REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 195 OF 2013

IN THE MATTER OF ARTICLE 159 (2) (D) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF ARBITRATION ACT, ACT NO. 4 OF 1995

IN THE MATTER OF SECTION 17 (4, 6, 7 & 8) OF THE ARBITRATION ACT NO. 4 OF 1995

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED……...…APPLICANT

V E R S U S

ARCH KAMAU NJENDU T/A GITUTHO ASSOCIATES ….. RESPONDENTS

JUDGMENT

1. This is an appeal against the Ruling of the sole arbitrator ALI MANDHRY of 20th June 2013. It presented through an Originating Summons the following questions:

a. **Whether there was an existing contract that bound the parties to Arbitration.**

b. **Whether the Arbitrator has jurisdiction to hear the dispute between the parties.**
c. **Whether a party can be forced into arbitration.**

d. **Whether an arbitrator can oust the jurisdiction of a trial court.**

BACKGROUND

2. The Respondent, Architect Kamau Njendu t/a Gitutho Associates raised a fee note of Kshs 924,235 dated 26th March 2001 for architectural work he allegedly did for the Appellant, Consolidated Bank of Kenya Limited, in respect of Appellant's Nyerere Avenue premises.
3. The Appellant's then managing director, E.K. Mathiu responded to that fee note by Letter dated 23rd May 2001 by denying that the Appellant had given the Respondent instructions to do any architectural drawings.
4. By Respondent's letter dated 16th December 2004 to the Appellant, Respondent indicated that it was treating the project as abandoned, since the Appellant had sold its premises, and Respondent proceeded to state that he was presenting his final fee note for settlement by Appellant.

Respondent's fee note dated 16th December 2004 was for kshs 908,570/=

5. That letter was responded to be Appellant by their letter dated 29th April 2005 whereby appellant stated:

> **"We have checked our records and do not seem to have any details or contract documents regarding this item. The bank is therefore unable to honour your fee note."**

6. It was not until 15th February 2007 that Respondent wrote a letter through his advocate alleging that there existed a dispute and Respondent invoked clause A-7 of the Architects & Quantity Surveyors Act, Cap 525, requesting Appellants concurrence on appointment of an arbitrator to preside over the alleged dispute.
7. Appellant through their advocate responded to that letter by theirs dated 12th March 2013, which was addressed to the arbitrator and copied to the Respondent's advocate. This is what the Appellant stated in that letter:

> **" a) That the Bank (Appellant) never entered into any agreement pertaining to the subject matter in this claim with the claimant (Respondent).**
>
> **b) That arbitration is a voluntary process and our client wishes not to involve itself in it. Therefore the bank is withdrawing from this claim.**

8. Respondent proceeded to file a statement of claim dated 24th October 2011 making a claim for judgment against Appellant for Kshs. 924,235/=.
9. The Appellant filed a statement of defence dated 12th April 2012 whereby Appellant denied Appellant's claim and stated there was no written contract between the parties and then pleaded:

> **"The Respondent admits the contents of paragraph 13 of Part B that an arbitrator has been appointed but the Respondent avers that this dispute does not qualify to fall under the arbitration process and the arbitration Act because the alleged contract was not in writing yet Section 4 of the Arbitration Act requires that dispute falling under the arbitration must be in writing and must contain a clause invoking the arbitration process."**

10. Appellant proceeded to raise a preliminary objection on jurisdiction before the arbitrator. The arbitrator ruled that he had jurisdiction. This appeal stems from that Ruling.

APPELLANT'S ARGUMENT

11. On the provisions of section 4 of the Arbitration Act, Cap 149, Appellant submitted that the arbitrator erred in finding he was possessed of jurisdiction to hear this matter because parties had not committed any agreement in writing capable of raising a dispute capable of being arbitrated upon. That section provides:

> **"4 (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.**
>
> **(2) An arbitration agreement shall be in writing.**
>
> **(3) An arbitration agreement is in writing if it is contained in –**

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

12. Appellant also relied on the provisions of clause A.I(F) in the Fourth schedule of Cap 525 which provided:

> **"The architect shall not initiate or proceed with any stage of his duties without the authority of the client…"**

Quoting the above clause Appellant did not elaborate in its submission the reason for the reliance on that clause. It is noted however that the clause is intended to further Appellant submissions that the respondent, if he undertook the work of drawing architects plans, he did so without authority of Appellant.

13. Appellant also relied on clause A.7 of the Fourth Schedule of cap 525 which provides:

> **"Where any difference or dispute arising out of the conditions of Engagement and Scale of Professional Fees and Charges cannot be determined in accordance with paragraph (a) of Clause A.6, it shall be referred to arbitration by a person to be agreed between the parties or failing agreement within fourteen (14) days either party has given the other a written request to concur in the appointment of an Arbitrator, to a person to be nominated at the request of either party by the president of the East African Institute of Architects."**

14. The Appellant in regard to the Respondent's claim submitted that there was no 'condition of Engagement,' since there was no written contract and no authority of the Appellant to do the drawings.
15. It is because of the above submission that the Appellant argued that the arbitrator misdirected himself when he held he had jurisdiction. That this matter rightly ought to have been filed in court of law and not before an arbitrator.

RESPONDENTS ARGUMENTS

16. Respondent relied on a replying affidavit of Kamau Njendu sworn on 4th February 2015. By that affidavit Respondent deponed that in March 2001 the Appellant, through its then managing director commissioned the Respondent to design and reconstruct the Appellants premises at Nyerere Avenue Mombasa, on plot No. LR 398/XX/MI into a Bank premises. After finalizing those drawings Respondent deponed that it forwarded them to Appellant.
17. The Appellant failed to settle the amount due as his fee note and later is 2004 Respondent discovered Appellant had sold the premises, it was then that Respondent invoked clause A–6 of Cap 525 seeking consent of Appellant to the appointment of arbitrator.
18. That since Appellant failed to consent to such appointment an arbitrator was appointed by the Chairman of Architectural Association of Kenya. This was in accordance with clause A–7 of Cap 525.
19. Respondent submitted there was a conflict between section 4 of Cap 49 and clause A-7 of Cap 525. It was however submitted by Respondent that the Architect, and Quantity Surveyor's Act, Cap 525 is the Act that deals with architects and their clients and it is the Act they go to when they have a dispute. That therefore the dispute herein was governed by Cap 525 and according to Cap 525 there need not be a written agreement to qualify a dispute for arbitration.
20. Respondent also submitted that by virtue of section 5 of cap 49 the Appellant waived its right to object to the arbitration for having participated in the proceedings before the arbitrator.
21. Although Respondent sought to submit on correspondence attached to the written submission, that

is rejected. A party cannot produce documents during submission because that is not only prejudicial to opposite party who would be unable to respond but it is also tantamount to adducing evidence from the bar. Those correspondence will therefore not be considered in this judgment.

COURT'S ANALYISIS

22. I will deal with the first two questions posed by the Appellant in its originating Summons together. To recap, the two questions were:

a. **Whether there was an existing contract that bound the parties to arbitration.**
b. **Whether the arbitrator has jurisdiction to hear the dispute between the parties.**

23. In my view the answer to question (a) above is strictly within special knowledge of the Respondent. It is the Respondent who has, by correspondence, insisted that he was engage to do architectural drawings. In accordance with the provisions of section 112 of the Evidence Act, Cap 80 the Respondent had a burden to prove there existed a contract between him and the Appellant. Section 112 provides:

> **"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disposing that fact is upon him"**

24. Appellant as far as the correspondence before court shows, has consistently disputed any agreement with Respondent authorizing the Respondent to undertake architectural work. An example is to found in Appellant's letter dated 23rd May 2001 which in part Appellant stated:

> **"As far we know, there was no time we gave any firm instructions to you to do any drawings for the alteration of our Nyerere Avenue premises. The initial verbal instructions given by the undersigned were your suggestions and rough sketches to indicate how that could have been altered to facilitate conversion to a branch of a bank.**
>
> **According to the initial sketches you submitted to us, we immediately advised you that they were not acceptable for a branch of a bank according to Central Bank requirement. We suggested we would meet to discuss the matter further, either with the undersigned or any of the Bank officers on their visit to Mombasa.**
>
> **At no time we quantify the amount of money we intended to spend in altering that particular premises to a branch of a bank. Consequently, we are not able to relate your alleged fee note of Kshs. 924,235/= as there were no bills of quantities obtained as the initial sketches were not acceptable to us. We believe as much as you may want to raise money, it is rather unethical to cost a sketch which had not been approved by the client or even discussed."**

25. The Appellant having denied existence of an agreement the burden to prove it existed lay upon the Respondent.
26. But I pose a rhetorical question, was there necessity for there to be a written contract for arbitration process to 'kick in'?
27. I begin by responding to that question by stating that in my view there is no conflict between the provisions of the Arbitration Act, Cap 49 and the Architect & Quantity Surveyors Act, Cap 525.
28. In my view cap 525 comes into operation when there is an Engagement between the parties but a dispute arises on the architect's charges. When that occurs that dispute is referred to arbitration. I repeat, for that clause A-7 of Cap of Cap 525 to be of invoked there must be Engagement between the parties.
29. In my view also clause A–7 only permits arbitration on the dispute of fees and nothing more.
30. On the other hand when there is no Engagement between the parties, section 4 of Cap 49 must be complied with. That is the agreement which provides for arbitration must be in writing.

