REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 204 of 2007

SPENCON KENYA LIMITED……PLAINTIFF

VERSUS

HARMAN MARWA & 2 OTHERS……..……..…RESPONDENTS

R U L I N G

This is an Originating Summons brought under Order XXXIX of Civil Procedure Rules, Section 12(4) (a) and (c), Section 13(3) and (6), Section 14(3), Section 16(1) and Section 7(1) of the Arbitration Act No. 4 of 1995 and Rules 1, 3(1) and 11 of Arbitration Rules of 1997.

It is seeking following orders:

1. THAT the appointment of the Sole Arbitrator be terminated; AND/OR.

2. THAT the Sole Arbitrator be retrained from the hearing and/or further hearing and/or proceeding any further with the said Arbitration and all proceedings in the said Arbitration be stayed except for purposes of implementing this Order.

3. THAT a substitute Arbitrator be appointed in accordance with the procedure that was applicable to the appointment of the Arbitrator being replaced.

4. FURTHER AND IN ALTERNATIVE, a Declaration that the appointment of the Sole Arbitrator was not make in accordance with the Arbitration Agreement between the Applicant and the 1st and 2nd Respondent.

5. THAT the costs of this application be paid to the Applicant.

The application is grounded on the following seven grounds:

1. That the Appointing Authority, The Chartered Institute of Arbitrators, Kenya Branch has failed to perform the function entrusted to it under the procedure agreed upon by the parties to the Arbitration Agreement for the appointment of suitable Arbitrator.

2. That the subsequent appointment of Mr. Sankale Ole Kantai is a defective appointment *ab initio* and is therefore a nullity and Mr. Sankale Ole Kantai, the Sole Arbitrator has no jurisdiction to issue Order for Directions directing the Applicant and STIRLING CIVIL ENGINEERING LIMITED (the

purported Claimant) to appear before him.

3. That the said appointment has been done in haste and surrounded in secrecy and/or shrouded in secrecy.

4. That the Arbitrator Mr. Sankale Ole Kantai has refused to voluntarily step down as the Arbitrator despite valid objections taken by the Applicant in the said appointment.

5. FURTHER AND IN THE ALTERNATIVE, the Arbitrator Mr. Sankale Ole Kantai has persistently failed to deal with the issue of his appointment by failing and/or ignoring to act on preliminary points raised by the Applicant.

6. That no prejudice or hardship will be suffered by the 1st and 2nd Respondent and it will be in the interest of justice that the Honourable Court gives effect to the parties intentions in the appointment of a suitably qualified Arbitrator.

7. The application is brought expeditiously.

The application is also supported by the affidavit of PRAGNESH PATEL dated 16th April 2007. The said affidavit, *inter alia* annexes the Consultancy Agreement entered into between Spencon Kenya Limited, the Applicant herein and Harman Marwa and Peter A Gould, the 1st and 2nd Respondents, on the other side. It also annexes correspondences between the parties dealing with the issues of the appointment of the Arbitrator. The affidavit also accuses the Chartered Institute of Arbitrators, Kenya Branch, of failing to perform the function entrusted to it under the procedure agreed upon by the parties to the Arbitration Agreement. It is also deposed that the appointment of Mr. Sankale ole Kantai, the 3rd Respondent, was defective and a nullity *ab initio*.

The application is opposed. Peter Gould, the 2nd Respondent has sworn an affidavit in reply to the application on his behalf and that of the 1st Respondent. In that affidavit, the deponent gives a chronology of events leading to the appointment of the 3rd Respondent. It is shown quite clearly that the parties attempted to agree on a Sole Arbitrator and when one year later no agreement had been reached, the 1st and 2nd Respondents' advocate wrote to the Chairman of the Kenya Institute of Arbitrators who appointed the 3rd Respondent. That soon thereafter the Applicant objected to the 3rd Respondent's appointment on the ground that the letter reporting the appointment was not copied to the Applicant. It deposes further that any attempts by the Arbitrator to call a meeting between the parties have been thwarted by the Applicant who has declined to attend any of the meetings. The affidavit annexes the Consultancy Agreement as 'PAG1' and various other correspondences between the parties.

