



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CAUSE NO. 372 OF 2016

HAUSRAM LIMITED.....CLAIMANT

- VERSUS -

NAIROBI CITY COUNTY.....RESPONDENT

RULING

1. On 15th September 2015, the arbitrator, Mr. John M. Ohaga, delivered an Interim Award. The said Award was in respect to the Preliminary Objection, which had challenged the jurisdiction of the arbitration tribunal.
2. The respondent to the arbitral proceedings had, in its response to the claim, raised issues regarding procurement.
3. The respondent had also raised a Counter-claim against the claimant. But the claimant's view was that the said counter-claim was time-barred, especially considering that the alleged procurement issues had not been referred to the Public Procurement Administrative Review Board within 7 days, as stipulated in the Public Procurement and Disposal Regulations, 2006.
4. The claimant's position had been that the arbitral tribunal lacked jurisdiction to handle public procurement related matters.
5. But the respondent had submitted that the matters which were before the arbitral tribunal were not a dispute concerning procurement, but were a dispute of a contractual nature.
6. In his determination, the arbitrator made it clear that when called upon to decide the issue of the arbitrator's jurisdiction, the starting point was the contract.
7. In this case, it was recognized that there are four (4) contracts.
8. The arbitrator acknowledged that;

“...the Arbitrator is a creature of the agreement between the parties. This means, in effect, that the Arbitrator draws his jurisdiction from the agreement between the party, which defines the parameters of such jurisdiction”.
9. Having set out the relevant portions of each of the 4 contracts which contain provisions for the

resolution of disputes, the Arbitrator noted as follows;

“It will be clear from the foregoing that each of the agreements specifically pleaded by the Claimant at paragraph 5 of the statement of claim contain provisions for dispute resolution which are worded differently and which do not provide sufficient clarity as to the parameters of the arbitrator’s jurisdiction. Unfortunately, none of the parties addressed the Tribunal with any specificity as to the exact terms of the Arbitration clause which gives rise to the jurisdiction of the Tribunal?.

10. Nonetheless, the Arbitrator observed that it is the claimant who had specifically particularized the 4 different contracts.

11. As the Claimant had enumerated the 4 contracts, the Arbitrator concluded that that action was responsible for inviting the respondent to expand the ambit of the dispute to include each of the said contracts.

12. It was the view of the Arbitrator that he may have to delve into all the 4 contracts in order to enable him make an informed determination of the issues. For that reason, the Arbitrator decided that it was premature to conclude whether or not any of the issues raised, placed the dispute beyond the arbitral tribunal’s jurisdiction.

13. It was for that reason that the Arbitrator refused to uphold the Preliminary Objection.

14. The Claimant has told this court that the Arbitrator had failed to resolve the Preliminary Objection.

15. Meanwhile, the Respondent was of the view that the issue which the Arbitrator was required to determine was not related to procurement.

16. To my mind, that would imply that the Respondent appreciated that if the matters in issue were related to procurement, then the Arbitrator would not have the requisite jurisdiction over the same.

17. However, even though the matters in issue were said, (*by the Respondent*), to be of a contractual nature, the Respondent expressed the view that the Arbitrator would have been entitled to take into account any aspects of the law, including procurement law, when making a determination.

18. The dispute arose out of the Operationalization contract.

19. But the claimant accused the Arbitrator of mixing-up that contract with the Customization of the Establishment of an Electronic Bill Presentment and payment platform. The latter contract had been performed, and no issues arose from it.

20. And because it is only the said Customization Contract which gave jurisdiction to an Arbitrator over issues of the validity of the Agreement, the Claimant submitted that that contract could not be used to clothe the Arbitrator with jurisdiction over matters arising from a separate contract.

21. The Respondent had raised the issue as to the validity of the contract, through its Counter-claim. And it is because of that fact that the Claimant submitted that the Arbitrator would have no jurisdiction to handle questions which should have been under the exclusive mandate of the self-governing Public Procurement & Disposals Act.

22. I understand the Claimant to be saying that disputes arising from the application of the Public Procurement & Disposals Act had to be governed in accordance with the mechanisms for their resolution, as provided for under that statute. The primary aspect of the said mechanisms is the creation of the Public Procurement Administrative Review Board and also the Public Procurement Debarment Committee.

23. When a specific organ is created with the mandate of addressing issues emanating from a particular

field, such as procurement or arbitration, the Courts have made it clear that parties should have issues addressed by such organs. Therefore disputes emanating from the Public Procurement & Disposals Act ought to have been resolved by the organs established under that statute.

24. In this case, the respondent confirmed to the court that the matters in issue arise from Public Procurement. It therefore follows that such matters ought to be addressed through the mechanisms for the resolution of disputes as provided for under the Public Procurement & Disposals Act.

25. It is important that this decision be put within its proper perspective. I say so because it is not the whole matter which is allegedly beyond the jurisdiction of the Arbitrator.

26. Both parties accept that the Claim is within the jurisdiction of the Arbitrator. Therefore, it is the Counterclaim, *(to the extent that it sought to expand the scope of the dispute by introducing matters which ought to be determined under the Public Procurement & Disposals Act)*, that introduced matters beyond the Arbitrator's jurisdiction. The Arbitrator appears to have fully appreciated that fact when he said;

“56. Therefore, notwithstanding that the Statement of Claim attempts to restrict the prayers sought to the termination of the Agreement dated 23rd July 2012, the Statement of Response has clearly, at the invitation of the Claimant, expanded the ambit of the dispute to include each of the other contracts and the Tribunal must necessarily take cognizance of the wording of the different dispute resolution clauses in order to determine the length and breadth of its jurisdiction”.

27. It should be borne in mind that it is the Claimant who placed before the Arbitrator, all the 4 contracts.

28. If, as the Claimant says, the dispute was only in relation to one contract, there must have been a reason to cause the Claimant to make available the other 3 contracts, which it now says are irrelevant to the matters in issue. I believe that that is why the Arbitrator deemed the respondent to have *“expanded the ambit of the dispute to include each of the other contracts...”* at the invitation of the Claimant.

29. But whether or not the Claimant had, by its pleadings and documentary evidence, invited the reaction of the Respondent, to expand the scope of the dispute, I find that such invitation cannot clothe the Arbitrator with jurisdiction which he did not have in the first instance.

30. Accordingly, I find that the Arbitrator lacks jurisdiction to determine;

a. matters which should have been raised before the Public Procurement Administrative Review Board;

b. the validity of the 3 other contracts, namely the:-

i. Customization Contract dated 17th May 2011;

ii. The Deployment Contract dated 6th August 2012; and

iii. The Financial Contract.

31. In order to enable the Arbitrator carry out his mandate, he may now give appropriate Directions on the Statement of Claim and the Statement of Response. I so direct because it is not acceptable for one party to provide the Tribunal with documents touching on contracts which are not in issue, but then insist on having the other party barred from responding to those other contracts.

32. In the final analysis, I allow the Claimant's application dated 4th August 2016, and set aside the Interim Award dated 15th September 2015.

33. The Arbitral proceedings should be limited to the disputes arising from the Operationalization Agreement dated 23rd August 2012.

34. The costs of the application dated 4th August 2016 shall be paid by the Respondent, to the Claimant.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Wanjala for the Claimant

Miss Maura for the Respondent

Collins Odhiambo – Court clerk.