REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc. Appli. 742 of 2008

PINNACLE PROJECTS LTD ……..……....……..……..… CLAIMANT

VERSUS

DICKSON MATU ……..…… RESPONDENT

RULING

(1) By an agreement in writing made on the 10th June 2005 ("**the Agreement**") between Pinnacle Projects Ltd. ("**the Respondent**") of the one part and Dickson Matu ("**the Applicant**") of the other part, the Applicant engaged the Respondent to perform the duties and responsibilities of a Project Manager and Financial Services Consultant in a housing development project on Plot L.R. No.3734/618, Lavington, Nairobi owned by the Applicant upon and subject to the terms and conditions set out in the Agreement.

(2) A dispute arose between the parties and in accordance with the terms of the Agreement, Eng. Isaac Gathungu Wanjohi was appointed sole Arbitrator on the 11th January 2008. The Arbitrator published his Final Award ("**the Award**") on the 5th September 2008 and the Award was filed in court on the 7th October 2008 pursuant to the Arbitration Rules, 1997.

(3) On the 9th October 2008, the Applicant (who was the Respondent in the Arbitration) took out a Chamber Summons under section 35(2) (a)(iv) and (b)(ii) of the Arbitration Act, [No.4 of 1995] seeking the following main order –

"1. This Honourable Court be pleased to set aside the arbitral Award dated 5th September 2008 and filed in court on 7th October 2008 to the extent of the award made in favour of the Respondent amounting to Kshs.4,851,097.35 together with interest and costs."

The application is based on several grounds, the principal ones being that the Award is in conflict with public policy and that the Arbitrator went beyond the scope of the provisions and terms of the Agreement. The Applicant also relies on his own affidavit sworn on the 9th October 2008. He says that the fees payable to the Respondent were clearly set out in Clause 1.4 of the Agreement; that the parties met on the 23rd February 2007 in the presence of Mr. Peter Maina Mukoma, Advocate, (who was invited as a mediator) with a view to ironing out any differences that had arisen between them; that various courses of action were agreed upon which Mr. Mukoma reduced into writing in a letter dated the 23rd February 2007 which he, the Applicant, signed.

(4) Paragraph 10 of Mr. Matu's affidavit is in the following terms:-

"10.That at paragraph one title AGREEMENTS the letter stated as follows:-

a) Mugumo Villas and the professionals shall all execute standard agreements formalizing their already existing relationship and containing the fees to be paid to each professional {total fees payable to all professionals exclusive of VAT shall not exceed 11.6% of the contractors fees is Kshs.9,628,000/-} and the agreed monthly installments for the same. To this end and upon execution of this letter by both of you, Mr. David Kuria shall provide a list of all professionals detailing their total fees and the monthly payments that each professional will be

paid. The total fees payable for the entire project shall be Kenya Shillings Eighteen Million (Kshs.18,000,000/- as indicated in the schedule attached hereto and signed by all the parties hereto.

b) Any previous agreement executed between Mr. Matu and any of the professionals will be varied so that the correct contracting party Mugumo Villas Ltd will execute the said deeds of variations."

(5) As Mugumo Villas Ltd. and or Mr. Matu had not executed standard agreements or, as the case may be, deeds of variation of the earlier agreements with the Respondent and the other professionals (as contemplated and expressly provided by the letter dated the 23rd February 2007) by the time the services of the Respondent were terminated on the 20th September 2007, Mr. Matu asserts that the Arbitrator was bound to execute his mandate within the confines of the Agreement.

(6) The Respondent opposes the application on the grounds set out in the affidavit of David Kabubii Kuria, its Managing Director, dated the 14th November 2008. In paragraph 10 of his affidavit, Mr. Kuria confirms the meeting of the 23rd February 2007 "**in which the parties discussed and agreed to amend the parent contract**." He says that Mr. Mukoma filed an affidavit in the Reference and also testified before the Arbitrator and confirmed that all the matters contained in the letter had been agreed by the parties and formed the way forward for the project and that all other professionals had been remunerated on the basis of the said letter of agreement dated the 23rd February 2008. As the arguments now advanced by the Applicant had already been heard and determined by the Arbitrator, the Applicant's complaints were baseless.