The third Respondent an Advocate of the High Court has also sworn a replying affidavit dated 15th May, 2007. In that affidavit, Mr. Ole Kantai gives details of his appointment as Sole Arbitrator in the dispute between the parties by the Chairman of the Chartered Institute of Arbitrators by a letter dated 1st March, 2007. He outlines steps he has taken since appointment and points out that the said appointing authority lacks jurisdiction to revoke his appointment. The deponent denies that his appointment was a nullity and deposes further that issues of his appointment could only be dealt with at a preliminary meeting, which the Applicant has declined to attend despite notice to do so. The deponent states that the court had no jurisdiction to appoint an Arbitrator. The deponent urges the court to find that the application had no merit.

The Applicant in this case was represented by R. Billing, while James Singh represented the 1st and 2nd Respondents and Mr. Laibuta acted for the 3rd Respondent.

I have considered the submissions by Counsel in this matter together with the application, the affidavits filed by all parties and the annexure thereto. Having considered the same, I have come to the following view and conclusion concerning this matter.

There is no dispute that the Applicant on one hand and the 1st and 2nd Respondents on the other, entered into a Consultancy Agreement, a signed copy of which is annexure 'PAG1" in the 2nd Respondent's replying affidavit. It is also not in dispute that the said Agreement had a clause dealing with disputes, which provides that any disputes between the parties shall be referred to a single Arbitrator. The method of appointing an Arbitrator is provided under the clause as follows:

"*Disputes: Any disputes or differences that may arise between the parties herein as to the meaning or construction of this Agreement or anything herein contained or as to the rights or obligations or either of the parties hereunder or otherwise in connection with this Agreement or anything to follow hereon shall be referred for decision to a single Arbitrator to be appointed by agreement within thirty (30) days after the date on which one of the parties hereto first serves on the other a notice giving his name, address and a summary of the qualifications of a suggested arbitrator, to be appointed by the Chairman for the first time being of the Kenya Chapter of the Chartered Institute of Arbitrators and any arbitration proceedings hereunder shall be conducted in Nairobi aforesaid in accordance with and subject to the provisions of the Arbitration Act, 1995."*

The issue before the court is whether the appointment of the single Arbitrator by the Chairman of the Kenya Chartered Institute of Arbitrators was made in accordance with procedure applicable under the Consultancy Agreement between the parties. Secondly, whether this court has jurisdiction to entertain the instant application. The issue of jurisdiction should of necessity be considered first.

Mr. Billing for the Applicant has submitted that the Applicant has approached the court under the powers donated to the court under Section 12(4) (a) and (c). Counsel submitted that the orders sought are governed by Section 16(1) of the Arbitration Act. Counsel submitted that the Appointing Authority breached the appointment procedure as agreed by the parties under the Consultancy Agreement and therefore under the section the court had jurisdiction to entertain the application.

Mr. Billing relies on a text COMMERCIAL ARBITRATION MUSTIL AND BOYD (2001) COMPANION VOLUME TO THE SECOND EDITION) PART III, 18 Failure of Appointment Procedure, where it states:

"*18 Failure of appointment procedure*

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties apply to the court to exercise its powers under this section.

(3) Those powers are -

(a) to give directions as to the making of any necessary appointments;

(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;

(c) to revoke any appointments already made;

(d) to make necessary appointments itself.

(4) An appointment made by the court under this section ahs effect as if made with the agreement of the parties.

A failure of the appointment procedure may come about in a various of ways. It may result from a failure or refusal of a party or an arbitrator to make or concur in an appointment, or from the failure or

refusal of a third party to make an appointment, a s provided by the arbitration agreement, or from the non –existence or dissolution of an agreed appointing body. Where the agreement lays down a time within which an appointment must be made, the appointment procedure cannot be said to have failed before the time has expired, unless the appointer has refused to act. Where there is neither a specified time nor an explicit refusal, it is clear that failure may result simply from the expiry of a reasonable time to make the appointment after the appointer has been called upon to make or to concur in the appointment."

