REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 230 OF 2016 (O.S)

IN THE MATTER OF AN ARBITRATION - TRIDEV BUILDERS CO. LTD (CLAIMANT) –VS- WEST MOUNT LTD (RESPONDENT)

AND

IN THE MATTER OF A REFERENCE UNDER SECTION 17 THE ARBITRATION ACT, 1995

BY

WEST MOUNT INVESTMENTS LIMITED…….....APPLICANT

AND

TRIDEV BUILDERS COMPANY LIMITED…….....RESPONDENT

JUDGMENT

Introduction

1. Parties in commercial transactions amiably enter into association and then quarrel. Occasionally, they provide how to resolve their disputes; often they leave the resolution to public institutions like the court.

2. The instant originating summons raises an important yet difficult question for consideration. It is a question about an arbitrator's jurisdiction but more critically it deals with whether the Respondent's claim is barred. The court is invited to consider a contractual time-bar clause. The court is largely invited to determine whether the Defendant may or may not proceed with the arbitration already commenced. A determination either way may lead to an objection of any award by the arbitrator at the enforcement stage that it is contrary to public policy as the claim was time-barred or even to an objection where a suit is commenced in lieu of the aborted arbitration that the claim is indeed time-barred. A close interpretation of the relevant time-bar clause is thus necessary.

Background facts

3. The facts are these.

4. West Mount Investments Ltd ("West Mount") is a realty company. It develops real property and then markets and sells the development. Tridev Builders Company Ltd ("Tridev") is a contractor.

5. In June 2012 Tridev and West Mount entered into an agreement for the construction of apartment

blocks on Land Reference Number 2/404 Nairobi owned by West Mount. The Agreement was the 1999 Standard edition published by the joint building council of the Architectural Association of Kenya and the Kenya Association of Building and Civil Engineering Contractors ("The JBC Agreement").

6. The JBC Agreement contained an Arbitration clause 45 (which was headed "Settlement of Disputes") in these terms:-

> ***45.1*** *In case any dispute or difference shall arise between the Employer or the on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the The Architectural Association of Kenya, on the request of the applying party.*
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> ***45.2*** *The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising under or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in Clause 34:0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract.*
>
> ***45.3*** *Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.*
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> ***45.4*** *Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.*
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> ***45.5*** *In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.*
>
> ***45.6*** *Notwithstanding anything stated herein the following matters may be referred to arbitration before the practical completion of the Works or abandonment of the Works or termination of the contract by either party.*
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> ***45.6.1*** *: The appointment of a replacement Architect, Quantity Surveyor or Engineer upon the said persons ceasing to act.*
>
> ***45.6.2:*** *Whether or not the issue of an instruction by the Architect is empowered by these conditions.*
>
> ***45.6.3:*** *Whether or not a certificate has been improperly withheld or is not in accordance with these conditions.*
>
> ***45.6.4:*** *Any dispute or difference arising in respect or war risks or war damage.*
>
> ***45.7*** *All other matters in dispute shall only be referred to arbitration after the practical completion or alleged practical completion of the Works, or abandonment of the Works, or termination or alleged termination of the contract, unless the Employer and the Contractor agree otherwise in writing.*
>
> ***45.8*** *The Arbitrator shall, without prejudice to the generality of his powers, have powers to direct such measurements, computations, tests or valuations as may in his opinion be desirable in order*

to determine the rights of the parties and assess and award any sums which ought to have been the subject of or included in any certificate.

45.9 *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.*

45.10 *The award of such Arbitrator shall be final and binding upon the parties.*

7. A dispute, unsurprisingly, arose between the parties and the parties ended before an arbitrator, Mr Tom Oketch. Pursuant to Section 17(2) of the Arbitration Act, No. 4 of 1995 ("the Act") West Mount raised a plea in limine that the arbitrator did not have jurisdiction to hear and determine the dispute. West Mount filed a motion to like effect and Tridev responded. West Mount's objection was premised on Clause 45.3 of the JBC Agreement which provided that

"No proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute".

8. The arbitrator heard the objection and declined to lay down his tools.

9. For the following reason he held that we had the necessary jurisdiction. The arbitrator found that the parties had waived the provisions of Clause 45.3 above and that a notice of dispute dated 28 September 2015 had been properly issued. The arbitrator in arriving at his decision also made various findings of fact, including the fact that West Mount had by its own conduct and or through agents varied the ninety day period under Clause 45.3 of the JBC Agreement.

West Mount's Case and Submissions

10. West Mount contended that the arbitrator had no jurisdiction to hear and determine the dispute as Tridev had failed to ignite the arbitration process within the prescribed time. In particular, West Mount pointed to Clause 45.3 of the JBC Agreement and contended that the clause required a party, who wanted to move to arbitration to have notified the other of a dispute within ninety (90) days the disputes emergence and where no such notice was given, arbitration proceedings could not be commenced. According to West Mount the dispute arose in October 2013 when West Mount terminated the JBC Agreement. Tridev however only gave notice of the dispute in September 2015 which was well beyond the ninety day period. West Mount consequently contended that Tridev was barred from proceeding under the dispute resolution clause. Tridev according to West Mount could not move the arbitration process but could seek refuge before any court of law for reliefs on its claims.

11. Advocating for West Mount, Mr. Tom Onyambu while conceding that Tridev's claim survived however insisted that the same could not be lodged and urged before an arbitral forum. Mr. Onyambu faulted the arbitrator for upholding his own jurisdiction on the basis of an alleged waiver when there was no proven evidence of such waiver before the arbitrator.

12. Mr. Onyambu insisted that it is Tridev's letter of 28 September 2015 which triggered the arbitral process and that the arbitrator having found as a fact that the same letter was the requisite notice under Clause 45.3 of the JBC Agreement, ought to have declined jurisdiction. According to Mr. Onyambu the dispute arose in January 2014 yet the notice of dispute was given in September 2015 which was effectively a failure on the contractual time limit. Counsel referred to the case of **Sebhan Enterprises Ltd *v* West Mount Power (Kenya) Ltd [2006]e KLR** as well as to the 23rd Edition of David St. John Stutton's treatise **Russel on Arbitration at para 5.006** for the proposition that where there is non-compliance with a contractual time limit in giving a notice, the arbitrator's jurisdiction ceases. Counsel insisted that purported waiver through exchange of correspondence could never hire any barred action or claim. For this latter proposition counsel relied on the case of **Telkom Kenya Ltd & Another *v***

Kamconsult Ltd HCCC. No. 262 & 267 of 2001 (O.S) where Ringera J (as he then was) was firm that

> ***" a dead right of action cannot be resurrected by subsequent actions by the persons who would have been sued had the claim not been statute barred"*** **further that a "*if a right of action was not available due to the expiry of the relevant limitation period, there can be no fresh accrual thereof as a result of acknowledgment or part payment*".**

13. While also attacking the arbitrator's decision on various allegedly erroneous findings of fact which appeared to touch on the merit of the dispute rather than jurisdiction, Mr. Onyambu urged me to vacate the arbitrators' determination that the arbitral forum had jurisdiction and instead confirm want of jurisdiction. Counsel further urged me to decide the issue in accordance with the JBC Agreement.

Tridev's case and submissions

14. Tridev was in support of the arbitrators finding as to jurisdiction. Tridev contended that the dispute resolution process was guided by clause 45 which had to be read in its entirety and not in an isolated manner. Tridev contended further that it had complied with all the requirements of clause 45.

15. Like West Mount, Tridev as may be retrieved from the further Affidavit of Mayi Kanyi Patel filed on 23rd September 2016, contended that the dispute emerged in October 2013 when controversy emerged between the parties with West Mount making late payments, withholding payments and ultimately interfering with the construction site. Tridev contended that since 2014 the parties engaged with a view to resolving the matter but still failed even after certain final accounts had been submitted to West Mount by the project's Quantity Surveyor. According to Tridev following the failure of the parties to resolve the dispute amicably, on 28 September 2015, Tridev sought arbitration. Tridev also insisted West Mount by its actions had waived the ninety day period under clause 45.3 of the JBC Agreement.

16. Ms. Eunice Lumallas attorned for Tridev and urged me to uphold the findings and decision of the arbitrator with counsel contending that the arbitrator had the right to determine his jurisdiction. Ms. Lumallas largely repeated the above narrative of Tridev's case.

