



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 255 OF 2016

NATIONAL HOSPITAL INSURANCE FUND.....PLAINTIFF

VERSUS

ENG. PETER SCOTT (SOLE ARBITRATOR).....1ST DEFENDANT

MANGA & ASSOCIATES.....2ND DEFENDANT

RULING

1. The Plaintiff (herein “the Applicant”) filed a Chamber Summons Application dated 27th June 2016 seeking for orders that, the Arbitral proceedings before the Arbitral Tribunal be halted, pending the determination of the Originating Summons it has filed herein.
2. The Application is brought under Section 7 and 17(6) of the Arbitration Act, Rule 3(2) of the Arbitration Rules, 1997, and all the enabling provisions of the Law. It is based on the grounds on the face of it, and the Affidavit sworn by Geoffrey Gitau Mwangi, dated 27th June 2016.
3. The Applicant avers that, pursuant to a request by the 2nd Respondent, Mango Associates Advocate, for the appointment of an Arbitrator, the 1st Respondent Engineer Peter Scott, (hereinafter “the Sole Arbitrator”) was appointed by the Chairman of the Association of Consulting Engineers of Kenya vide a letter dated 18th December 2015. On 29th February 2016, the 2nd Respondent’s Advocate served the Applicant’s Advocate with a statement of claim. The Applicants then filed a Notice of Preliminary Objection on 11th March 2016, premised on the grounds that, as there is no Arbitration Agreement between the Parties, the Sole Arbitrator lacks jurisdiction to entertain the claim. However, the Preliminary Objection was opposed. It was subsequently disposed of vide written submissions. In addition, the 2nd Respondent was requested to supply documents to support the argument that there is an Arbitration Agreement, founded on the conditions of Engagement for Civil, Mechanical and Electrical works and for Structural Engineering Works, executed by the parties. Subsequently, the Sole Arbitrator rendered a ruling on the Preliminary Objection on 9th June 2016 and dated 6th June 2016, The Preliminary Objection was dismissed. The Applicant was on 23rd June 2016, then served with a letter to appear before the Sole Arbitrator on 8th July 2016 to fix dates for hearing of the matter, hence the Application herein.
4. This Application was however, opposed vide a Replying Affidavit filed in Court on 25th July 2016, sworn by Engineer S. R. Manga. He averred that, paragraph 2 of the letter dated 19th August 2002, clearly states that, the 2nd Respondent appointment shall be in accordance with the Association of Consulting

Engineers of Kenya (ACER) conditions of Engagement and Scale of fees. The said Conditions of have two agreements, the first is where the Architect is not appointed by the client, and the other is where the Architect is so appointed. That Clause 4 of both agreements provide for settlement of disputes, and the steps to be followed in case a dispute or difference arises, and Clause 4(c) provides that, a dispute shall be referred to the Arbitrator. As such, the Sole Arbitrator has the jurisdiction to entertain the 2nd Respondent's claim.

5. The Parties agreed to dispose of the Application through written submissions. The Applicant filed their written submissions on 15th August 2016 and the 2nd Respondent on 8th September 2016. On 4th November 2016, the Parties' respective learned Counsels highlighted the submissions. I have considered the said submissions and I find that the following issues arise for determination:

(i) Whether the Sole Arbitrator has jurisdiction to entertain the 2nd Respondent's claim.

(ii) Whether, the Arbitral proceedings should be stayed.

6. As regards the issue of jurisdiction, the Applicant referred to the case of **Yusuf Gitau Abdallah Vs Building Centre (K) Ltd & 4 others 2014 eKLR**, where the Supreme Court held that jurisdiction cannot be assumed by craft nor will it be conferred by way of a party's "pestering" and that it is paramount in any adjudication as held in the case of **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (K) Ltd (1989) eKLR**, where Justice Nyarangi (as he then was) held:

"Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction".

7. Similarly in the case of; **State Vs Ollagoruwa (1992) CSCD 17 at 19**, cited in **Consolidated Bank of Kenya Ltd Vs Arch Kamau Njendu t/a Gitutho Associates (2015) eKLR** Justice Akpala stated

".....A Court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based, but when a Court lacks jurisdiction and continues to hear and determine judicial proceedings; it build on quick sand and all proceedings and steps taken on it will not stand..."

8. The Applicant reiterated that the Sole Arbitrator has no jurisdiction herein due to lack of a contract between the Parties evidencing an Arbitration clause. Therefore, the Court should stay the Arbitration proceedings and determine the issue of jurisdiction raised in the pending originating summons herein.

9. The Applicant further submitted that, the Court has the power to stay Arbitral proceedings, and relied on the cases of **Stirling Civil Engineering Ltd Vs TM – AM Construction Group Africa (2012) eKLR**, where the Court stayed proceedings pending before the Arbitrator, and **Eldoret Municipal Council Vs Rural Housing Estates Ltd (2002) eKLR**, where the Court stayed Arbitral proceedings to avoid the suit before it being rendered nugatory.

10. In response to the Applicant's submissions, the 2nd Respondent submitted that Section 4(3) of the Arbitration Act, N0. 4 of 1995, provides a list of what constitutes a written Arbitration Agreement and states as hereunder.

"An arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegram or other means of telecommunication which provide a record of the agreement".

11. That, in the instant matter the Parties exchanged two letters. A letter of offer and acceptance, which form part of engagement between them hence they are bound by the ACEK conditions. That the Applicant has not challenged the two letters as not being genuine. Neither is it refuted that there was

indeed an agreement between the Parties. Moreover, the Applicant has not provided the Court with an alternative agreement the parties executed, hence the two letters remain the basis of the contractual relationship.

12. I have considered the rival arguments on the issue of jurisdiction and the authorities cited. It is trite law that jurisdiction is everything. I note that in the instant case, the Applicant has filed an Originating Summons dated 27th June 2016 and among the prayers sought therein, is for the Court to determine whether, the 1st Defendant/Respondent has jurisdiction to entertain the claim lodged by the 2nd Defendant/Respondent and whether the dispute between the Parties raise questions of public interest and policy and should be tried by a Court of law as opposed to resolution by an Arbitral Tribunal.

13. In that regard, if I delve deeply into the issue of jurisdiction and determine it at this stage, I shall generally be ruling on the 1st prayer in the Originating Summons. In my considered opinion, the prayer for stay of the Arbitral proceeding sought for in the Chamber Summons dated 27th June 2016, is basically meant to preserve the Originating Summons, so that it is not rendered nugatory. I therefore find that, it is in the interest of justice to allow that prayer seeking to “halt” or stay the Arbitral proceedings to enable the Court first determine the issue of jurisdiction raised under the Originating Summons. The submissions made herein, in relation to the same will be preserved or banked for use while considering the prayers in the originating Summons.

14. The upshot of all this is that I allow prayer (2) of the Chamber Summons Application dated 27th June 2016, however for the expeditious disposal of this matter, I allow the Application as aforesaid on conditions that;

(a) The Applicant files and serves written submissions on the Originating Summons within 14 days of this order.

(b) The Respondents to reply thereto within 14 days of service.

(c) The matter to come for mention to confirm compliance and for further orders as to highlighting of the submissions and/or a date for ruling.

(d) The Costs of the Chamber Summons shall abide the outcome of the Originating Summons.

15. Those then are the orders accordingly

Dated, signed, and delivered in an open Court on this 20th day of April 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In the Presence of:

.....for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

Teresia.....Court Assistant