REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CAUSE NO. 96 OF 2017

THOMAS & PIRON GRANDS LACS LIMITED…….....APPLICANT

VERSUS

WHITEFIELD INVESTMENT LIMITED.....RESPONDENT

RULING

1. The application before me arises from arbitral proceedings. The said proceedings were between **WHITEFIELD INVESTMENT LIMITED,** as the Claimant, and **THOMAS PIRON GRANDS LACS,** as the Respondent.

2. The arbitrator is **EMMANUEL O. ODHIAMBO.**

3. It is common ground that the parties were unable to agree on the question regarding the applicable law to the arbitration. They therefore made their respective submissions, and the arbitrator held that;

> **"…whereas the Kenyan JBC Form of Contract was used in the contract, and the appointing authority being the Chairman of the Architectural Association of Kenya, the fact that the Companies in this Arbitration being registered in Rwanda and the Construction Project, which is the subject matter of this Arbitration being in Rwanda, the applicable law should be Rwandese" (sic!).**

4. The respondent to the arbitral proceedings felt aggrieved by the decision of the arbitrator, and therefore brought this application, seeking the setting aside of the said decision.

5. It is the respondent's position that the law applicable to the arbitration should be the Law of the Republic of Kenya.

6. The submission of the respondent was that the choice of the applicable law is normally made by identifying the seat of the arbitration.

7. In this case, the respondent reasoned that through the signing of the **JBC** Agreement on 13th September 2013, the parties conduct is deemed to imply that they had chosen the Republic of Kenya.

8. It was the respondent's case that the parties conduct can be appreciated from the following;

> **a) Clause 45.1 of the Agreement stipulated that if the parties did not agree on the arbitrator,**

it was the Chairman of the Architectural Association of Kenya who would appoint the arbitrator; and

b) The Form of Contract which the parties signed was Kenyan.

9. The respondent cited the decision in **SULAMERICA CIA NATIONAL DE SEGUROS S.A & OTHERS Vs ENESA ENGENHARIA S.A & OTHERS [2012] E W C A (IV 638,** to support its case.

10. It is interesting to note that whilst the respondent was of the view that that authority supported its case, the Claimant submitted that the same case was consistent with the decision of the arbitrator.

11. The **JBC** contract document does not specify the applicable law. But because it is in the Kenyan format, the respondent submitted that the choice of that format, demonstrated an inclination towards the Kenyan law.

12. But the Claimant contends the proximity test was not the only one which should be applied when determining the law applicable to the arbitration.

13. The proximity about which the Claimant was making reference is that of the respondent to Kenya, as the respondent was currently operational in Kenya.

14. But even if the proximity test were to be applied, the Claimant submitted that it would support the finding of the arbitrator. Its reason for saying so was that both parties used to operate in Rwanda at the material time; the contract was signed in Rwanda and the subject matter of the contract is in Rwanda.

15. In the Sulamerica Case Lord Justice Moore – Bick said;

"It is common ground before us, as it had been before the Judge, that the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognize and give effect to the parties choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection".

16. The case before me is of an international arbitration, as opposed to an arbitration in which the parties, the subject matter and the law applicable are all within one nation.

17. The Claimant is a Rwandan Company. The respondent is a Kenyan Company, but which also carries on business in Rwanda. The subject matter of the contract is the development of a Free Trade Zone in Kigali, Rwanda. But the Agreement & Conditions of the Contract were those published by the Joint Building Council **(JBC)** of Kenya.

18. And whereas the work was being undertaken in Rwanda, the parties agreed that if they were unable to agree on an arbitrator, to help them resolve their disputes, the arbitrator would be appointed by the Chairman of the Architectural Association of Kenya.

19. That kind of scenario is by no means strange.

20. In **CHANNEL TUNNEL GROUP LIMITED Vs BALFOUR BEATTY CONSTRUCTION LIMITED [1993] A.C. 334, at page 357,** Lord Mustill said;

"It is now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration".

21. Bearing in mind that the law governing this substantive contract may well be different from the law governing the interpretation of the agreement to submit the dispute to arbitration, Lord Justice Moore Bick said the following, at paragraph 32 of his decision in the Sulamerica case;

> **"One then has to consider with what system of law the agreement has the closest and most real connection".**

22. But, whereas it might be easy to imagine that the test of how close and most real a connection is between the agreement and the system of law, the truth is that it is not a simplistic derivative.

23. In the Sulamerica case, the learned Judge said;

> **"No doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different. In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of the dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective".**

24. In which country will the supporting and supervisory jurisdiction of the court be necessary, to ensure that the procedure is effective?

25. In my considered opinion the answer is Rwanda. I say so not just because the subject matter of the substantive contract is located in Kigali Rwanda, but also because both parties were operating in Rwanda at all times material to the contract from which the dispute arose.

26. Such remedies or reliefs as the arbitrator may award would need to be capable of recognition and enforcement in Rwanda.

27. It is therefore the jurisdiction of the courts in Rwanda which will be necessary to ensure that such award as is granted can be given effect.

28. Accordingly, I find that there is no merit in the application which seeks to set aside the decision of the arbitrator. Therefore, the application dated 24th February 2017 is dismissed, with costs to the Claimant.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **24th day** of **May** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Ouma for the Applicant

E. Orinda for the Respondent

Collins Odhiambo – Court clerk.