



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 427 OF 2015

MELLECH ENGINEERING & CONSTRUCTION LIMITEDPLAINTIFF/RESPONDENT

VERSUS

DAVID M GALATY DEFENANT/APPLICANT

RULING

The parties herein entered into a construction contract. The contract contained an arbitration clause in the following terms,

“3. In case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, such disputes shall be referred to the project architect for arbitration.”

A dispute arose and this was referred to the project architect as provided in the above clause. It turned out that the appointed arbitrator was conflicted. As a result, the defendant herein applied for the recusal of the arbitrator.

Following that step, the arbitrator recused himself. The plaintiff then moved to court and filed the present suit for payment of the sum in dispute as set out in the pleadings and the prayers thereunder.

The present application is by the defendant by way of Chamber Summons pursuant to Sections 4, 6 and 10 of the Arbitration Act 1995, Rules 2 and 11 of the Arbitration Rules, 1997 and Section 3A of the Civil Procedure Act.

The prayers therein are that,

- i. THAT these proceedings be stayed pending the hearing and determination of the arbitration proceedings between Mellech Engineering & Construction Limited on one part and David M. Galaty on the other part.
- ii. THAT the dispute between the parties be referred to arbitration.
- iii. THAT the defendant/applicant be at liberty to apply for such further or other orders and/ or directions as this Honourable Court may deem fit and just grant in the circumstances.
- iv. THAT the costs of this application be provided for.

The grounds upon which the application is based are set out on the face of the application alongside the supporting affidavit sworn by the defendant. The application is opposed by the plaintiff and there is a

replying affidavit sworn by one Jerald Wamalwa, the Chief Executive Officer of the plaintiff company. Both parties have filed written submissions and cited some authorities.

From the material before me, the project architect was appointed by the parties in line with clause 3 cited above. The plaintiff submits that the recusal of the appointed arbitrator terminated the arbitration clause and nothing is left to be enforced thereunder. The defendant on the other hand claims that notwithstanding the recusal of the said arbitrator, the arbitration clause remains and therefore the parties are at liberty to agree to appoint another arbitrator to step into the place of the one who has withdrawn.

The intention of the parties herein, I believe, is clear. Any dispute arising was to be referred to arbitration. They went further to determine who should be the arbitrator but unfortunately that arbitrator appeared to have conflict of interest.

I have gone through the Arbitration Act 1995, but I have not seen any provision that addresses the situation the two parties herein have found themselves. That is to say, no provision exists for the resolution of a dispute where the appointed arbitrator recuses himself or what should take place after such a step by an arbitrator.

However Section 16 (1) provides as follows,

“Where the mandate of an arbitrator is terminated under Section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced”.

Section 15 (1) (b) of the Arbitration Act provides as follows,

The mandate of an arbitrator shall terminate if:

a).....

b) He withdraws from his office.”

In the instant case the above section is applicable and therefore that mandate ceased at that point.

The court must now ask itself; what was the intention of the parties? The wider interpretation of clause 3 cited above is that, the parties intended to use arbitration as an alternative dispute resolution. Assuming without deciding that the project architect was not available, does it mean that that intention would be defeated? The answer is no, because the intention of the parties shall remain alive.

One can go further and state that the appointed architect should not have taken this mandate knowing very well that he was conflicted. But now that this has come to light, it behoves the parties to execute the intention embodied in the contract and the courts role is only to facilitate that intention.

It is true that the courts should not rewrite contracts between the parties but they have all the rights to direct the parties abide by their intention. In the present case, it is manifestly clear that alternative dispute resolution was intended and should be facilitated.

I am fortified in that assertion by the decisions in the case of **Antony Munene Maina Vs. University of Nairobi & Another** [2015] e KLR page 4 where the court held as follows,

“It is therefore clear that in matters governed by an arbitration clause the court only plays a facilitative role rather than an obstructionist one. The court therefore cannot bypass an arbitration clause under the guise of exercising its supervisory jurisdiction under Article 165 of the Constitution.”

The learned counsel for the defendant has cited a decision of the Supreme Court of India **Huawei**

Technologies Company Limited Vs. Starlite Technologies Limited, Arbitration Case (Civil) No. 27
of 2015 where Lord Ranjan Gogoi J, stated as follows,

“in a situation where the original arbitrator ie Shree Justice S.K. Dubey had recused himself the substitute or new arbitrator is required to be appointed according to the rules that were applicable to the appointment of the original arbitrator.”

It is observed that Section 15 (2) of the Arbitration and Conciliation Act, 1996 is a replica of Section 16 (1) of the Arbitration Act, 1995 Laws of Kenya.

The argument by the plaintiff, that since the parties had specifically confirmed themselves to the project architect as the arbitrator in case of any dispute, is rather restrictive and may defeat the intention of the parties to submit themselves to alternative dispute resolution.

The court respects the intention of the parties, and to overrule the plaintiff is not a violation of that respect. If anything it is to give effect to the intention of the parties.

Accordingly, this application succeeds. The parties shall agree on another arbitrator to resolve the dispute within 30 days of this ruling. In the event no agreement is reached, the court shall give directions through the Chartered Institute of Arbitrators to appoint an arbitrator to preside over the dispute.

The costs shall be in the cause.

Dated and delivered at Nairobi this 25th day of July, 2016.

A.MBOGHOLI MSAGHA

JUDGE