



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 5 OF 2016**

**BRENDA NGII MUIU ..... PLAINTIFF**

**VERSUS**

**PETER MWANGI KIMANI T/A**

**ELECTRO BROTHERS & GENERAL CONTRACTORS...1<sup>ST</sup> DEFENDANT**

**AMACO AFRICAN MERCHANT ASSURANCE CO. LTD...2<sup>ND</sup> DEFENDANT**

**RULING OF THE COURT**

1. The Notice of Motion before the Court is dated 20<sup>th</sup> June, 2016 and is filed by the Plaintiff seeking to secure the following prayers;

*a. That this application be certified as urgent and be heard exparte in the first instance.*

*b. An order of the Court of the reference of this matter to arbitration as provided for in Clause 45 of the building agreement of the parties dated 30<sup>th</sup> April, 2015 and the 1<sup>st</sup> Respondent's application dated 21<sup>st</sup> March, 2016.*

*c. That the 1<sup>st</sup> Defendant's application dated 21<sup>st</sup> March, 2016 be granted as prayed therein and the application be marked as dispensed with.*

*d. That the Court does appoint any of the following persons who are qualified quantity surveyors duly enlisted as members of the Chartered Institute of Arbitrators Kenya Chapter to hear the dispute:*

*(i) QS KISHORE BOBBY NAYER OR*

*(ii) QS KAIRU BACHIA OR*

*(iii) ANY OTHER Quantity Surveyor enlisted as a member of the Chartered Institute of Arbitrators in which case an order does issue instructing the Chartered Institute of Arbitrators to appoint the arbitrator within seven (7) days of the court order.*

2. The application is premised on grounds set out therein and is supported by the affidavit of **Brenda Ngii Muiu** sworn on 20<sup>th</sup> June, 2016.

3. At the time of hearing the Respondent's advocate Mr. Olwande conceded to prayers 2 and 3 of the application leaving for the determination of this Court prayer number 4. Parties having conceded to arbitration, the issue now is who and how to appoint the arbitrator.

4. The Respondent's case is that prayer 4 of the application is premature. They submitted that **Section 12(2)** of Arbitration Act gives the parties autonomy to appoint an arbitrator of their choice. They submitted that under Clause 45 of the Agreement before the parties there is a procedure of appointing an arbitrator. The appointing authority is the Architectural Society of Kenya. That Clause is exhaustive and the Court should not interfere under **Section 12(3)** of **Arbitration Act**.

5. On their part, **M/S Koki Mbulu** for the Applicant submitted that the parties have already reached a deadlock under the agreement, and that in an earlier ruling of this Court delivered on 27<sup>th</sup> April, 2016 the Court gave the parties authority to appoint an arbitrator. Parties have failed to agree and this Court should now intervene under **Section 12** of the **Arbitration Act**.

6. I have looked at **Clause 45.1** of the Agreement between the parties. The Clause provides for the appointment of an arbitrator by the consent of the parties. However, if the parties fail to agree

***"... the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya, on the request of the applying party"***

7. Clearly, it is the Architectural Society of Kenya Chairman or Vice Chairman to appoint an arbitrator. However, in this application the Applicant has suggested names of certain Quantity Surveyors, or a Surveyor appointed by the Chartered Institute of Arbitrators. The Applicant's emphasis here is on a "Surveyor" as opposed to an architect under the agreement.

8. My understanding is that the Applicant seeks a Quantity Surveyor as arbitrator because of a Surveyor's assumed expertise knowledge of determining the quantities of work that were performed or not performed and the value thereof. The issue is whether this prayer is reasonable.

9. Before I answer that issue, we need to go to the Plea from which it is clear that the dispute concerns disagreement on the amounts paid by the Plaintiff for works done by the Defendant, and an allegation of overpayment. In this instance, the insistence by the Applicant to have a Quantity Surveyor as arbitrator appears reasonable.

10. More importantly, however, under Clause 45(1) of the Agreement, an arbitrator shall be appointed by the Architectural Association of Kenya on the request of the applying party (*emphasis mine*). This means that the applicability of Clause 45(1) on appointment of arbitrator was self actualizing upon any party herein taking steps. This means that the Respondent did not have to wait for any consent from the Applicant to apply to the Architectural Society of Kenya to appoint an arbitrator. If the Respondent had done that this Court would have no business determining who the arbitrator would be. Clause 45(1) on the appointment of arbitrator becomes operational upon one of the parties applying. In this case none of the parties have taken that option, and indeed both came to this court to seek leave for appointment of arbitrator. The jurisdiction of this Court to appoint an arbitrator has therefore been given to this Court by the parties themselves, and cannot be limited. Having assumed that jurisdiction, this Court will appoint an arbitrator who professionally appears to have ample knowledge to assist the parties to find a solution to their problem.

11. In that regard, it is the finding of this court that a Quantity Surveyor as arbitrator herein would be suitable for the parties.

12. In the upshot, prayer No. 4 of the application under consideration is granted as follows:

***(i) The Chairman/Secretary of the Chartered Institute of Arbitrators shall within fourteen(14) days from the date hereof appoint a Quantity Surveyor enlisted as its member as arbitrator herein, and inform the parties hereto accordingly.***

***(ii) Costs shall be in the cause.***

Order accordingly.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JULY, 2016**

**E.K.O. OGOLA**

**JUDGE**

**In the presence of;**

Mr. Kyalo holding brief for Koki for Plaintiff

Mr. Mwema holding brief for Olwande for Defendant

Court Assistant – Ms. Doreen