Mr. Laibuta for the 3rd Respondent, the appointed Sole Arbitrator, had a different view of the issue of jurisdiction. Counsel submitted that once a challenge as to the appointment of an arbitrator(s) arises, the challenge must be presented to the Arbitral Tribunal for consideration and determination. Mr. Laibuta relied on the provisions of Section 14(2) of the Act for the preposition that once an Arbitrator has been appointed, he is the only person who can consider any challenge arising out of his appointment. Mr. Laibuta invoked Section 10 of the Act and submitted that the provisions of that section, which is coined in mandatory terms, limited the courts power of intervention in Arbitral proceedings. Counsel submitted that in this case, Section 10 limited the court's power to intervene only after the arbitrator had considered and determine the issue. That it is only after a party was aggrieved by the arbitrator's decision that it could come to court as contemplated by Section 14 of the Act. Counsel submitted that Section 12(4) of the Act applied to situations where one party refuses to get involved in appointment of an arbitrator and no alternative for appointment is provided.

Mr. Singh for the 1st and 2nd Respondents submitted that under Section 14(2) of the Act, only the Arbitral Tribunal could decide the challenge against it by hearing the aggrieved party and making a ruling. Mr. Singh submitted that if the Arbitrator chose not to be terminated then only Section 15 of the Act could remove him. Counsel submitted that clearly the court lacked jurisdiction to entertain the issue.

The text relied upon by Mr. Billing is a commentary of probably the British Arbitration Act of 1996. The Kenyan Arbitration Act, 1995, makes provisions touching on failure of appointment procedure under Section 12(4) of the Act. The two provisions are quite different rendering the commentary of very little value to the issue at hand.

The Applicant has invoked Section 12(4) **(a)** and **(c)** of the Act as what donates to this court the jurisdiction to hear this application. The section provides as follows:

Section 12 (4) Where, under a procedure agreed upon by the parties for the appointment of an arbitrator or arbitrators-

(a) a party fails to act as required under such procedure;

(b) the parties or two arbitrators, fail to reach agreement expected of them under such procedures; or

(c) a third party including an institution, fails to perform any function entrusted to it under such procedure; any party may apply to the High Court to take the necessary measures, unless the agreement otherwise provides, for securing compliance with the procedure agreed upon by the parties."

The first thing to investigate is whether the parties agreed on a procedure for the appointment of an arbitrator. The clause providing the procedure, as set out in the Consultancy Agreement is set out hereinabove. I will however repeat it here for convenience.

"*Disputes: Any disputes or differences that may arise between the parties herein as to the meaning or construction of this Agreement or anything herein contained or as to the rights or obligations or either of the parties hereunder or otherwise in connection with this Agreement or anything to follow hereon shall be referred for decision to a single Arbitrator <u>to be appointed by agreement within thirty (30) days after the date on which one of the parties hereto first serves on the other a notice giving his name, address and a summary of the qualifications of a suggested arbitrator, to be appointed by the Chairman for the first time being of the Kenya Chapter of the Chartered Institute of Arbitrators</u> and any arbitration proceedings*

hereunder shall be conducted in Nairobi aforesaid in accordance with and subject to the provisions of the Arbitration Act, 1995." (Emphases mine)

The parties agree to the interpretation of this provision on Disputes. They all concede that the parties were to agree on the appointment of a single Arbitrator within 30 days after the date on which one of the parties first served a notice on the other, giving names, addresses and a summary of the qualifications of a suggested arbitrator. The Applicants advocate Mr. Billing submitted that the notice letter was the one by the Applicant dated 8th October, 2004. Mr. Laibuta for the 3rd Respondent stated that the notice was the letter to the Applicants dated 15th June, 2004.

I have perused through all the documents annexed by the parties herein. The letter of 15th June 2004 was a demand to the Applicants to pay money for the services rendered by the 1st and 2nd Respondents. The letter which fits the description of a notice to the other party, signifying that a dispute had arisen, is the Applicant's Advocates letter to the 1st and 2nd Respondent's Advocate dated 8th October, 2004. In that letter at page 4, the Applicant states in part as follows:

"*The Dispute clause under the Contract Conditions is hereby invoked considering your client's position on the issues raised by our client. Our client will nominate any one of the following as Sole Arbitrator:*

1. Mr. Norman Mururu, A Quantity Surveyor and Fellow of the Chartered Institute of Arbitrators of P. O. Box Number 51885 00200 NAIROBI;

2. Mr. Brian Barton, A Quantity Surveyor and Fellow of the Chartered Institute of Arbitrators of P. O. Box Number 41643 NAIROBI;

3. Mr. S. S. Jabbal, a Quantity Surveyor and Associate of the Chartered Instituted of Arbitrators of P.O. Box Number 39363 NAIROBI;

4. Mr. A Marjan a Quantity Surveyor and Fellow of the Chartered Institute of Arbitrators.

The letter was dated 8th October 2004, as stated. Thirty days after 8th October ended on 7th November 2004. The parties had therefore between 9th October, 2004 and 7th November, 2004 to agree on a single arbitrator. There is no dispute that no agreement was reached on the appointment of a Sole Arbitrator within the 30 days agreed by the parties. Section 12(4) (a) of the Act is therefore met.

The second option under the agreement was for the Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators to appoint a single Arbitrator. Section 12(4) (c) of the Act provides that a party could come to court for specific purpose under the section only where a third party, including an institution, fails to perform any function entrusted to it under such procedure. Under the Disputes Clause of the parties Agreement, the only function a third party could perform was to appoint a sole Arbitrator. The third party is specified in the Agreement as the Chairman of the Kenyan Chapter of the Chartered Institute of Arbitrators.

The next question to ask oneself is whether the Chairman of the said Institute "*failed to perform any function entrusted to it under such procedure*". The Applicant herein argues that the said Chairman failed in his duty. In the supporting affidavit of Mr. PRAGNESH PATEL, he deposes in various paragraphs as follows:

In paragraph 3, he deposes in part as follows: -

"3.... However, the parties have not agreed on the name of anyone of the Arbitrators, and the 1st and 2nd Respondent unilaterally applied to the Chartered Institute of Arbitrators. I now annex together marked "PP 2" true copies of the correspondence relating to the issue of the appointment of the Arbitrator."

The paragraph suggests that the applicant is complaining of the move by the 1st and 2nd Respondents to

request for the appointment of an Arbitrator without reference to the Applicant.

In paragraph 4 he deposes:

"*4. That the Appointing Authority, The Chartered Institute of Arbitrators, Kenya Branch has failed to perform the function entrusted to it under the procedure agreed upon by the parties to the Arbitration Agreement for the appointment of suitable Arbitrator."*

Here the Applicant's complaint is that the appointing Authority had failed to appoint a "*suitable*" arbitrator under the procedure agreed upon by the parties.

Mr. Billing in his submissions contented that the appointment of the 3rd Respondent as sole arbitrator was defective *ab initio* and was therefore a nullity. Mr. Billing contended that the matter before the court was the procedure adopted to appoint the arbitrator and that therefore the matter fell squarely under Section 12(4) of the Act.

On the issue of jurisdiction it is my view that the court has the power to entertain the matter if the application is based on the ground that a party or a third party or an institution failed to perform the function entrusted to it under such procedure as per agreement of the parties.

Section 12 of the Act deals with the processes of the appointments of arbitrators and makes provision for appointment of arbitrator(s) by the High Court on application of a party where the parties are unable to appoint arbitrator(s) as per their agreement.

Sections 13 and 14 of the Act deal with the grounds for challenging an arbitrator and the procedure of raising the challenge. Section 13 is very clear that a challenge can only arise where circumstances exist which raise justifiable doubts as to the arbitrators impartiality, independence or if he does not possess qualifications agreed upon by the parties. in my considered view Sections 13 and 14 of the Act do not apply tot his matter as the Applicant is not raising the issues of impartiality, independence or qualifications of the Arbitrator. The application challenges the process of the appointment of the arbitrator. That being the case, it is only the High Court which has jurisdiction to determine the issue of the process of appointment of the 3rd Respondent. The 3rd Respondent's jurisdiction is limited to hearing and determining a challenge in regard to its impartiality, independence and qualification. In that regard **Section 10** of the Act, which is a general provision restricting the court from intervening in arbitral proceedings does not oust the courts jurisdiction. The section limits the courts jurisdiction to intervene only subject to the provisions of the Act. As stated this application falls under **Section 12(4**) of the Act, which gives this court jurisdiction to hear the Applicant.

