



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 513 OF 2013**

**IN THE MATTER OF THE ARBITRATION ACT NO. 1995 AND THE ARBITRATION RULES**

**AND**

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**KENYA AIRPORTS AUTHORITY.....APPLICANT**

**VERSUS**

**BASELINE ARCHITECTS.....1<sup>ST</sup> RESPONDENT**

**TAMCOM ASSOCIATES.....2<sup>ND</sup> RESPONDENT**

**FERRADON ASSOCIATES.....3<sup>RD</sup> RESPONDENT**

**COSTWISE ASSOCIATES.....4<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Application before the Court is the Applicant's Originating Summons dated **5<sup>th</sup> December 2013** and filed on **6<sup>th</sup> December 2013**. It is expressed to be brought under Sections 17 (6) and (7) of the Arbitration Act 1995 (Act No. 4 of 1995) and Rules 3 (1) of the Arbitration Rules. It sought the following orders:-
  1. *This Honourable Court be pleased to set aside the Arbitral Tribunal's finding on jurisdiction as set out in Paragraphs 54-57 of the preliminary award dated 12<sup>th</sup> March, 2013 and delivered on 16<sup>th</sup> July 2013 on account of the binding decision of the Court of appeal in Davies & Another vs Ministry [1973] E.A 463, which as early as 1973 declared Clause A.7 of the Fourth Schedule to the Architects & Quantity Surveyors Act ultra vires, unlawful and of no effect in law.*
  2. *This Honourable Court be pleased to set aside the Arbitral Tribunal's ruling on jurisdiction dated 13<sup>th</sup> November 2013 in view of the binding decision of the Court of appeal in Davies &*

*Another vs Ministry [1973] E.A 463, which as early as 1973 declared Clause A.7 of the Fourth Schedule to the Architects & Quantity Surveyors Act ultra vires, unlawful and of no effect in law.*

3. *This Honourable Court be pleased to decide on the matter of jurisdiction.*
4. *This Honourable Court be pleased to make further or other Order(s) it may deem necessary in the interests of justice.*
5. *The costs of this application be provided for.*

#### **THE APPLICANT'S CASE**

2. The application is premised on the grounds stated therein and is supported by the Affidavit of VICTOR ARIKA, the Acting Corporation Secretary of the Applicant and sworn on **5<sup>th</sup> December 2013**. The Applicant also filed written submissions dated **28<sup>th</sup> October 2014** on **30<sup>th</sup> October 2014** in support of the application.
3. The Applicant averred that through its award dated **12<sup>th</sup> March, 2013** but delivered on **16<sup>th</sup> July, 2013**, the arbitral tribunal made a finding of jurisdiction under **section 17** of the **Arbitration Act**, wholly based on compulsory arbitration under the statutory provisions of **Clause A.7** of the **Fourth Schedule** to the **Architects & Quantity Surveyors Act**. Subsequent to the delivery of the award, and through diligence, the applicant made discovery of new and important points of law in relation to **Clause A.7** of the **Fourth Schedule** to the **Architect & Quantity Surveyors Act**, which was not within the knowledge of the Tribunal, the Claimants or indeed the Respondent at the time of lodging the jurisdictional challenge. The Court of Appeal in **Davies & Another vs. Ministry [1973] EA 463**, had declared **Clause A.7** of the **Fourth Schedule** to the **Architect & Quantity Surveyors Act** ultra vires, unlawful and of no legal effect in law whatsoever as early as 1973 (*herein the Davies Case*).
4. It was therefore the Applicant's case that it cannot be compelled to arbitrate on the basis of the said clause. It was further its case that In the absence of a finding of a valid and mutually binding arbitration agreement outside **Clause A.7** of the **Fourth Schedule** to the **Architect & Quantity Surveyors Act**, the Tribunal's finding on jurisdiction cannot stand. The Applicant contends that the Architectural Association of Kenya lacked jurisdiction to appoint the tribunal, a matter which goes to the composition of the tribunal under Section 13 of the Arbitration Act.
5. The Applicant further averred that the Arbitral Tribunal had held in its ruling of **13<sup>th</sup> November 2013** that it had no jurisdiction to review its decision on this preliminary question, and disregarded that the review was a power necessarily incidental and/or ancillary to its power to determine its jurisdiction under **Section 17** of the **Arbitration Act**, in circumstances of discovery of new and important material to the issue. In addition, the Arbitral Tribunal further failed to exercise its power under **Section 20 of the Arbitration Act** whereby the tribunal has power at any stage to determine the admissibility, relevance, materiality and weight of any evidence.
6. The fact that the Arbitrator declined to review their ruling on jurisdiction based on the **Davies Case** is what prompted the Applicant to move to the High Court for a review of the said award and consequently the review of the ruling delivered on **16<sup>th</sup> July 2013**.

