



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 591 of 2009

DONWOODS COMPANY LIMITEDPLAINTIFF

VERSUS

SAMURA ENGINEERING LIMITEDDEFENDANT

RULING

1. On or about 11th November 2002, the plaintiff and the defendant entered into a contract for the installation of a PABX MACHINE and related equipment to the then proposed Kenya Pipeline Company headquarters at Nairobi terminal for a sum of Ksh.14,235,815/- . Under clause 35 of the contract any dispute or disagreement arising during the period of the contract, the dispute would be referred for arbitration by a person to be agreed between the parties or failing agreement within 14 days an arbitrator may be appointed by the request of either party by the chairman of the Architectural Association of Kenya.
2. A dispute arose regarding this contract and the necessary machinery was put in place when on 10th July 2006 the defendant wrote to the plaintiff giving the 14 days notice within which to concur on the appointment of an arbitrator to resolve the issue in dispute. On 6th August 2008, the defendant informed the plaintiff that they were proceeding to request the chairman of the Institute of Arbitrators of Kenya to appoint an arbitrator and indeed on 15th August 2008 the defendant wrote to the chairman of the Institute requesting them to appoint an arbitrator.
3. On the 24th September 2008 Honorable H.G. Nyakundi was appointed a sole arbitrator. On 30th September 2008 the arbitrator accepted the appointment and proposed an initial meeting in his office on 16th October 2008, on that day both parties met with the arbitrator in his office and agreed on the terms and the schedule of work in writing. Both parties signed and the arbitrator gave directions on what the parties were supposed to do. Each party was required to pay a sum of Ksh.50,000/- as fees before the commencement of the pleadings and they both complied.
4. The parties also exchanged documents and filed the agreed bundles of documents which were forwarded to the arbitrator on 7th April 2009. The hearing dates were fixed for 28th and 29th April 2009. On the appointed day of hearing, the applicant challenged the jurisdiction of the sole arbitrator on the grounds that the dispute was not properly before the tribunal because the appointment of an arbitrator was supposed to be done by the Architectural Association of Kenya and not the Institute of Arbitrators. The arbitrator was asked to terminate the proceedings. The objection was opposed by the defendant and in his ruling the arbitrator dismissed the objection

and directed the parties to agree on a hearing date.

5. That is the ruling which triggered the filing of this suit by way of an originating summons seeking for an order that the Honorable arbitrator Mr. Haron G. Nyakundi has no jurisdiction to arbitrate a dispute between the plaintiff and the defendant. Simultaneously with the filing of the originating summons, the applicant filed a chamber summons seeking for stay of proceeding of the arbitration between the parties pending the hearing and determination of the suit.

6. It was further argued by counsel for the applicant that the procedure of the appointment of the arbitrator was flawed from the beginning therefore no authority was conferred upon the arbitrator to act when the contract between the parties clearly provided how the arbitrator should be appointed. Counsel relied on the case of Eldoret Municipal Council v Rural Housing Estate Ltd Civil Suit No. 255 of 2001 (OS) KLR (2002) 1 KLR 589 where Tunya J held

“1. The applicant's application is competently before the court under section 17 of Arbitration Act which is the appropriate provision.

2. Jurisdiction cannot be conferred or waived by consent or the parties.

3. The issue of jurisdiction was fundamental. Once a tribunal lacks jurisdiction, any proceedings held before it must be null and void, therefore the issue of jurisdiction must be determined first before the arbitrator may conduct any proceeding”

7. This application was opposed by the defendant who relied on the replying affidavit by **Mungai Ngaruiya** sworn on 2nd September 2009. It is contended that under clause 35 of the subcontract the dispute is supposed to be referred to the arbitration of such persons as the parties may agree to appoint as an arbitrator. Failure to agree on arbitrator, that is when the chairman of the Architectural Association of Kenya would be asked appoints an arbitrator.