(7) At paragraph 3.5A of his Award, the Arbitrator considers whether or not the letter dated the 23rd February 2007 constitutes an agreement between the Applicant and the Respondent. The Arbitrator says in material part –

"**From its submissions and addresses, it was evident that the Claimant regarded the document as important and considered it as an agreement binding the parties. On the other hand, the Respondent hammered its opinion that the document was only a clarification of the parties' roles but not an Agreement that superseded or altered the Agreement of 10th June 2005, in any way.**

During the trial, the Parties agreed to adjourn the hearing pending attendance at the tribunal by Mr. Peter Maina Mukoma as a witness to adduce evidence on the status of this document. Eventually, Mr. Mukoma came and testified that he was the author of the document and that it was signed by both parties as an agreement between them. He further testified that although the contracts between the Respondent and the various professionals were never prepared as anticipated, nonetheless the document and the schedule attached to it, was used as a basis to pay fees and costs to the various professionals and service providers."

The Arbitrator concludes by "**accepting, Mr. Mukoma's evidence, I find and hold that the letter of 23rd February 2007, constitute** (sic) **an agreement between the parties. Further, I find and hold that this agreement wherever it may be in conflict with any earlier agreement, it will be construed to supersede such an earlier agreement**."

(8) I have considered the evidence in conjunction with the Award and the submissions of learned counsel and the authorities they have cited in support of their respective arguments.

Mr. Peter Maina Mukoma's letter dated the 23rd February 2007, addressed to and signed by Mr. David Kuria (of the Respondent) and the Applicant respectively begins by stating that "**the following are the matters that were discussed and agreed upon and I request each of you to strictly adhere to the same and to sign the 3 copies of the letters** (sic) **in agreement to the contents thereof**." [Emphasis added].

In his affidavit sworn on the 11th June 2008 and filed in the Arbitration, Mr. Mukoma states as follows at paragraphs 7 and 8:

"**7. THAT the purpose of putting the said matters in the letter was so that the record was clear as to what matters had been discussed and what action was to be taken thereafter and by whom.**

8. THAT the letter highlighted 4 main areas that were discussed at the meeting, that is,

A) preparation of deeds of variations to the various agreements to regularise the relationship between Mugumo Villas Limited and the various professionals;[Emphasis added]

B) how money related matters would dealt with;

C) who would deal with the buyers and the marketing of the remaining 3 houses; and

D) Stamp Duty for the transfer of the property to Mugumo Villas Limited."

(9) There is no dispute that the standard agreements and/or the deeds of variation of previous agreements stipulated or contemplated under the head "**Agreements**" in the letter dated the 23rd February 2007 were never executed. From the evidence both of the Applicant and the Advocate who drew the letter and indeed the letter itself, it is clear that the parties did not thereby vary the Agreement dated the 10th June 2005 – rather, as Mr. Mukoma states in his said affidavit, "**I prepared the letter dated 23rd February 2007 highlighting the matters that had been discussed and the agreed way forward for the project**."

(10) Finally, Clause 12.1 of the Agreement provides that unless otherwise expressly provided, "**no modification, amendment, alteration, or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement …….**" [Emphasis added]. There is no evidence before me to show that the parties complied with this provision. The letter dated the 23rd February 2007 does not specifically refer to the Agreement dated the 10th June 2005 nor does it state in what respects the Agreement is modified, amended, altered or waived. Consequently, I find and hold that the letter dated the 23rd February 2007 was beyond the scope of the Reference before the Arbitrator. The application must therefore succeed.

(11) Accordingly, it is ordered that the arbitral Award dated the 5th September 2008 and filed on the 7th October 2008, be and is hereby set aside but to the extent only of the award in favour of the Respondent amounting to the sum of K.sh.4,851,097.35, together with interest and costs, but not otherwise howsoever and in all other respects such arbitral Award be and is hereby confirmed. The Applicant will have his costs of the application.

It is so ordered.

Dated and delivered at Nairobi this Thirtieth day of January 2009.

P. Kihara Kariuki

Judge