#### **THE RESPONDENTS' CASE**

7. In opposition to the application, the Respondents filed the Grounds of Opposition dated **16<sup>th</sup> June 2014** as well as written submissions dated **14<sup>th</sup> January 2015** and filed in Court on **15<sup>th</sup> January 2015**.
8. It is the Respondents' case that the decision in **Davies & Another v Mistry (1973) EA 463** is neither binding nor does it reflect the law currently in view of the express provisions of Article 159 (2) (c) of the Constitution, 2010 which actively seeks to promote arbitration as an alternative form of dispute resolution. It is further their case that the said decision is a direct affront to Section 10 of the **Arbitration Act, 1995** which has given arbitral autonomy statutory recognition. It is also their case that the decision is unsustainable in light of section 7 of the Sixth Schedule of the Constitution which is unequivocal that all existing laws must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the

Constitution.

## **ANALYSIS**

9. I have considered the application, the Grounds of Opposition as well as the written submissions by Counsel in support and in opposition to the application. Having done so, I take the following view of the matter.
10. This Court has the jurisdiction to determine the current application subject to Section 17 (6) of the Arbitration Act 1995 which provides thus:-

***“Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.”***

11. The main issue for determination is whether or not the Arbitral tribunal has jurisdiction to adjudicate the claims between the parties herein. The Applicant’s case is that the Arbitral tribunal has no jurisdiction in light of the Davies Case. On the other hand, it is the Respondents’ case that the said Decision is not applicable in light of Article 159 of the Constitution of Kenya, 2010.
12. It is not in dispute that the arbitral tribunal made a finding of jurisdiction under **section 17** of the **Arbitration Act**, wholly based on compulsory arbitration under the statutory provisions of **Clause A.7** of the **Fourth Schedule** to the **Architects & Quantity Surveyors Act**.
13. It is the Applicant’s submission that the Respondents’ only claim to arbitration as a recourse is anchored on Clause A.7 which was invalidated by the binding decision of the Court of Appeal, in the **Davies Case**.
14. On the other hand, it is the Respondents’ submission that the Davies Case is neither binding nor reflective of the current laws in Kenya.
15. What is the jurisprudence on arbitration in Kenya today? The starting point is Article 159 (2) of the Constitution which enjoins this Court to promote alternative forms of dispute resolution and this includes arbitration. There is also the Arbitration Act of 1995 which promotes arbitration. The Civil Procedure Act 2010, also has provisions for arbitration and alternative dispute resolution mechanisms.
16. The general rule therefore is that Courts will be hesitant to intervene in matters where Arbitration has been provided for.
17. In Kenya the Arbitration Act, 1995 does not necessarily oust the jurisdiction of the Courts but it limits the same. *See section 10 of the Arbitration Act 1995*. Therefore an Arbitration agreement that limits or even ousts the jurisdiction of the Courts in determining disputes between the parties is not necessarily null and void. The Davies Case that the Applicant relies on to challenge the jurisdiction of the Arbitral tribunal was decided in 1973 before the development of arbitration laws as envisaged in the Arbitration Act, 1995 and the Constitution of Kenya, 2010. Therefore with respect, the said case might have been good law back then but in light of the current progressive laws with regard to arbitration the same is not binding on the parties. The same is inconsistent with the letter and spirit of the current laws governing arbitration.
18. In light of the above findings, Clause A.7 of the Fourth Schedule to the Architects & Quantity Surveyors Act is a sound and valid arbitration clause. An arbitration clause amounts to an arbitration agreement. In that case there was a valid and binding arbitration agreement between the Applicant and the Respondents anchored on the aforesaid clause. It is through a valid arbitration agreement that the tribunal derives its jurisdiction. Therefore, the arbitral tribunal in this case has the jurisdiction to adjudicate the claims and disputes between the parties.
19. The other challenge on the arbitral jurisdiction as raised by the Applicant is on the appointment of the Arbitrator. The Applicant contends that the appointment of the arbitrator was marred by substantial procedural defects that gave rise to justifiable doubts as to the impartiality and independence of the arbitrator.
20. The grounds for challenging an arbitrator are provided for in Section 13 of the Arbitration Act, 1995. In particular Section 13 (3) of the said Act provides as follows:-

***“An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.”***

However, in light of the above the Applicant has not demonstrated any circumstances that would give rise to justifiable doubts as to the arbitrator’s impartiality and independence. The Applicant has also not demonstrated that the arbitrator is unqualified or that he does not have capacity to conduct the arbitral proceedings. In that regard, I uphold the Tribunal in its preliminary award dated 12<sup>th</sup> March, 2013 and delivered on 16<sup>th</sup> July, 2013 dismissing the challenge to the appointment of the arbitrator.

### **DISPOSITION**

21. In the circumstances foregoing, the upshot of this court’s ruling is that the Arbitral tribunal has jurisdiction to adjudicate on the dispute (s) between the parties and therefore the Applicant’s Originating Summons dated 5<sup>th</sup> December 2013 and filed on 6<sup>th</sup> December 2013 is hereby dismissed. I will however give no order as to costs as the matter involved the interpretation of the Court of Appeal decision in the Davies Case and the Applicant need not be penalised for relying on the same. In addition, the appeal to this Court from the arbitral tribunal on the issue of jurisdiction was a right and the same was on plausible ground based on the Davies Case.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Sifuna holding brief for Munyalo for the Applicant

Mr. Mayende for Respondent

Teresia – Court Clerk