I find and hold that this court has jurisdiction to entertain the instant application.

In regard to the second issue whether the appointment of the single arbitrator was flawed or breached. The Applicant complains that the appointment by the Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators was not made in accordance with the procedure applicable under the Consultancy Agreement. The Applicant's complaint is found in the supporting affidavit of PRAGNESH PATEL. Paragraph 4 as already stated, complains of the procedure adopted in the appointment process. In paragraph 6 of the same affidavit more grounds are given as follows:

"6. That the said appointment has been done in haste and surrounded in secrecy and/or shrouded in secrecy."

I have already set out paragraph 3, 4 and 6 of Patel's supporting affidavit. These paragraphs reveal the nature of the Applicant's complaint regarding the process adopted by the parties concerned. My view is that once a party complained of the appointment process, the entire procedure adopted by the parties in their attempt to choose the arbitrator must be scrutinized.

As stated in this ruling the parties are in agreement that they were unable to agree on a sole arbitrator

within the time set in their Agreement. I noted that after the Applicant's notification that a dispute between the parties had arisen; and after the Applicant suggested possible arbitrators, the parties continued exchanging correspondence and giving names of their nominees for arbitrator long after the 30 day period agreed by the parties had expired. In fact the parties continued corresponding for a period of well over two years. These exchanges were an exercise in futility. The parties acted in breach of their agreement. Each party was bound by the Agreement between the parties as no provision was made for its variation. Having failed to appoint an arbitrator within 30 days and instead having continued in the attempt to appoint one breached their Agreement at the onset. Any further step taken in furtherance of the said Agreement was void. In that regard the 1st and 2nd Respondents' letter to the Chairman of the Chartered Institute of Arbitrators to appoint an Arbitrator because the parties had failed was also void. That letter further compounded the matter because it was written without the input of the Applicants. It defeated the very principle of Arbitration that the parties to the arbitration must be willing and in agreement to participate in the arbitration process. That process begins with consensus of the parties. In the Agreement between the parties in this case, that consensus included the decision to seek a third party, and in this case, the Chairman of the Chartered Institute of Arbitrators, to appoint an arbitrator. The decision by the 1st and 2nd Respondents to unilaterally approach the said Institution to appoint the Arbitrator went against this principle.

I can go even further and say that it is not the possibility that the Arbitrator may be biased that is the issue. It is the process that led to his appointment that was flawed. The 3rd Respondent, with due respect to him, had nothing he could have said that could have assisted with the determination of this application as the concern of the Court was the process adopted prior to his appointment. The entire process was flawed and the Applicant was right to come to court. The appointment of the 3rd Respondent was therefore void.

Having considered this application I am satisfied that the appointment process of the Sole Arbitrator by the parties, and subsequently by the Chairman of the Chartered Institute of Arbitrators, was flawed, that it breached the Agreement of the parties as contained in the Consultancy Agreement and was therefore a nullity.

Having come to the conclusion I have of this matter, I allow the Applicants application in the following terms:

1. That the Sole Arbitrator, the 3rd Respondent, appointed by the Chairman, Chartered Institute of Arbitrators, be and is hereby terminated.

2. The Applicant Spencon Kenya Limited do pay Kshs.20, 000/- to the 3rd Respondent.

3. The Applicant to pay thrown away costs to the 1st and 2nd Respondents.

4. The parties have 30 days from the date herein to agree on a Sole Arbitrator in the manner agreed in the Consultancy Agreement.

5. The parties will come for Mention of this matter on 30th June 2008 for further directions.

Dated at Nairobi, this 30th day of May, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Rajinder Billing for the Applicant

Mr. Ochwo holding brief Mr. James Singh for the 1st and 2nd Respondents

Mr. Ochwo holding brief Mr. Laibuta for the 3rd Respondent.

LESIIT, J.

JUDGE