8. The competence integrity and independence of the arbitrator is not challenged. Only the method of appointment is objected to after the parties had submitted themselves to the arbitration proceedings, paid the arbitration fees, exchanged and filed the documents but on the eve of the hearing, the applicant raised the objection. Counsel submitted that there is no prejudice that will be suffered because of under the provisions of section 5 of the Arbitration Act; the applicant waived their right to object.

9. The above is the summary of the rival arguments and the salient issues raised herein. The issue to determine is whether the proceedings before the honorable arbitrator should be stayed. I have glanced through the documents of contract that has the provisions the parties relied upon to refer the matter to arbitration, this is primarily a standard agreement and schedule of conditions of building subcontract as published by the Kenya Association of Building and Civil Engineering contractors dated 11th November 2002. It is provided that in the event of a dispute the parties have the option to agree to appoint an arbitrator and failure to agree either party can request the chairman of the Architectural Association of Kenya to appoint an arbitrator.

10. A dispute was declared by the defendant on the 14th July 2008. Since no agreement was reached the defendant requested the chairman of Chartered Institute of Arbitrators to appoint an arbitrator. Honorable H.G. Nyakundi was

appointed. He accepted the appointment and set out his terms on how he intended to proceed with the arbitration. Both parties submitted themselves to the jurisdiction of the said arbitrator. They paid the requisite arbitration fees, filed their pleadings and exchanged their respective bundles of documents. But on the day of the hearing, a preliminary objection was raised regarding the appointment of an arbitrator which was done by the **Institute of Chartered Arbitrators** instead of the **Architectural Association of Kenya**.

11. Is this a fundamental flaw that goes to the root of the matter and takes away the jurisdiction of the arbitrator? Firstly, the competence, integrity and independence of the arbitrator are not in issue. The applicant has also not stated that the appointment of the arbitrator has caused them prejudice. The arbitrator was appointed on 24th September 2008; the applicant participated up to the hearing date when it raised this objection on the threshold of the hearing. The applicant was in possession of the subcontract which provided that the arbitrator would be appointed by the Architectural Association of Kenya. By waiting and participating in the proceedings for a period of almost 6 months and raising an objection on the day of the hearing, that delay in my humble opinion was tantamount to a waiver of the applicant's rights. Under Section 5 of the Arbitration Act it provides:-

“A party who know by any provision of this act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, shall be deemed to have waived he right to object”.

12. If there was a mistake in the manner in which the arbitrator was appointed the applicant waived their rights when they submitted themselves to the jurisdiction of the arbitrator and agreed to proceed. Moreover it can also be interpreted to mean the parties agreed on the arbitrator as indeed the applicant did not raise any objection to the appointment of the arbitrator until after six months. A parallel can be drawn in this case with a decision by the Court of Appeal of **Uganda** in the case of **Uganda Law Society vs. The Attorney General EALR (2001)** | EA 301 the presumption is

“All things are presumed to have been legitimately done, until the contrary is proved (omina praesumuntur legitime facta probetur in contrarium)

Thus the applicant has not been able to prove that the appointment of Mr. Nyakundi although done by the Chartered Institute has caused them any prejudice.

13. This application which seeks an order for stay of proceedings invokes the exercise of this court discretion on whether to grant the order. Judicial discretion gives the court flexibility to provide definition according to the dictates of justice. This must be done judiciously based on facts and law and in order to promote fair and expeditious disposal of cases. As noted above in this ruling the issue raised does not touch on the competence, integrity or independence of the arbitrator. This court is being asked to stay proceedings merely because the procedure which the applicant acquiesced to and submitted themselves to, is now said to be flawed because the appointment was done by a different institution.

14. I do not see any prejudice that has been suffered by the applicant. On the other hand if the proceedings are stayed there will be inordinate delay in setting the machinery for arbitration, not to mention the cost which will have to be paid for another arbitrator to be appointed. For the aforesaid reasons, I decline to grant the orders sought and dismiss the application with costs to the defendant.

RULING READ AND SIGNED ON 5TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE