REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HCCC NO. 16 OF 2012

IN THE MATTER OF THE ARBITRATION ACT CAP 49 LAWS OF KENYA BETWEEN

STIRLING CIVIL ENGINEERING LIMITED…… PLAINTIFF

AND

TM-AM CONSTRUCTION GROUP (AFRICA)……...DEFENDANT

RULING

On 13th January, 2012, the Plaintiff filed an Originating Summons dated 12th January, 2012 seeking the determination of various questions relating to Arbitration between TM-AM CONSTRUCTION GROUP and STIRLING INTERNATIONAL CIVIL ENGINEERING LIMITED. That arbitration is before Mr. Festus Litiku Esq. On 23rd January, 2012, the Plaintiff filed a Notice of Motion dated the same day seeking orders, inter alia, staying those arbitral proceedings and/or restraining the Arbitrator from continuing with those proceedings pending the hearing and determination of this suit. The main issue in the Originating Summons is the challenge upon the Arbitrator's competence to conduct the aforesaid arbitration. Before the said motion came up for hearing, the Defendant raised a Preliminary Objection on points of law against the entire Originating Summons as well as that Motion. That Preliminary Objection is dated 8th February, 2012 and was argued before me on 16th March, 2012 and is the subject of this ruling.

In the written Preliminary Objection, the Defendant set out eight (8) grounds. These can be summarized as follows: that the application by the Plaintiff was incompetent and an abuse of the court process as it was in breach of Sections 7(2), 10, 13(4) and 14(2) and (3) of the Arbitration Act 1995, Sections 4, 5 and 10(3), (4), (5) and (6) of the Arbitration (Amendment) Act of 2009, Section 7 of the Civil Procedure Act and Rule 16B (1), (3), (4), (5) and (7) of the Chartered Institute of Arbitrators (Kenya branch) Arbitration Rules of 1998. The parties filed their written submissions which were ably argued by counsels for the respective parties. When it came to arguing the Preliminary Objection, Mr. Ameyo learned Counsel for the Defendant submitted on two broad issues. Firstly, that by virtue of Section 10 of the Arbitration Act, this court has no jurisdiction to entertain the issues raised in the Originating Summons and secondly, that given the decision in HCCC No.886 of 2009, the Originating Summons was Res Judicata.

The Defendant contended that the arbitrator having been appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) such appointment was not subject to appeal to this court under Section 12(5) of the Act, that since the arbitrator was not appointed by the parties he cannot be subject to a challenge under Section 13(2) of the Act, that the Plaintiff's application to challenge the appointment of the arbitrator under Section 14(2) of the Act was time barred as it was being made too late in the day, that

in so far as the Plaintiff was seeking interim measure by way of an injunction under Section 7 of the Act, that remedy was unavailable as Hon. Koome J (as she then was) had determined the issue and further that Section 7(2) of the Act obliged the court to consider the matter already decided by the arbitrator to be final.

It was further contended for the Defendant that Section 10 of the Act restricted the court on instances it can intervene on matters arbitral and in so doing limited the courts power on intrusion to the parties autonomy, that Section 10 of the Act was mandatory in its terms. The Defendant cited the cases of **Copper Lavalin SA/NV –vs- Ken Ren Chemicals and Fertilizer Ltd (1994) 2 All ER 465** and **Epco Builders Ltd –vs- Adam S. Arbitrator & Another CA No. 248 of 2005** (UR) to buttress the position of the limited and restricted jurisdiction the court has on matters arbitral and that there is redress under the Arbitration Act which the Plaintiff should have pursued rather than come to court. It was argued for the Defendant that under Section 17 of the Act, the arbitrator had jurisdiction to rule on his jurisdiction and the Arbitrator had ruled on the issue on 9th November, 2009 a fact which Hon. Koome J had found out in HCCC No. 886 of 2009, that these are the very same issues that were being raised in paragraphs 1, 2, 3, 5, 12, 13 and 14 of the Originating Summons and paragraphs (J), (K) and (L) of the grounds relied on. Accordingly, it was submitted that this court lacked jurisdiction to entertain any application challenging the arbitrator's jurisdiction at this stage.

On Res Judicata under Section 7 of the Civil Procedure Act, it was submitted that that doctrine applied to the present proceedings, that the issues being raised by the present application were the very same ones as those that were settled by Hon. Koome J (as she then was), the Defendant relied on the cases of **Gichuki –vs- Gichuki (1)(82) KLR 285, Timotheo Makenge –vs- Manunga Ngochi CA (Nbi) CA No. 25 of 1978, Kamunga and Others vs. Pioneer General Assurance (1971) EA 263, Willie vs. Muchuki & 2 Others (2004) 2 KLR, Caltex Oil (K) ltd vs. Mohammed Yusuf & Others HCCC No. 1322 of 1993, Bulhan & Another vs. Eastern and Southern Trade and Development Bank (2004) KLR 147, Rajwani vs. Roden (1990) KLR 4, Pop-In (Kenya) Ltd and 3 Others vs. Habib Bank AG Zurich CA No. 80 of 1988 and Kanorero River Farm Ltd and 3 Others vs. National Bank of Kenya Ltd (2002) 2 KLR 207** in support of the proposition, inter alia, that res judicata applies where parties to the suit are the same, that there should be an end to litigation, that res judicata applies not only to points that were raised and decided upon but also to points that could have properly been raised for adjudication in that former suit and that the principle applies to suits as well as to applications. It was further submitted that since the Defendant did not appoint the arbitrator and neither the arbitrator nor the appointing authority was a party to the proceedings before court there was a mis-joinder and finally that the plaintiff's intention was to scuttle the arbitral proceedings and the court should not help the Plaintiff to do so.

Mr. Ameyo, learned Counsel for the Defendant reiterated what was contained in the written submissions, took the court through the letter and spirit of the Arbitration Act which has incorporated the spirit and objectives of the United Nations Commission on International Law and urged the court to uphold those novel principles which were behind the enactment of the said piece of Legislation. Some of those principles include the freedom of the parties to decide on the platform of dispute resolution, the principle of non-interference with the arbitral process once the same has been commenced and the courts limit as to areas and circumstances of interference with arbitral process. Counsel urged the court to uphold the Preliminary Objection.

For the Plaintiff, submissions dated 14th March, 2012 were filed. The Plaintiff contended that the Preliminary objection was misplaced as the Defendant had not responded to the entire originating Summons, that the Plaintiff had a constitutional right to come to court under Article 50 as the tribunal was impartial; that the challenge by the Defendant under Section 12 was misplaced, that the process of the appointment of the arbitrator was faulty, that the Preliminary Objection was being made to shut out the opportunity for scrutiny of the Arbitral process which to the Plaintiff was flawed, that it was intended to curtail the doing of justice contrary to the provisions of the constitution, that the objection under Sections 13 and 14 of the Arbitration Act was misplaced, that since the matters raised in the Originating Summons are substantive and not procedural the objection under Section 10 of the Act was untenable.

On res judicata, the Plaintiff contended that since HCCC No. 886 of 2009 was withdrawn prematurely, no

issue of law and/or fact was determined, that the present suit raises issues arising subsequent to December, 2009 when Koome J, made her decision.

Mr. Mungu, learned Counsel for the Plaintiff cited the case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 696** and submitted that a preliminary Objection is raised on the basis that facts are agreed, that the Defendant had admitted that the Plaintiff had been oppressed in the conduct of the Arbitral proceedings, that the issue of jurisdiction of the Arbitrator cannot be final until a court of law has ruled on it. He cited the case of **Calibre Ventures LLC –vs- Texas Houston Inc & Others 2011 EWHC 1624 (comm.) (UR),** that the Arbitrator had re-opened the issue of his appointment and jurisdiction and therefore that the same was still alive and was properly raised in the Originating Summons and that the issues in the present suit were not before Koome J. Counsel urged the court to dismiss the Preliminary Objection.

I have considered the Originating Summons, the Notice of Motion dated 23rd January, 2012, the written submissions, oral hi-lights of counsel and the authorities relied on. I am grateful to Counsel for their elucidative and well researched submissions, that I have not rehearsed in this ruling the authorities referred to is not out of disrespect. I have considered the same in detail before writing this ruling.

