REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL APPLICATION NO. 160 OF 2018

JOMA INVESTMENTS LIMITED.....APPLICANT

VERSUS

N K BROTHERS LIMITED.....RESPONDENT

RULING

1. In the Amended Originating Summons (hereinafter the summons) dated 18th June, 2018, the applicant *Joma Investments Limited* sought the following substantive orders:

> *i. That the Honourable Court be pleased to order that the Arbitral Tribunal has no jurisdiction to open the dispute between the parties beyond the declared dispute.*
>
> *ii. That the Honourable Court be pleased to order that the Arbitrator exceeded his jurisdiction in seeking to determine claims outside the declared dispute.*
>
> *iii. That consequently, the Honourable Court be pleased to set aside the Arbitrator's ruling delivered on 5th February, 2018.*
>
> *iv. That the costs of the suit be borne by the Respondent.*

2. The summons are expressed to be presented under *Section 17 (6)* of the *Arbitration Act, 1995* and *Rule 3 (1)* of the *Arbitration Rules of 1997*. It is premised on grounds stated on its face which are to a large extent replicated in the supporting affidavit sworn on 18th June 2018 by *Morrison Wayaya*, one of the applicant's directors.

3. The background against which the dispute between the parties arose as can be ascertained from the grounds anchoring the summons and the depositions in the supporting affidavit is that on 15th August, 2011, the parties entered into a contract for the construction and completion of apartments on LR No. 18109 at Mlolongo along Mombasa Road. At the conclusion of the project, the respondent, *NK Brothers Limited*, prepared the final account which was signed by the architect and the quantity surveyor. The draft final account was shared with the applicant who on perusal found that some figures stated therein were allegedly inflated and unjustified. The applicant then sought provision of documents or an explanation from the respondent to justify payment of the questioned figures which fell under the following heads:

> i. Preliminary items as listed;
>
> ii. Insurance claim;
>
> iii. Civil works;
>
> iv. Profit and attendance on specialist works; and
>
> v. Claim for interest on delayed payments.

4. The applicant contends that it was unable to make the payment sought in the final account as the respondent failed to provide the required documentation to justify the amounts claimed under the above five items; that subsequently, in letter dated 7th March 2017, the respondent through *Steg Consultants* declared a dispute in respect of sums owed in the final account and requested the Chairman of the Chartered Institute of Arbitrators to appoint an arbitrator to resolve the dispute.

5. It is the applicant's case that subsequent to the appointment of an arbitrator, the respondent who was the claimant in the arbitral proceedings sneaked in claims that were outside the dispute as declared in the letter dated 7th March 2017; that this letter limited the scope of the arbitral proceedings to the final account. The applicant asserted that the arbitrator exceeded his jurisdiction when he determined in his ruling dated 5th February 2018 that he had jurisdiction to open up the entire final account and to evaluate issues which were outside the originally declared dispute and that therefore his ruling ought to be set aside.

6. The summons is opposed through a replying affidavit sworn on 29th June 2018 by *Mr Pravichandra Mavji Khoda*, the respondent's Managing Director. In the replying affidavit, the respondent did not respond to the substantive issues raised in the summons regarding whether or not the arbitrator exceeded his jurisdiction in his ruling dated 5th February 2018. The respondent instead attacked the competence of the summons claiming that it was misconceived and amounted to an abuse of the court process since it was filed by the firm of *Ochieng, Onyango, Kibet and Ohaga Advocates*, which is not on record for the applicant; that the advocates on record are *Triple OK Law Advocates* as no notice of change of advocates had been filed as required by the *Civil Procedure Rules, 2010*; that the summons is incurably defective as it is allegedly supported by an amended supporting affidavit of *Morrison Wayaya* dated 18th June 2018 while as the court in its order of 14th June 2018 only allowed amendment of the summons to cure the misdescription of the parties but did not allow amendment of the supporting affidavit; that the current summons therefore lack any evidential basis and should be struck out with costs.

7. The summons were argued orally before me on 7th November 2018. Learned counsel *Mr. Obuya* appeared for the applicant while learned counsel *Mr. Kamau* represented the respondent. Both parties had prior to the hearing date filed a list of authorities which they intended to rely on in support of the respective positions taken by their clients in the matter.

8. In his submissions, *Mr. Obuya* set out the background against which the summons was filed and reiterated the grounds supporting the summons. He argued that the jurisdiction of the arbitrator is limited to the declared dispute that was referred for arbitration as per the contract and cannot be open ended. It was his view that the arbitrator exceeded his jurisdiction when he determined in the impugned ruling that he could adjudicate on new claims made by the respondent which fell outside the final account.

9. In his rejoinder, *Mr. Kamau* maintained that the arbitrator had jurisdiction to deal with the matters that had been referred to him for arbitration as well as other matters related and incidental thereto since the parties had agreed that any dispute arising between them should be referred for arbitration.

10. I have carefully considered the summons, the affidavits sworn in support and in opposition to the summons, the annextures to the supporting affidavit and the authorities cited by both parties.

11. Having done so, I find that the key issue for my determination in the application is whether the applicant has demonstrated that the arbitrator exceeded his jurisdiction to warrant the setting aside of his ruling dated 5th February 2018.

12. Before addressing my mind to the above issue, I wish to deal first with the preliminary issues raised by the respondent with regard to the competence of the summons.

13. The respondent has claimed that the summons as drawn are incompetent and amount to an abuse of the court process allegedly because they were filed by a firm of advocates which is not on record for the applicant and that the summons are supported by an amended supporting affidavit which is not properly on record.

14. These claims by the respondent were not challenged by the applicant as the applicant did not file a supplementary affidavit to respond to the averments in the replying affidavit nor did *Mr. Obuya* address the said issues in his oral submissions.

15. I have perused the court record. I have not come across anything to suggest that the amended originating summons was filed by a firm of advocates which is different from the advocates on record for the applicant. Though it is true that the initial originating summons dated 5th March 2018 was drawn by *Triple OK Law Advocates*, the supporting affidavit annexed to the motion clearly shows that it was drawn by *Ochieng, Onyango, Kibet and Ohaga Advocates.*

16. The court record shows that all the other pleadings filed on behalf of the applicant were filed by the same firm of advocates including the instant summons. It is thus apparent that the two firm names refer to one and the same firm of advocates. The respondent has not availed any evidence to prove its allegation that the two names refer to two different firms of advocates. The law is that he who alleges must prove. The respondent had the burden of proving its claim that the summons was incompetent as it was filed by advocates who were not on record for the applicant which it failed to do. In the circumstances and considering that the respondent's claim is not supported by the records in the court file, I do not find any basis to conclude that the current summons is defective as alleged.

17. With regard to the second limb of the respondent's objection, I find it difficult to follow the respondent's argument that the summons do not have any evidential basis as it is allegedly supported by an amended supporting affidavit dated 18th June 2018 in contravention of the court order of 14th June 2018 which did not allow amendment of the affidavit which supported the application dated 19th March 2018.

18. It is true that in my ruling of 14th June 2018, I granted the applicant leave to amend the originating summons to cure the misdescription of the parties. Once the amended originating summons was filed, it became an independent pleading and the affidavit filed in its support was equally independent of the affidavit used to support the initial summons. The affidavit sworn by *Morrison Wayaya* on 18th June 2018 is clearly titled "supporting affidavit" and a reading of the same shows clearly that it provides the evidential basis for the prayers sought in the amended originating summons filed on 21st June 2018. There is nothing on its face or content to suggest that it was meant to be an amended affidavit as alleged by the respondent. In any event, affidavits in law amount to evidence and cannot be amended.

19. In view of the foregoing and with tremendous respect to learned counsel Mr. Kamau, I do not find any substance in the respondent's objection to the validity of the amended originating summons. I am thus satisfied that the summons is competent and is properly before this court.

20. Having resolved that preliminary issue, let me now turn to the crux of the applicant's complaint which is that in his ruling of 5th February 2018, the arbitrator exceeded the scope of his authority when he determined that he had jurisdiction to determine claims that fell outside the declared dispute.

21. Under *Section 17 (1)* of the *Arbitration Act* (the Act) an arbitral tribunal is empowered to rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of an arbitration agreement. The tribunal is also mandated to rule on a plea that it has exceeded the scope of its jurisdiction. Under *Section 17 (6)* of the *Act*, where an arbitral tribunal has ruled on a preliminary question that it has jurisdiction, any party aggrieved by that decision can appeal to the High Court on the issue of jurisdiction within 30 days of the tribunal's decision.

22. In my view, *Section 17 (3)* of the *Ac*t empowers an arbitral tribunal to rule on a plea that the tribunal had started entertaining matters that are perceived to be outside the scope of its authority during the hearing of the dispute. It is only after a ruling on such a plea is made that an aggrieved party can have recourse to the High Court under *Section 17 (6)* of the *Act* by way of an appeal against the arbitrator's decision. I think it is important to reproduce the entire *Section 17 (3)* of the *Act* in order that its true import may be appreciated. It reads as follows:

> ***(3) "A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."***

In my view, the wording of the section leaves no room for doubt that it contemplates a situation where the actual hearing of the dispute in question had commenced and the arbitrator had proceeded to entertain or deal with a matter which was not set out by the parties in their pleadings or was not identified as an issue for determination or claims which could not have been contemplated by the parties as they were not covered by the parties arbitration agreement.

23. In ***Equity Bank Limited V Adopt a Light Limited [2014] eKLR,*** *Ogola J* set out the factors which an applicant must prove to establish that an arbitral tribunal had exceeded the scope of its jurisdiction. He expressed himself thus:

> ***"There is no proof that the arbitrators went beyond the scope of their jurisdiction, or engaged in a frolic of their own. An Arbitrator sitting as a Tribunal has the authority to interpret contractual documents. The law must give them enough latitude to interpret those documents in a manner which makes them more effective, without re-writing the contracts. This court will accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties. In the case of Mahican Investments Limited v Giovani Gaid & 80 others, Justice P.J. Ransley stated that '…In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the Applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute. I totally agree. There is no proof in this matter that the Tribunal went off the tangent and in an expedition looking for fresh terms to insert in the contract……'***

24. In this case, from a reading of the impugned ruling, it is apparent that the ruling was on a preliminary issue which was raised by the parties before hearing of the dispute referred for arbitration commenced. The parties had requested the arbitrator to determine whether or not the final account served on the applicant by the respondent (the claimant in the arbitral proceedings) could be opened and if so to what extent.

The ruling was not as a result of an objection raised to the effect that the arbitrator had, in the course of hearing the main dispute embarked on a determination of a matter that fell outside the scope of his jurisdiction.

25. A reading of the said ruling shows that in its submissions before the arbitrator, the applicant had conceded that the arbitrator had jurisdiction to review and revise the final account but that such jurisdiction was limited to the five items raised in the declared dispute. However, a look at the letter dated 7th March 2017 which was used to refer the dispute for arbitration shows clearly that the dispute that was declared for arbitration by the respondent was in respect of sums owed in the final account. The dispute was declared in general terms and was not limited to certain aspects of the final account as alleged by the applicant.

26. The scope of an arbitrator's authority or jurisdiction is determined by the terms of the arbitration agreement and the subject matter of the dispute as contained in the pleadings filed before the arbitral tribunal. In this case, the arbitration agreement in the contract between the parties contained elaborate provisions which provided for resolution of disputes by arbitration. The arbitration agreement specified the procedure to be adopted in referring the disputes that may arise for arbitration and the mandate of the arbitrator to be appointed to resolve those disputes.

27. *Clause 45.9* of the *Arbitration Agreement* which is most relevant to the issues raised in this application is in the following terms:

> ***"The arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given."***

28. It is not contested by the parties that the dispute that was referred for arbitration in this case was in respect of sums due in the final account.

The parties under clause 45.9 of the agreement gave the arbitrator wide powers of opening up, reviewing and revising *inter alia* any certificate, opinion, decisions made by them and to determine all matters in dispute submitted to him for determination. This means that the arbitrator had power or jurisdiction to hear and determine all or any dispute submitted to him by the parties for arbitration provided that the dispute pertained to a determination of what should constitute the final account.

29. In this case, the arbitrator had not started hearing the actual dispute referred for arbitration. All that the arbitrator did was to rule on a preliminary issue raised by both parties with regard to whether he had authority under the arbitration agreement to open up the final account. A reading of clause 45.9 reproduced above clearly shows the scope of the jurisdiction the parties had bestowed on the arbitrator. He had authority to open up, review or revise inter alia certificates and opinions on the basis of which the final account was compiled. The applicant has not demonstrated how the arbitrator exceeded the scope of that jurisdiction in making the findings that he did in the impugned ruling. The applicant had the onus of proving that the arbitrator dealt with issues that were beyond the subject matter of the dispute referred for arbitration or considered matters that were outside the issue that the parties had framed for his determination which it failed to do.

30. It is of interest to note that like in this application, the applicant contended before the arbitrator that the respondent had sneaked in new claims in its statement of claim that did not form part of the declared dispute. It is important to point out that the said statement of claim was not availed to this court nor were the new claims allegedly introduced by the respondent disclosed. The court cannot therefore make a finding of fact regarding what the alleged new claims entailed and whether or not they fell within the arbitration agreement.

31. Given the foregoing, my take is that since the arbitrator did not deal with any substantive aspect of whatever dispute that was before him, instead of filing the instant summons, the applicant ought to have followed the procedure stipulated under *section 17* of the *Arbitration Act* and challenged the arbitrator's jurisdiction to determine those claims it felt went beyond the scope of his authority once the arbitral proceedings began as had been directed by the arbitrator in his ruling.

32. The arbitral tribunal should have been given an opportunity to rule on its own jurisdiction as provided for in *section 17 (1)* of the *Arbitration Act*. Had this been done, the parties would have been heard on the allegation that some of the claims made by the respondent exceeded the arbitrator's jurisdiction and a decision would have been made on the merits. The applicant would then have been at liberty to apply to this court if it was aggrieved by the arbitrator's decision.

33. For the foregoing reasons and findings, I have come to the conclusion that the applicant has failed to demonstrate that in making his decision in the ruling dated 5th February 2018, the arbitrator exceeded the scope of his jurisdiction. It is my finding that the filing of the amended originating summons was in fact premature. I am thus satisfied that the amended originating summons dated 18th June 2018 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 29th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Miss Mulumba for Mr. Kamau for the Respondent

No appearance for the Applicant

Mr. Fidel: Court Assistant