17. Additionally, counsel asserted that the arbitration agreement (Clause 45 of the JBC Agreement) was binding on both parties and as the dispute was one capable of resolution by arbitration, and the arbitrator had been validly appointed jurisdiction duly existed. Counsel then pointed to Article 159 of the Constitution and urged me to promote alternative dispute resolution by allowing the arbitration between Tridev and West Mount to proceed. Counsel referred to various case law mainly for the proposition that an arbitrator's jurisdiction is founded on a valid arbitration agreement and arbitrable disputes.

Discussion and determination

18. The sole question for my determination is whether the arbitrator has jurisdiction to determine the dispute between the parties.

19. I must hasten to point out that corollary issues raised by both counsel as to whether or not there were final accounts (West Mount's contentions) or whether each party performed its part of the bargain (Tridev's arguments) tend to make a visit to the merits of the dispute between the parties and ought not form a basis for any determination at this stage where the question is all about *forum conveniens*. I must consequently avoid a discussion on various aspects of the dispute if anything to avoid pre-empting any findings by either the court or the arbitrator wherever the dispute may ultimately land.

20. Secondly, I must also point out that it is true and beyond controversy that an arbitrator, thanks to the doctrine of *kompetenz-kompetenz*, has the jurisdiction to determine his own jurisdiction. This position is further strengthened by the provisions of Section 17 of the Act which provides that the Arbitral tribunal has such powers.

21. Thirdly, I also hasten to point out that where an arbitrator determines that he has no jurisdiction the

arbitral proceedings must be brought to a halt. Neither party may then move to force the arbitral process. Such a determination may not be challenged in court: see **Sebhan Enterprises Ltd *v* West Mount Power (Kenya) Ltd [2006] eKLR** which upheld a contention that Section 17(6) of the Act does not allow any challenge to the High Court where an arbitral forum determines that it lacks jurisdiction.

22. However, where the arbitral forum determines that it has jurisdiction then any party aggrieved may apply to the High Court to decide the matter of jurisdiction. It must be pointed out that the High Court determines the issue a fresh and in its original jurisdiction. The language of Section 17(6) of the Act does not point to an appeal or review of the arbitral forum's decision. It is an application lodged under Rule 3 of the Arbitration Rules 1997 through an originating summons returnable before the judge in chambers with a specific question as to jurisdiction stated.

23. As already pointed out, the application to the High Court under Section 17(6) the Act is not an appeal. The court must then in considering the matter exercise an original jurisdiction and is not beholden to any findings of fact by the arbitral tribunal. The court is to evaluate the evidence, assess it and make its own conclusion while relating the same to the arbitration agreement which the court is also to construe independently. Even if it was to be deemed that an application under Section 17(6) of the Act is an appeal, it would still be a first appeal and the High Court would still be under an obligation to re-evaluate and consider all the evidence and material laid before the arbitral tribunal and make its own conclusions: see **Selle *v* Associated Motor Boat Company [1968] EA 123** and **Ramp Ratua & Company Ltd *v* Wood Products Kenya Ltd CACA No. 117 of 2001.**

24. In my view, for any application under Section 17(6) of the Act the court is to consider four substantive issues. First, is whether there is a valid arbitration agreement. Secondly, is whether the arbitral tribunal is properly constituted and, thirdly, whether matters have been submitted to arbitration in accordance with the arbitration agreement. Finally, is whether the matters submitted to arbitration fall within the scope of the arbitration agreement.

25. In the instant case, there is no dispute that the arbitration agreement was valid and enforceable. There is also no controversy that the arbitral tribunal was properly constituted. Thirdly, there is also no dispute that the issues placed before the arbitral tribunal constituted disputes as contemplated by the arbitration agreement and by the parties. Controversy emerges when West Mount contests the manner and procedure of submission to arbitration by insisting that a mandatory procedure was not observed by Tridev, as Tridev did not within the prescribed time give notice of the dispute pursuant to clause 45.3 of the JBC Agreement.