31. It is as result of the above holding that I respectfully disagree with the arbitrators Ruling.
32. The arbitrator found he had jurisdiction on various grounds. He was of the view that the agreement need not be in writing for one to refer the matter to arbitration. In part in his Ruling the arbitrator said:

> **"That Cap 525 supersedes the Arbitration Act as far as disputes and appointments of Arbitrators are concerned and therefore Respondent is barred from withdrawing. In the alternative, claimant submits by virtue of Section 5 of the Arbitration Act 1995 (waiver of right to object) The Respondent is barred from withdrawing or raising an objection as he has proceeded with the arbitration process and failed to raise objection without undue delay."**
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> **That further by virtue of S17 (2) and 17 (4) a plea that the tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. That the Respondent should have raised the plea or objections before filing defence. The delay in raising objection is not justified as the same has not been explained in spite of the fact that they were all along aware of the issues.**
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> **In respect to the Respondent's submission submits S A 7 (sic) under which the arbitrator was appointed S4 of the act would not apply. The issue of limitation was not brought out in the initial notice and should be disregarded and in any event it goes to the root of the matter and can be dealt with the hearing."**

33. From the above I find the arbitrator greatly erred. Cap 525 does not state that it supersedes cap 49. That statement is a travesty of the provisions of both Acts of parliament. Cap 525 and cap 49 operate in different circumstances as stated above.
34. Arbitrator rejected Appellant's submissions on jurisdiction on the ground that Appellant had failed to raise objection to jurisdiction before filing its defence before the arbitrator. The arbitrator permitted the Appellant to raise objection to jurisdiction. Having done so and having Ruled on that objection it is then deemed that he permitted late plea of no jurisdiction as provided under section 17 (4) of Cap 49. That section provides:

> **"(4) The arbitral may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified."**

35. Having allowed Appellant to raise a late objection to jurisdiction Appellant cannot be said to have waived its right to object as provided in section 5 of cap 49. That waiver could only be arise if arbitrator refused a party to raise late objection.
36. I have stated before that if an arbitrator has jurisdiction under clause A-7 of cap 525, that jurisdiction is limited to the dispute on fees. The arbiter therefore erred to hold that he would determine whether there was an agreement between the parties at the main hearing. Clause A–7 Limited arbitrator's consideration to the dispute of fees, that was his Limitation, to have attempted to go further than that Limit was to act without jurisdiction. A case in point is **ASSOCIATED ENGINEERING C .Vs. GOVT OF ANDHIRA PRADESH and ANR [1992] AIR 232** a case decided by the Supreme Court of India viz:

> **"The Arbitrator cannot act arbitrarily, irrationally, capriciouslu or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given under the contract, if he has travelled outside the bounds of the contract, he has acted without jurisdiction."**
>
> Another citation relevant to this point is the extract of the book "Commercial Arbitration" by Mustill and Boyd cited in the case **Kenya Tea Development Agency Ltd & 7 Others vs Savings tea Brokers limited [2015]eKLR**
>
> Viz:

"General words such as these confer the widest possible jurisdiction. They must, however, be construed by reference to the subject matter of the contract in which they are included. Thus, the inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between parties concerning, say, personal injuries caused by one to the other, or over allegations of libel." (see pages 118-119)

37. The following cases show the importance of a court or tribunal ensuring that it has jurisdiction to entertain the dispute before it. The other cases were cited in the case.

Law Society of Kenya v Centre for Human Rights and Democaracy & 13 others [2013] KLR viz:

"This was further expounded by Ojwang J (as he then was) in Boniface waweru v Mary Njeri & Another H.C Misc Application No. 639 of 2005 (Unreported)

"Jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question."

No less illuminating in this regard is the contribution of Justice Akpata in State v Ollagoruwa [1992] C.S.C.D. 17 at 19 who in his words said:

"…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…"

38. Did the arbitrator have jurisdiction to entertain the parties matter. My answer is in the negative. That find flows from the above discussion that there was no agreement or contract between the parties and which evidenced Engagement. Accordingly clause A–7 could not be invoked. That being so that arbitrator could only have jurisdiction if section 4 of Cap 49 was fulfilled that is the arbitration clause had to be in writing.
39. It follows that the answer to the two questions, (a) and (b) reproduced above are in the negative too. That is there was existing no contract between the parties evidencing either engagement or arbitration clause. Accordingly the arbitrator had no jurisdiction.
40. The remaining two question will be answered without much discussion. That is a party cannot be forced into an arbitration where there is no legal basis for such arbitration. Further, unless the arbitration clause permits or the Law permits an arbitrator cannot oust the court's jurisdiction.
41. It follows that appeal against the arbitrator's finding that he has jurisdiction succeeds.
42. In the end I grant the following orders:

a. **The Ruling of Arbitrator Ali Mandry delivered on 20th June 2013 is hereby set aside and is substituted with an order that the Arbitrator Ali Mandry or any other Arbitrator has/have no jurisdiction over the matter of the Respondent's claim of fees from the Appellant.**
b. **The Appellant is awarded costs of this appeal.**

DATED and DELIVERED at MOMBASA this 25TH day of JUNE, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Appellant:

For Respondent:

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE