determination is a Chamber Summons dated 28th March, 2017 brought under the provisions of Section 6 of The Arbitration Act 1995, seeking to stay the proceedings herein and to have the matter referred to Arbitration/Mediation.

2. The subject matter of these proceedings is the Agreement for Sale dated 14th July 2015 which has the following Arbitral clause:-

“If a dispute, controversy or claim arises out of or relates to this contract or the breach thereof and if the dispute cannot be settled through good faith negotiation within seven (7) business days of an offer by one (1) party to negotiate a settlement, the parties agree to attempt to settle the dispute by Arbitration by any one (1) party, it shall be referred to and determined by arbitration in accordance with the Kenya Arbitration Act 1995 and the Rules of the Kenya branch of the Chartered Institute of Arbitrations which Rules are deemed to be incorporated by reference to this clause. The tribunal shall consist of one (1) Arbitrator to be appointed by agreement between the parties within seven (7) Business days of the first date when a party gives notice of the identity of the proposed Arbitrator. Failing such agreement, the Arbitrator shall be appointed (upon application by any party) by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch. The Arbitration shall be conducted in Nairobi. The language of the Arbitration shall be English.

The Awards of the Arbitration shall be final and binding upon the parties and any party may apply to a Court of competent jurisdiction for enforcement of such award. The award of the arbitrator may take the form of an order to pay an amount or to perform or to prohibit certain activities. Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any Court of competent jurisdiction pending the final decision or award of the arbitrator”.

3. The ICEA Building (as was formerly known) (hereinafter the Building) is no doubt a prestigious building and stands out prominently along Kenyatta Avenue in Nairobi. It is not surprising that when sold through an Agreement for Sale dated 14th July 2015, it would attract a purchase price of Khs.1,850,000,000/=. The Building was sold by IEAC Lion Life Assurance Company Ltd (the Plaintiff) to Jomo Kenyatta University of Agriculture and Technology (the University).

4. Special condition 14.1 of the Agreement provided as follows:-

“Each party shall bear their own Advocates Legal costs in respect of the Sale transaction, but the purchaser shall pay the VAT, Stamp Duty and Registration fees on the Transfer and charge of the Property”.

The Plaintiff is aggrieved that the University has failed to pay the VAT and the same continues to attract penalties and interest.

5. In these proceedings commenced by way of Originating Summons, the Plaintiff seeks the following two (2) substantive prayers:-

2. THAT the Respondents do honour the terms of the Agreement for Sale for L.R.No. 209/8287, ICEA Building, Kenyatta Avenue, dated 14th July 2015 and forthwith pay to the Applicant Khs.296,000,000/= being VAT due pursuant to the terms of the Agreement for Sale dated 14th July 2017.

3. THAT further the Respondents to account for and pay to the Applicant Kshs. 115,440,000/= being penalties and interest on the sum of Kshs.296,000,000/= from 1st October 2015 to 30th March, 2017 and thereafter any additional penalties or interest that may accrue until payment in full.

6. The University takes a view that there is a dispute and invokes the provisions of Section 6 of The Arbitration Act which reads:-

“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

7. From a plain reading of these provisions, an applicant must demonstrate two things before deserving of a Stay and Referral Order. First there must be an Arbitration agreement that is valid, operative and capable of being performed. Second, that there is in fact a dispute with regard to the matters agreed to be referred to Arbitration.

8. My understanding of the Application is that it is an argument that the two conditions exist. The Plaintiff on the other hand, while acknowledging the validity of the Arbitration Agreement, takes the view that there is in fact no dispute for purposes of Reference.

9. On 3rd November 2015 the Plaintiff's Advocate wrote to the University's Advocate demanding payment of the VAT 'payable' on the purchase price. The response by the University's Advocates was contained in a letter of 6th November 2015 which is reproduced as follows:-

LJA Associates

3rd floor, Cavendish Block 14

Riverside Drive

P.O. Box 49594-00100

NAIROBI

ATTN: LINDA MURIUKI

Dear Madam,

RE: SALE AND PURCHASE OF ICEA BUILDING KENYATTA AVENUE, NAIROBI BY JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY.

We refer to the above matter and your letter dated 3.11.2015 contents of which we have noted.

Please note that we have instructed our client to pay the remainder of the balance of the purchase as soon as possible.

However as regards the issue of payment of VAT, we are of the considered opinion that there is no VAT payable on the purchase price.

In the event that your client is still of the view that VAT is payable on the purchase price, we would be obliged to be informed of the relevant statutory provisions in support thereof.

Yours faithfully,

For: CHEPTUMO & COMPANY ADVOCATES

10. It is now argued that the assertion by the University that no VAT is payable on the purchase price sets up a dispute which should be referred to Arbitration. To buttress this argument, Counsel for the University submits that the Advocate representing the University on the transaction gave an undertaking to pay the purchase price. It is further argued that the Plaintiff should have produced a valid ETR invoice and or Demand letter from Kenya Revenue Authority showing the amount payable, penalties and interest thereon.

11. So, is there really a dispute as to whether VAT is payable and who should pay it? For starters, the Sale agreement is as plain as can be on this aspect and Special condition 14.1. expressly provides:-

“14.1 Each party shall bear their own Advocates’ legal costs in respect of the sale transaction, but the Purchaser shall pay the VAT, Stamp Duty and registration fees on the Transfer and Charge of the Property”.

12. Whilst it is true that the University had on 6th November 2015 doubted any obligation to pay VAT on the purchase price, other correspondence run contrary and confirms that the University is well aware of this obligation. In a letter of 13th August 2015, the Vice Chancellor writes as follows:-

JKU/2/1/073

13th August, 2015

Knight Frank Kenya Limited

Lion Place-Ground Floor

Waiyaki Way,

Westlands

P.O. Box 00623

NAIROBI

Dear Sir,

RE: TAX WAIVER ON ICEA BUILDING

This is to inform you that the University is aware of her tax obligation and has since written for exemption of the same from the relevant authority. The copy of the letter is attached.

Sincerely,

Signed

PROF. MABEL IMBUGA, PhD, EBS

VICE CHANCELLOR

13. The University thereafter requested for waiver on payment of VAT on the grounds that the “*principal purpose of the acquisition is for the expansion of the JKUAT Nairobi Campus which shall continue to offer University Education Services*”. This request is in a letter of 29th September 2015. In this letter the University makes the following admission,

“*under the Agreement of Sale between the two parties, the University as the Purchaser is required to pay VAT on the purchase Price*”.

14. This is a position from which the University should not be allowed to resile from. A dispute does not arise merely because a party to an Arbitral Agreement asserts that one exists when both the clear terms of the agreement and conduct of the parties thereto tell a very different story. There is no evidence whatsoever that there is a dispute as to the University’s obligation to pay VAT. Any penalties on interest that may accrue because of late payment must necessarily be met by the party which bears the responsibility of paying the Principal sum. The quantum of such penalties and interest would easily be verified from the Tax Authority. No dispute or difficulty should come about that.

15. I agree with the observation made by Counsel for the Plaintiff that the Defendants application for stay and referral will simply delay the determination of the matter. The application is without merit. The Chamber Summons of 28th March 2017 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 28th day of September, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Lutta for Defendant

Dondo for Plaintiff

Nixon - Court Assistant