



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 393 OF 2013
[FAST TRACK]

MARTIN OTIENO OKWACH & CHARLES ONG'ONDO WERE

T/A VICTORIA CLEANING SERVICES.....PLAINTIFF

VERSUS

KENYA POST OFFICE SAVINGS BANK.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 13th September 2013 was brought under the provisions of Article 165 of the Constitution of Kenya, 2010, Section 7 of the Arbitration Act, Sections 1A, 1B, 3A and 63 (c) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rule (sic) and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought the following orders :-
 1. **Spent**
 2. **Spent.**
 3. **Spent.**
 4. **THAT this Honourable Court do direct, order or compel the Defendant to submit to Arbitration in compliance with the terms of the arbitration clause in the Service Contract Agreement executed by the Plaintiff and the Defendant dated 19/3/2013.**
 5. **THAT this Honourable Court be pleased to make such other or further orders as it deems fit and just to grant.**
 6. **THAT costs if this Application be borne by the Defendant.**
2. Before the court could determine the present application, on 26th November 2013, the Defendant filed a Notice of Preliminary Objection, Chamber Summons application and a Statement of

Defence all dated 14th November 2013. The Chamber Summons application had sought to have the proceedings herein stayed and the dispute referred to an Arbitrator. This application has not been heard and determined to date.

3. In the said Notice of Preliminary Objection, the Defendant had contended that the court did not have jurisdiction to hear this matter as the same was the preserve of the Public Procurement Administrative Review Board under Section 93 of the Public Procurement and Disposals Act.
4. In its ruling dated 19th March 2014, the court declined to uphold the Defendant's Notice of Preliminary Objection as it found that once the contract between the Plaintiff and the Defendant was executed, the jurisdiction of the Public Procurement Review Board was ousted and that the court became properly seized of this matter.

THE PLAINTIFF'S CASE

5. The Plaintiff and the Defendant entered into a Service Contract Agreement dated 19th March 2013 (hereinafter referred to as "the Agreement") in which the Plaintiff was to provide cleaning, messengerial and other related services at the Defendant's premises for a period of two (2) years. The Defendant introduced an Addendum to the said Agreement purporting to reduce the duration of the contract to one (1) year which the Plaintiff rejected. As a result thereof, a dispute arose.
6. Instead of the Defendant initiating the arbitral process, it persisted in the commission of inviting tenders/bids for the provision of the aforesaid services which was an attempt to unlawfully terminate the said Agreement and unless, the Defendant was restrained by the court, it would proceed to terminate the said Agreement which would cause the Plaintiff to suffer severe loss and damage including foreseeable claims from labour disputes as it would be forced to prematurely terminate several employment contracts with its workers.
7. The Plaintiff subsequently abandoned Prayer Nos (1), (2) and (3) of its application as the duration of the aforesaid Agreement was to come to an end on 31st August 2014 and fresh tenders had already been awarded to another third party.
8. Its prayers were therefore restricted to this court ordering, directing or compelling the Defendant to submit itself to arbitration in accordance with the terms of the aforesaid Agreement.
9. Its application was supported by the Affidavit of Charles Ong'ondo Were while its written submissions were dated and filed on 21st July 2014.

THE DEFENDANT'S CASE

10. Its case was that it was a clear term and intention of the parties that duration of the said Agreement for a period of one (1) year as was evidenced by several correspondence that had been exchanged between the parties. It noticed the anomaly of the two (2) year period on 13th May 2013 but when it forwarded an Addendum to the Plaintiff to execute on 19th March 2013, the Plaintiff declined to execute the same on the ground that since the contract had been executed, no amendment could be allowed.
11. On 30th September 2013, Jude Chesire swore a Replying Affidavit on its behalf. The same was filed on 9th October 2013. Its written submissions were dated 30th May 2014 and filed on 4th June 2014.

LEGAL ANALYSIS

12. A perusal of the prayers in the Plaintiff's Plaint dated and filed on 10th September 2013 shows that the Plaintiff cause of action was one that was hinged on Section 7 of the Arbitration Act, which were for the court to grant interim measures of protection or injunction pending the hearing and determination of the dispute by the Arbitration Tribunal. It was set out as follows:-
 - a. **Pending referral of the dispute to arbitration for final determination a permanent injunction do issue restraining the Defendant from terminating the Plaintiff's contract and or (sic) inviting tenders or bids for said services.**
 - b. ...

c. **Such interim measures of protection as appropriate in the circumstances...**

13. Evidently, as was conceded by the Plaintiff, the need for any interim measures of protection or injunction was overtaken by events once the Defendant awarded the contract to a third party. The Defendant's written submissions largely focused on this ground which was of no relevance in the determination of this application. The court will therefore disregard the same as what was now of concern to the court was whether or not the court had jurisdiction to grant Prayers (4), (5) and (6) of the Plaintiff's application.