26. I must first point out that I had, during an interlocutory mention of this case asked both counsel to agree and let the court know when they deemed it that a dispute arose and also the exact dispute which was before the arbitrator but, somehow surprisingly and belligerently, both counsel failed to agree and let the court in. The issues were thus not isolated.

27. For purposes of this case, it is unnecessary to determine what issue or dispute was/is before the arbitrator. It is however necessary to determine when the dispute arose as that is what forms the core of the question as to whether the arbitral tribunal has jurisdiction or not.

28. West Mount complains that Tridev failed to observe a time limit clause which was to help trigger the dispute resolution clause. West Mount states that Tridev failed to give notice within the time prescribed under clause 45.3 of the JBC Agreement and thus it (Tridev) lost the right to have the dispute resolved through arbitration. According to West Mount it was mandatory that the prescribed period of ninety days is observed otherwise the right to arbitration (over the dispute) was lost.

29. Contractual time bar clauses are a common place in commercial, especially engineering and construction, contracts. They vary from contract to contract. Some state when a claim may be commenced, others state when arbitration or litigation may be instituted. Yet others make notification of dispute a mandatory prerequisite to lodging any claim or commencing any arbitration. The purpose of a contractual time bar clause is to ensure that any dispute that may arise is dealt with swiftly: see ***The***

Simonburn [1972] 2 Lloyds Rep 355 at 394 per Lord Denning MR. The clauses also help in ensuring that relevant evidence in support of or in opposition to a claim (or dispute) is assembled with samples not destroyed and scenes or sites not altered beyond recognition. Effectively, contractual time bar clauses allow greater commercial certainty with parties able to deal and transact without the potential threat of unknown claims. There is no point in a party keeping a dispute up his sleeve with a "wait and see what happens" attitude while considerable costs and expenses are incurred.

30. As contractual time bar clauses make reasonable commercial sense in administration of contracts and management of risk, courts ordinarily will not and should not interfere especially where the parties have equal bargaining strength. If claims fall foul of such limitation clauses then the claim or the arbitral process may be barred, even where it appears to have been a bad bargain.

31. Where the effect of default is to bar the right to arbitrate or obtain remedy in arbitration, then any arbitral forum constituted despite the default will lack jurisdiction. But where the effect is to extinguish the claim, then the arbitral tribunal, will be possessed with the jurisdiction to decide if the claim is barred i.e. whether it is "a dead claim".

32. A strict interpretation is therefore to be adopted when construing a contractual time bar clause given that it has the potential of locking out a claim which statute has not time barred: See **Niajing Tianshun Shipbuilding Co. Ltd *v* Orchard Tankers PTE Ltd [2011] EWHC 164.** There should be no room for implied and inferred conditions and consequences but the clause ought to be clear plain and express as to its purport and effect.

33. In casu, Clause 45 anticipates two notices in my view. Under sub clause 1, a notice commencing arbitration is expected to be given with the applying party requesting for an arbitrator to be appointed. This is in line with section 22 of the Act as to commencement of arbitration. Before the commencement though, there is a preceding notice to be given to notify a party of the dispute. Under Clause 45.3 of the JBC Agreement it is relatively clear that for the arbitration process to be commenced an applying party had to notify the other party of the dispute or controversy within ninety (90) days of the occurrence or discovery of the matter or issue giving rise to the dispute.

34. At the risk of repetition, Clause 45.3 of the instant JBC Agreement stated thus:

> ***45.3*** *Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.*

35. A dispute of course arises when a claim is made by one party following the action of the other party and is either rejected or ignored by the other party.

36. My review of the evidence and facts before me would reveal that the dispute in this matter arose in October 2013 when West Mount terminated the JBC Agreement and had Tridev vacate the construction site. The termination was contained in a letter dated 7 October 2013. On 8th October 2013 Tridev penned a couple of letters to the project Architect as well as to West Mount. The letter to the project Architect, U-Design Architects & Interior Designers, contested the termination and forceful takeover of the site. The second letter by Tridev on 8 October 2013 was to West Mount and was copied to the project Architect. This latter letter was more forceful and it partly read as follows;

> ***"…***
>
> ***This morning you forcefully gained access to the site by breaking the gate padlocks and kicked our workers out of site. Your action and your assertion that you have terminated the contract with effect from 7 October 2013, is not only malicious but is unreasonably and vexatiously issued in total disregard to our contractual rights and obligations all aimed to deny us payment of money you owe us in the project.***

We therefore reject the purported termination as being contrary to the contract and a breach to the terms of the said contract.

Without prejudice to our rights, we are prepared for a joint measurement and valuation of our work done and by a copy of this letter request the Quantity Surveyors and Architects to inform us of the date of the said exercise.

Further we reserve our rights to activate the dispute resolution provision in the contract should there be no amicable resolution of the matter.

….”

37. Prior to this letter and the West Mount letter of 7 October 2013, there had been a flurry of correspondence between the parties with each party accusing the other of breach and default of the contract. The parties had information of all the matters which were being alleged and only came out strongly on 7 October 2013 when West Mount terminated the JBC Agreement and took over the site.

38. I am unable to discern how it may be argued that there was no dispute until September 2015. I would agree with West Mount that the dispute arose in October 2013 and more precisely when West Mount took over the construction site from the Tridev. Tridev then contested the takeover. Tridev also laid claim to what was due to it by asking for a valuation. These differences could thereafter only be resolved amicably or through arbitration.

39. Effectively and pursuant to clause 45.3 of the JBC Agreement, Tridev after the termination only had ninety days to notify West Mount of the dispute and intent to have the same resolved amicably before moving to arbitration. These are the precise words of clause 45.3 which stipulated that the notification of dispute be made within ninety (90) days of occurrence of event igniting the dispute or difference and the parties to venture into an amicable settlement process. Clause 45.5 prohibited any arbitration being commenced within 90 days of the notification, while Clause 45.4 prohibited arbitration prior to any attempts to amicably resolve the dispute or difference.

40. arbitration agreement (clause 45) did not provide any formal or prescribed format for the notice of dispute and it is thus a matter of construction whether there is substantial compliance with Clause 45.3. It cannot be ‘exact’ compliance in the absence of any prescribed format of a notice. What is critical is whether the objective and purpose of the clause has been substantially met within the prescribed time. This approach countenances any deviation from any imagined or imaginary notice formats.

41. I have already indicated that the general purpose of time bar clauses is to ensure that disputes are swiftly attended to and that any relevant evidence is gathered early enough. The notification that there is a dispute will thus take any form. It could be a basic simple letter.

42. In the instant case, the intention of clause 45.3 of the JBC Agreement, in my view was also to ensure that parties do not move to an adversarial process without first exploring an amicable avenue of resolving any identified and existing dispute.

43. My view is that the letter by Tridev of 8 October 2013 directed to West Mount met and achieved the purpose of Clause 45.3 of the JBC Agreement. The letter identified the dispute. Tridev contested the termination which West Mount was not willing to rescind. Tridev also identified the fact that West Mount owed it monies and the payment was not forthcoming. More critically Tridev invited an amicable approach to the differences which is what clause 45.3 advocated.

44. This position appears vindicated with what happened after Tridev’s letter of 8 October 2013. The parties engaged. There were attempts to identify what was truly due to Tridev. For a period of nearly two years the parties engaged.

45. I must also point out that the notification required under clause 45.3 was only for the dispute and not

the commencement of arbitration. The arbitration itself commenced on 21 October 2015 when West Mount received Tridev's letter of 28 September 2015 requesting for the appointment of an arbitrator. Section 22 of the Act stipulates that when a party receives a letter requesting for appointment of an arbitrator then arbitration is deemed to commence. The letter of 28 September 2015 was not a notice of the dispute for purposes of clause 45.3 of the JBC Agreement but a notice under clause 45.1 for the commencement of arbitration between the parties.

Conclusion and disposal

46. I find that Tridev gave a notification of the dispute in October 2013 within 90 days as was expected under the JBC Agreement. Further, the arbitration was commenced after ninety (90) days of the notification of the dispute. The arbitration agreement is also not contested and is valid. So too is the dispute referred to the arbitrator which is arbitrable.

47. In the circumstances, the arbitrator as appointed has the jurisdiction to consider and determine the dispute between the parties.

48. The Originating Summons dated 15th June 2016 is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 21st day of April, 2017.

J.L.ONGUTO

JUDGE