



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC. APPLICATION NO. 491 OF 2017

NYORO CONSTRUCTION CO.LTD.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERALRESPONDENT

RULING

1. The Plaintiff (herein “the Applicant”) filed the subject notice of motion application dated 15th December 2017, seeking for orders that;

(a) *This Honourable Court be pleased to appoint Engineer Peter Scott as an Arbitrator in the dispute herein;*

(b) *Costs be borne by the Respondent*

2. The application is brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act, Section 12 of the Arbitration Act No. 4 of 1995 and all other enabling provisions of Law. It is supported by the grounds on the face of it and an affidavit sworn by Josiah Njoroge Njuguna.

3. In a nutshell The deponent averred that, it is a building and construction engineering firm registered as such and that on or around 30th April 1996, the Respondent invited bids for civil engineering firms to tender for the construction of the proposed Nakuru-Njoro-Mau Summit and Njoro-Mau Narok roads and related support works. A total of seven bidders tendered inclusive of the applicant. After the entire process, the applicant emerged the winner with the lowest bid of Kshs. 513,243,666 and was awarded the contract accordingly.

4. On 29th August 1996, the applicant accepted the award through the letter of acceptance, and consequently the agreement and conditions of contract for building works was duly executed, whereupon, the Respondent then handed over the site to the applicant. The construction works commenced on 18th November 1996, and were carried out as per the bill of quantities. The applicant avers that it prepared interim certificates for payments as the work progressed and they were duly paid as invoiced through the Resident Engineer. However, there remained an outstanding balance of Kshs. 609,893,199.32, which the Respondent has without any reason and/or explanation whatsoever, declined to pay to-date, and/or has declined to give direction on the whole construction.

5. The Applicant argues that, it contracted services of other suppliers for supply of equipment and as a consequence of the Respondent’s failure to pay it has defaulted in paying the supplies inspite of request sent to the Respondent on 4th June 2011 for payment of the final certificate which has not been honoured to date.

6. It was argued that to clause 67 in the contract agreement deals with the settlement of disputes and provides that, differences regarding the contract agreement between the parties shall be referred to an Arbitrator.

7. That as a result on 3rd December 2010, the Respondent was served with a statutory notice of thirty (30) days notice pursuant to Section 12 of the Arbitration Act No. 4 of 1995, which deals with the appointment of the Arbitrator, but there has been no response to the notice, necessitating the prayer for appointment of the Arbitrator by the court.

8. The application was served upon the Respondent and a perusal of the court record reveals that, on 26th February 2018, the Respondent filed a notice of appointment of Advocates dated 22nd February 2018 and grounds of opposition dated 22nd February 2018, in which it avers that the application as drawn is incompetent, bad in law and an abuse of the Court process.

That there has been an inexcusable inordinate delay by the Applicant in commencing the Arbitral proceedings. Further the present proceedings are time barred by virtue of Section 4 of the Limitation of Actions Act.

9. Be that as it were, the parties agreed to dispose of the application by filing submissions and adoption thereof. In a nutshell, the Applicant reiterated the averments in the Affidavit in support of the application. In response to the grounds of opposition, it was submitted that, the delay was caused by the Respondent who misled the Applicant to believe that, the money would be paid. Further that when the Respondent referred the Applicant's claim the pending Bills Committee, the Respondent created the impression that, they were acting in good faith and would settle the matter only for the Government to reject the claim after first offering to pay Kshs. 11,000,000 only.

10. Finally, the Applicant argued that the appointment of an Arbitrator is provided for under the terms of the contract signed by the parties and in particular, the Appendix to the Form of Tender dated 16th June 1996.

11. However, the Respondent filed response submissions and argued that Section 3 of the Civil Procedure Act vests the Honourable Court with special jurisdiction or power, as conferred by the Act or under any other law for the time being in force. That Section 3A provides that, the Honourable court has the inherent power to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court. Further that Section 12(5) of the Arbitration Act stipulates the extent of the Court's power in making appointment of arbitral tribunal(s). Whereas Section 12(6), (7), (8) and (9) defines the jurisdiction of the Honourable Court, in considering an application brought under Section 12(5).