14. In Clause J of the said Agreement, it was provided as follows:-

“In the event of any dispute arising between the parties as to the interpretation of any part of this agreement such dispute shall be referred to an arbitrator to be appointed by both parties and should the parties fail to agree on one arbitrator the dispute shall be referred to any one arbitrator appointed by the chairman for the time being of the Law Society of Kenya and it is hereby agreed that the decision of such arbitrator shall be final and binding on both parties.”

15. It is clear from the aforesaid Clause that there existed a valid and binding Arbitration Clause in the Agreement within the meaning of Section 4 (1) and (2) of the Arbitration Act Cap 49 (Laws of Kenya). The procedure and appointing authority of an arbitrator was clearly set out in the said Agreement rendering the invocation of Section 12 of the Arbitration Act inapplicable herein. Either party could refer the dispute to arbitration. The Plaintiff did not require the consent of the Defendant for the referral of the matter to arbitration.

16. This is not to insinuate that the court has no power or jurisdiction to stay proceedings in court and refer a dispute to arbitration where there is an arbitration agreement. Indeed, a defendant can approach the court under Section 6 (1) of the Arbitration Act to have the proceedings in the court stayed and for the referral of the dispute to arbitration.

17. However, the court can only intervene to refer a matter to arbitration under Section 6 of the Arbitration Act if a plaintiff's suit is one that seeks to have the dispute between the parties determined by the court when already there was an arbitration agreement between the parties to the dispute.

18. The referral of the dispute under Section 6(1) of the Arbitration Act is also not automatic. The court can decline to refer the matter to arbitration in the circumstances shown hereinbelow:-

“A court before which proceedings are brought in a matter which is the subject of an arbitration shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of proceedings and refer the parties to Arbitration unless it finds-

- a. **that the arbitration agreement is null and void, inoperative or incapable of being performed;**
or
- b. **that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration...**”

19. Evidently, the dispute as to whether or not the duration of the said Agreement was one (1) or two (2) years was in fact one which could be referred to arbitration for determination. There was nothing that was presented before the court to show that the arbitration agreement was null and void or inoperative and the court would have had no hesitation in referring the dispute for determination by an arbitral tribunal.

20. However, the Plaintiff's suit was not one which sought to have the dispute determined by the court as it was premised under the provisions of Section 7 of the Arbitration Act. It follows that the gap that would have been utilised by this court to refer the dispute to arbitration was sealed and in the circumstances, Section 6(1) of the Arbitration Act would have been inapplicable in the circumstances of the case.

21. The court also noted that the Defendant filed a Statement of Defence in this matter. This very action meant that the court was now fully seized of this matter and it was not correct as the

Plaintiff submitted that the parties herein had ousted the court's jurisdiction by inserting Clause J on the said Agreement.

22. However, both the Plaintiff and the Defendant were in agreement that this matter should be referred to arbitration, which the court could glean from the Plaintiff's present application and the Defendant's aforementioned Chamber Summons application, the only available option to both of them is to make the necessary application under Order 46 Rule 1 of the Civil Procedure Rules, 2010 which provide as follows:-

“1. Where in any suit all the parties interested (emphasis court) who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration they may, at any time before judgment is pronounced apply to the court for an order of reference.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.”

23. Although the Plaintiff had submitted that all the court was being called to do was to make a determination on whether or not there existed a dispute that could be referred to arbitration, this is not the duty of the court where parties have an arbitration clause and needed no such interpretation from the court before they could proceed for arbitration. Such a determination could only have been made if a party had contested the existence of a dispute which was not the case herein.

24. The court has no power to compel the Defendant to submit itself to arbitration on the ground that parties had failed to agree on an arbitrator as the procedure was clearly spelt out in the said Agreement or because Section 6 of the Arbitration Act empowered it to stay proceedings and refer the dispute for determination by the arbitration tribunal. The court must at all times bear in mind the consensual nature of arbitral proceedings, the parties' agreement to arbitrate and the limitations imposed on the court by the Arbitration Act before it can intervene in matters where parties have opted to proceed to arbitration.

25. However, although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having duly filed its Statement of Defence in this matter. The Plaintiff would, however, be minded to look at its pleadings in view of the nature of the reliefs it had sought to enable the court make a determination of the dispute between it and the Defendant herein.

26. Unless, parties consent to have the matter referred to arbitration under Order 46 Rule (1) of the Civil Procedure Rules, 2010, they are firmly stuck in the court system. Indeed, while Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of Section 10 of the Arbitration Act which provides as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

27. Accordingly, having carefully considered the pleadings, affidavit evidence and the written submissions relied upon by the parties, the court finds that the Plaintiff did not persuade it to find that it had powers and jurisdiction to grant the orders that it had sought in its application.

DISPOSAL

28. For the aforesaid reasons, the upshot of this court's finding is that the Plaintiff's Notice of Motion application dated and filed on 13th September 2013 was not merited and in the circumstances, the same is hereby dismissed with costs to the Defendant herein.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 9TH day of DECEMBER, 2014

J. KAMAU

JUDGE