From the outset, I fully agree with the submissions of Mr. Ameyo, Counsel for the Defendant on the spirit and letter of the Arbitration Act Chapter 49 Laws of Kenya (1995), I agree that for international enterprises to enter into any meaningful commercial transactions, they had to be assured as to the legal process prevailing in commercial transactions in this country. The uniformity of the arbitral process that is not easily impugned by the courts had to be assured. The spirit of Arbitration worldwide is that the parties to such commercial transactions are given the freedom to decide how their disputes are to be resolved, who and how the arbitrator is to be appointed, the limited power and/or jurisdiction that courts have in matters arbitral and the need for Arbitral proceedings to continue uninterrupted once they have commenced. This was imported and embedded in the enactment of the Arbitration Act, Chapter 49 of the Laws of Kenya.

Having so stated, before me is the Defendant's preliminary objection dated 8th February, 2011 to these proceedings.

In the **Mukisa Biscuit Manufacturing Co. Ltd case (Supra),** Sir Charles Newbold President of the Eastern Court of Appeal stated at page 701:-

"***The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion. Confuse the issues. This improper practice should stop."***

The Plaintiff's Originating Summons and the notice of motion were served upon the Defendant. The said Summons and Motion were supported by the Affidavits of Dr. Eng. Maurice De Souza on 12th and 23rd January, 2012 respectively wherein various facts were sworn to. In response thereto, the Defendant opted to file Grounds of Opposition dated 8th February, 2012 and a Preliminary Objection dated the same day. On the authority of **Mukisa Biscuits case** which I have referred to above, the Defendant is deemed to admit the facts sworn to by the Plaintiff in the said Affidavits to be true. This is so because no Replying Affidavit was filed to controvert or deny the averments of the Plaintiff. By taking the P.O he has inferred his omission that the facts are true. The matters therefore admitted by the Defendant on the basis of which it raised the Preliminary Objection dated 8th February, 2012 that this court has to rule on are, inter alia, that:-

a) the Plaintiff herein have never willingly submitted to the Arbitral proceedings;

b) the Plaintiff was not a party to the appointment of the arbitrator;

c) the Plaintiff was not a party to an arbitration agreement with the Defendant;

d) the Plaintiff was irregularly substituted as a party to the arbitral proceedings by the Arbitrator in the place of a party against whom arbitral proceedings had been ordered by the Chairman of the Chartered Institute of Arbitrators of Kenya.

e) the arbitrator's conduct and suitability had been challenged and he had declined to rule on the challenge or had wrongly made an award on such a challenge in December, 2011.

f) that the appointment of the Arbitrator did not comply with Rule one (1) of the Chartered Institute of Arbitrators Arbitration rules and thereby rendering the entire process of arbitration null and void.

These and many others are matters that have been sworn to by Dr. Eng. Maurice De Souza in the said Affidavits and were not controverted. In view of the foregoing, what is the position of the Preliminary Objection as regards the issues raised therein?

I have carefully perused the Laws of Kenya published by the National Council for Law Reporting and was not able to see the so called The **Arbitration (Amendment) Act 2009**. If it does exist, those amendments must have been incorporated in the **Arbitration Act, Chapter 49 Edition 2010 (1995)** which I believe is the statute applicable at the moment on matters touching on Arbitration in this country. Accordingly, to the extent that grounds 6 and 8 of the Notice of Preliminary Objection make reference to that piece of legislation that was not even produced to court by Mr. Ameyo, the same is rejected and dismissed. I will refer to and consider the issues raised and provisions touching on the Arbitration Act, Chapter 49 Laws of Kenya (1995) as amended.

Does this court have jurisdiction to entertain this matter in light of Sections 7 (2), 10, 13(4) and 14(2) of the Arbitration Act?

Section 7 (2) of the Arbitration Act enjoins the Court to consider the matters on which an Arbitral tribunal has made a ruling on as being conclusive for purposes of any proceedings before it. Accordingly, in so far as the arbitrator has made any findings on any of the matters in the application before court, the same are conclusive and are not open to challenge in the application for injunction.

Section 7(2) when read together with Section 10 of the Act indeed deny the court jurisdiction to deal with matters arbitral. Section 10 provides:-

"Except as provided in this Act, no court shall interfere in matters governed by this Act."

My reading of this Section leads me to believe and hold that where an arbitrator has conclusively made a finding on a matter that is before him, it is not open to this court to re-open it unless as permitted by the Act. That was the finding by Koome J, in her ruling of 1st October, 2010.

As regards Section 13(4) and 14(2), I agree with Mr. Ameyo that in so far as the suit seeks to challenge the appointment of the arbitrator, the suit is misconceived in that Section 13(4) allows a party to challenge an arbitrator he has appointed or in whose appointment he has participated. Further, such challenge MUST be made within 15 days after such party has become aware of the composition of the tribunal. However, this only extends to the first part of Section 14(2) which provides

"2. Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal……."

In the case before me, the Plaintiff did not participate in the appointment of Mr. Litiku Esq. and neither did it make an application to challenge him within 15 days of knowing of his appointment. After becoming aware of the appointment of Mr. Litiku,Esq as arbitrator, the Plaintiff delved into frolics of its

own which the Arbitration Act does not recognize and was consequently caught up with the limitation set out in the first part of Section 14(2) of the Act. In my view therefore, those questions in the Originating Summons which deal with the issue of the appointment of the arbitrator will not fall for consideration as they are time barred.

It was the Defendant's further contention that the appointment of the arbitrator could not be a subject of appeal under Section 12(5) of the Act since such appointment had been effected by the chairman of the Chartered Institute of Arbitrators Kenya Branch. I do not agree with Mr. Ameyo on this ground. It does not matter by whatever means an Arbitrator is appointed. Once an appointment has been made by whoever is the appointing authority, the party who has not participated in the appointment is entitled to challenge such appointment under Section 14(2). However, such a challenge MUST be made within 15 days of a party being notified of such appointment. Mr. Ameyo was however right on the point that an appeal under Section 12(5) did not lie in that, the arbitrator was not appointed by the Defendant under Section 12 (3) of the Act. In any event, even if the Defendant had appointed Mr. Litiku Esq. as arbitrator, the Plaintiff had a period of fourteen (14) days upon being notified of such appointment to apply for his removal. This the Plaintiff did not do.

Mr. Mungu submitted that since most of the questions raised in the Originating Summons went to the issue of jurisdiction, the ruling of the Arbitrator as to his jurisdiction does not bind the parties. He cited the cases of **Ex-Calibe Ventures LLC –vs- Texas Houston INC & Others** and text on the **The Law and Practice of Commercial Arbitration in England 2nd Edition Butterworths 1989 at page 108** in support of that proposition that it is the courts who are the final determinants of issues of whether an Arbitral tribunal has or has no jurisdiction and that such an issue may be determined whenever it is raised with and/or brought to court.

I do agree with the said proposition which were however made on the basis that the issue of jurisdiction will be re-opened and considered by the court in accordance with the law. Indeed, the holding by Gloster J in the **Excalibur Ventures case** was made with Sections 67 and 72 of the English Arbitration Act of 1996 in mind. Sections 67 of the English Arbitration Act allowed a party to apply to an English court within a specified period on an issue of jurisdiction of an arbitral tribunal whilst Section 72 provided for the court to determine whether there is an arbitration agreement binding on the parties. The applicable provision in Kenya is Section 17 of the Arbitration Act which allows the Arbitral tribunal to rule on whether there is in existence an arbitration agreement as well as on matters of jurisdiction. Once the tribunal has made a ruling, the aggrieved party has 30 days within which to appeal to the High Court whose decision thereon is final. Accordingly, the holding in the **Ex – Calibe Ventures Case** is not applicable to the case before me.

In view of the foregoing, I agree with the Mr. Ameyo for the Defendant that any matters touching on the appointment of Mr. Litiku Esq. as well as matters which the arbitrator ruled on in his ruling of 9th November, 2009 cannot be re-opened. They are time barred. The foregoing in my view covers question Nos. 1, 2 and 3 of the Originating Summons which I hereby strike out.

At pages 6 and 7 of his submissions on Section 17 of the Arbitration Act, Mr. Ameyo submitted that Question Nos. 1, 2, 3, 5, 12, 13 and 14 and paragraphs (J) (K) and (L) of the Originating Summons were jurisdictional in nature and that therefore this court has no jurisdiction to consider them. That they are a preserve of the Arbitral Tribunal. I have dealt with question Nos. 1, 2 and 3 of the Originating Summons which I have already struck out for reasons given. Question No. 7 in the Originating Summons does not lie for consideration as the qualifications of Mr. Litiku Esq. were never a subject of any agreement between the Plaintiff and the Defendant. I also strike it out.

As regards Question Nos. 5, 12, 13 and 14 of the Originating Summons, I entertain doubt. In my view, the said questions emanate from and/or buttress Question Nos. 4, 6, 8, 9, 10 and 11 of the Originating Summons. They relate to the Plaintiff's challenge on the arbitrator dated 18th November, 2011 and the award or decision of the arbitrator thereto. That challenge and the decision thereto are exhibited as "MDS6" and "MDS7", respectively. I have perused the said exhibits and my take is as follows:-

Section 13(3) of the Arbitration Act provides:-

"(3)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."

This Section therefore sets out the grounds for which an arbitrator may be challenged. In my view, issue Nos. 4, 5, 6, 8, 9, 10, 11, 12, 13 and 14 of the Originating Summons as well as the Supporting Affidavit have captured that particular provision of the law.

The procedure for such challenge is set out under Section 14(2) of the Act. The jurisdiction of the High Court is then donated by Section 14(3) of the Act. That jurisdiction attaches if the challenging party applies to the High Court within 30 days of being notified of the decision of the challenge. The subject matter of these proceedings are, inter alia, the challenge by the Plaintiff made on the arbitrator on 18th November, 2011 and the arbitrator's decision thereon dated 13th December, 2011. Clearly, if these proceedings were commenced within 30 days in terms of Section 14(3) of the Act, this court has jurisdiction to entertain the appeal against the decision of the arbitrator on his challenge.

The Defendant submitted in its submissions that the proceedings were time barred under Section 14 (2) of the Act. There is no evidence on record to show that the Plaintiff became aware of all grounds set out in the challenge dated 18th November, 2011 earlier than 3rd November, 2011. This is because the limit set out in Section 14(2) is that the challenge should be made within 15 days of a party becoming aware of the grounds set out in Section13(3) of the Act. The Defendant having not sworn any Affidavit to make any such allegation or produce any evidence to that effect, this court cannot speculate on the same. Accordingly, I am of the view and I so hold that this court has jurisdiction to entertain the appeal against the decision of Mr. Litiku Esq. on the challenge of 18th November, 2011.

As regards res – judicata, I am in agreement with the principles enunciated in the various authorities cited and relied on by the Defendant. However, they are not applicable in the circumstances of this case because, the challenge to the arbitrator came way after the ruling of Koome J. The issue of the challenge and the decision thereon could not have been raised in the proceedings before Koome J. In my view, therefore, Explanation 4 to Section 7 of the Civil Procedure Act on which the case of **Pop-In (Kenya) Ltd –vs- Habib Bank AG Zurich (supra)** was decided would not apply to these proceedings.

The Defendant did raise the issue of non-joinder of the appointing authority and the arbitrator Mr. Litiku Esq. A reading of Section 14(4) of the Act would show that the arbitrator is a mandatory party. However, his non-joinder in my view is not fatal to these proceedings as the Arbitrator can be joined at any time and be heard before the court can determine the issue of his challenge in terms of Section 14(4) aforesaid.

For the foregoing reasons and save as it relates Question Nos. 1, 2, 3 and 7 of the Originating Summons, the Defendant's Preliminary Objection dated 8th February, 2012 is hereby dismissed with costs .

Minded that arbitral proceedings are not supposed to be delayed by the technicalities that attendant in Civil Litigation, I direct that the Plaintiff does serve all its pleadings upon Mr. Festus Litiku Esq. within seven days of the date of this ruling for his participation in these proceedings. The parties are also directed to take a hearing date for the motion dated 23rd January, 2012 for hearing within 21 days of the date of this ruling.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 20th day of April, 2012.

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A. MABEYA

JUDGE