12. It was argued that these sections of the Arbitration Act, vests the High Court with the jurisdiction to make an appointment of an arbitrator after it has set aside the appointment of an arbitrator by one party to an arbitration and on an application by the other party.

13. The Respondent thus submitted that, the nature of the orders sought for by the Applicant do not fall within the ambit of Section 12 and therefore the Honourable Court does not have the jurisdiction to grant the orders. It was further argued that the Applicant herein does not have a cause of action against the Respondent to be referred for arbitration to warrant the appointment of an Arbitrator. The Respondent relied on the provisions of the Limitation of Actions Act that prescribes the period within which disputes may be referred for Arbitration. That Section 4(1) of this Act provides that, actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued.

14. It was submitted that the present dispute arises out of the letter dated 18th August 2010 (marked as "JNN6") which in part reads:

".....The contract was substantially completed on 7th December 2001 and to date the issue of the claims has not been sorted out....."

15. Therefore the net effect of the statement is that the alleged cause of action arose on 7th December 2001, close to eighteen (18) years ago. That even if the Court was to find that, the cause of action arose on the date of the last correspondence, in the matter being 3rd December 2010, (as per the document marked as "JNN7"), there would be a delay of close to eight (8) years since the cause of action arose. That it amounts to an inordinate delay which falls outside the ambit of the time provided for under the provisions of the Limitations of Actions Act, yet the Applicant has not offered any explanation for the inordinate delay to warrant the Honourable Court to lift the cap provided for under the Limitations of Actions Act and find that there is indeed a cause of action by the Applicant against the Respondent to warrant it to grant the prayers for the appointment of an arbitrator to arbitrate the dispute.

16. It was submitted that the parties to an arbitration must have an arbitration agreement in the form of an arbitration clause in a contract or in form of a separate agreement as per the provisions of Section 4(1) of the Arbitration Act. That the arbitration agreement must provide for the mode of appointment and the preferred number of arbitrators. Yet the Applicant herein has not submitted any evidence in the form of an arbitration agreement before the Honourable Court to prove that the parties to the dispute agreed to have any dispute arising be referred to arbitration. The mere reference to Clause 67 is not sufficient prove that the said clause exists and in the absence of such evidence, there is no arbitration agreement to have the alleged dispute be referred for arbitration so as to warrant the Honourable Court grant the orders sought for the appointment of Mr. Eng. Peter Scott as the arbitrator.

17. I have considered the rival arguments as supported by the submissions filed. I find that, the simple task of the Court is to consider whether, it has the jurisdiction to appoint an Arbitrator as requested. To answer this question, regard must be held inter alia, on the law that governs appointment of Arbitrators, the agreement between the parties in relation to dispute resolution mechanism agreed on and/or the appointment of an arbitrator.

18. As a general rule, since Arbitration is based on a contract, the parties are in principle free to choose their arbitrator. They can appoint anyone with legal capacity to act as an arbitrator. Party autonomy is thus the principal controller of the appointment process. Article 11(2) Model Law also provides that the parties are generally free to agree on how the Arbitration Tribunal will be appointed. This can be done by including a special provision on the appointment of the tribunal into the arbitration agreement.

19. Alternatively, the parties can agree on appointment procedure by submitting their dispute to arbitration rules which provide for the appointment of arbitrators. In this regard, Section 11 of the Arbitration Act, No. 4 of 1995, provides that, the parties are free to determine the number of arbitrators and failing such determination, the number shall be one. Similarly, Section 12 of the Act provides that, the parties are free to agree on the procedure of appointment of the Arbitrator.

20. Thus the role of the Court in appointment process in arbitration is that of a default mechanism. Section 12(3)(a) of the Act, (see also Article 11(3)(b) Model Law) referred to herein gives the High Court the authority to appoint an arbitrator upon an application of a party. It however suffices to note that, it will be upon the failure of the parties to agree on an arbitrator. It states as follows:-

“where a sole arbitrator has been appointed under sub section (4), the party in default may upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.”

21. I have considered the documents annexed to the Affidavit in support of the application and I find that, the contract for repair of the subject matter roads was awarded to the Applicant vide a letter dated 19th August 1996, (produced as “JNN4”). First and foremost, the copy thereof produced is a photocopy but even more, the 2nd page at the top is completely eligible. The parts that can be read on these page do not make reference to the agreed (if any) mode of dispute resolution mechanism.

22. The Applicant in the submissions referred the Court to the Appendix to Form of Tender, signed by the parties dated 16th June 1996. However, it is noteworthy that the same was not annexed to the Affidavit in support of the Application but it was annexed to the submissions.

23. Be that as it were, I am not quite sure that, the said appendix constitutes an agreement between the parties. However, assuming it does, what does it say about the dispute resolution mechanism and/or the appointment of arbitrator(s). I note that in the said contract document being the “contract for Repair and resealing of Nakuru-Njoro-Mau Summit and Njoro, Mau Narok Roads (C56 and C57). Contract No. R.L. 0329, Clause 67.1 deals with settlement of Disputes and states;

(i) 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 and whether before or after repudiation or other termination of the Contract, including any dispute 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. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

(ii) Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award;

(iii) If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of eighty four (84) days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

24. Clause 67.3 further provides that;

“67.3 Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to sub-clause 67.1, and

(b) amicable settlement has not been reached within the period stated in sub-clause 67.2,

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator(s) shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

25. Therefore, Clause 67.3 clearly states that, one or more arbitrators appointed shall be appointed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. (herein “the Rules”). Article 13 thereof, lays down the criteria the Court will consider when appointing or confirming of the arbitrator under these Rules. The Court referred to under the Rules the International Court of Arbitration as defined under Article 1 of the Rules. It must be borne in mind that as stated there under, the Court does not itself resolve the disputes. It administers the resolution of the disputes by arbitral tribunals in accordance with the Rules of Arbitration of the ICC (the “Rules”).

26. The provision of Article 13 empowers the Court to make an appointment upon proposal of a National Committee or Group of the ICC or in the absence, thereof, on a proposal from another National Committee or Group, it considers appropriate, or appoint directly to act as an arbitrator any person it regards as suitable. Therefore, the Applicant cannot disregard two issues:

(a) The provisions of clause 67.3 of the agreement the parties signed that recognizes the ICC Rules for appointment of an Arbitrator; and

(b) The procedure laid down in the said “Rules” for the appointment of an Arbitrator in view of the fact that, the said contract did not specify the method and/or procedure of appointment of an arbitrator).

27. It is therefore not adequate for the Applicant to simply aver that, clause 67 of the Agreement provides for settlement of disputes and argues:

“That the Applicant proposes the appointment of Peter Scott, a Civil Engineer and a member of Chartered Institute of Arbitrators to arbitrate on the matter.”

28. This Court cannot appoint an arbitrator under the Rules as it is certainly not the Court envisaged under the Rules. The Court does not therefore have the jurisdiction to appoint the said Mr. Eng. Peter Scott. Be that as it were, assuming the Court has the jurisdiction, the Applicant has relied on Section 12 of the Arbitration Act cited herein. As submitted by the Respondent, the Court can only descend in the arena where the parties fail to agree on an arbitrator to be appointed as provided for under Section 12(3)(a) and (b). That is not the case herein. What transpired herein is that, the Applicant did not refer the dispute to the Engineer in the first instance, nor waited neither for the specified period within which the Engineer was to make a decision to expire nor for the decision before giving the notice of the intention to commence Arbitration. In that regard, it cannot be said, that, the parties have failed to agree on the appointment of the Arbitrator. In the given circumstances, I find that, the application has no merit.

29. Finally, I note that the Respondent has raised the issues as to whether the Applicant has a cause of action to refer to arbitration and whether there is an arbitration clause in the contract executed by the parties, in that the claim (if any) is statute barred. However, these issues cannot be dealt with in this matter. They will be dealt with once the arbitral proceedings commence and if a formal application is filed in Court.

30. The upshot thereof is that, the application is dismissed with costs to the Respondent.

31. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 23rd day of November 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Walubengo for the Applicant

Ms. Nthige for the Respondent

Dennis -----Court Assistant