REPUBLIC OF KENYA

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

Civil Misc 762 of 2003

DEEKAY CONTRACTORS LTD..... PLAINTIFF

- VERSUS -

CONSTRUCTION & CONTRACTING LTD..... DEFENANT

RULING

This application seeks an order that this court do set aside thedecision in the Arbitration Award dated 19th July, 2003 that theapplicant cannot recover liquidated damages from the respondent aspleaded and proved at the trial because the Architect did not issuethe certificate required by clause 22 of the contract to trigger theapplicant's right to liquidated damages, and that therefore the arbitralaward be remitted to the tribunal to be varied accordingly. It isbrought by Chamber Summons under S. 35(2) (a) (iii) and (iv) of theArbitration Act, 1995 and Rules 2 and 7 of the Arbitration Rules,1997, and dated 5th November, 2003 and filed in court on 6thNovember, 2003.The application is based on the grounds that the arbitrator'sdecision was made without giving the applicant the opportunity topresent its case on the point; that the decision was made on an issuewhich was not in controversy between the parties in the pleadings orat the trial, and that the decision offends the rules of natural justicewhich require that each party should have a friar trial, due notice of what case it has to meet and reasonable opportunity of preparing andpresenting its case on the basis of the issues disclosed in thepleadings and no others. It is also supported by the annexed affidavitof Hon. John Matere Keriri, the managing director of the applicantcompany.

The application is opposed. In the grounds of opposition filedby the respondent through its advocate, the respondent contends that the application is misconceived and incompetent and that it wasmade three months after the date on which the applicant received thearbitral award dated 19th July, 2003 and published on 31st July, 2003.Consequently the same should be dismissed and/or struck out withcosts under s. 35(3) of the Arbitration Act, 1995. Without prejudice tothis ground, the respondent further states that the aforesaid chambersummons *are* barred by res judicata since the applicant previously filed an originating notice of motion for appeal under s.39(b) of thesaid Arbitration Act on 14th August, 2003 which was with drawn by theapplicant. Even though the respondent consented to the withdrawalof that originating notice of motion, it did not consent to any leavebeing granted to the applicant to file a fresh application to challengethe award if it so wished to do and objected to such a freshapplication being filed on the ground that the parties could not have,by consent, have conferred jurisdiction on the court which it does notpossess under the statute. If any such leave was granted, then it wasnull and void. It is also the respondent's case that with the originatingNotice of Motion for appeal having been withdrawn, the presentchamber summons cannot consequently have been validly filed in thesame suit which is dead and stands dismissed upon withdrawal.Finally the respondent maintains that the applicant has not

furnishedany evidence that it was unable to present its case, which it did fully.Furthermore, the respondent had throughout denied liability fordamages which in any event are always an issue between litigatingparties or parties involved in Arbitration, and the applicant nevermade any application to the Arbitrator for permission to appear beforeit and make further submissions on liquidated damages. During the oral submissions, Mr. Oyatsi appeared for theapplicant while Mr. Gautama appeared with Mr. Sharma for therespondent. Mr. Oyatsi explained the genesis of and context in whichthis application was made. The construction contract which is thesubject matter of this suit was supposed to be completed on 30thJune, 2000. It was not completed until September, 2001. However,whereas the arbitrator awarded damages to the applicant for theperiod from May, 2001 to September, 2001, he declined to award anydamages or compensation for the period from 30th June, 2000 toMay, 2001 on the ground that although the applicant was entitled toliquidated damages for this period as agreed in the contract, thesewere not recoverable because the architect had *not* issued therelevant certificate under clause 22 of the contract which entitles theapplicant to recover liquidated damages. Mr. Oyatsi argued that thisissue was never raised in the defence and therefore it never arose fordetermination at the trial. Furthermore, there was a full trial for thereference and at no stage during the trial was that issue ever raisedas a defence to the applicant's claim. Neither the applicant,therefore, nor the respondent, adduced any evidence on theexistence or otherwise of that certificate. The agreement between the parties was that the arbitration would be conducted on the basisof pleadings exchanged and issues raised in those pleadings, but thefirst time that this matter was raised was during the submissions ofthe respondent after close of the hearing, and yet, whether thearchitect's certificate existed or not was a matter of evidence to begiven by witnesses.

Counsel therefore submitted that the finding of the arbitratorwas erroneous and offends the law inasmuch as the applicant wasnot heard on that point, and that also offended the rules of naturaljustice. He submitted that the solution to the problem lies in s.35(2)(a)(iv) under which the court can sever the decision on thisparticular issue from the rest of the award, set it aside and refer itback to the arbitrator for him to correct the award. Referring to therespondent's ground of opposition and preliminary objection, Mr.Oyatsi said that the applicant had explained that the cause of thedelay in the filing of the application was caused bymisrepresentations made to the applicant through the respondent'sadvocates that this application could be dealt with by way of appeal.It was not until the hearing of the appeal that the advocate for therespondent said he had no authority to consent, and that appeal had been filed within three months. In any event, counsel submitted, on28th October, 2000 the court recorded a consent order that the appealbe withdrawn and the applicant be granted liberty to challenge thearbitral award, and that that consent supersedes all objections. Heasked the court to allow the application. In his response, Mr.Gautama contended that the application byway of Originating Notice of Motion, given No. Misc. App.752/03having been withdrawn, this application should have been given anew number. Referring to s.35 (2) (a) (iii) under which the applicationis made, Mr. Gautama submitted that the words "or was otherwiseunable" must be read *"ejusdem generis"* with the phrases beforethose words, and consequently the applicant had not demonstratedinability to present its case. He also submitted that O.XXIV of theCivil Procedure rules does not apply to arbitration, as arbitration is notcommenced under the Civil Procedure Rules. Consequently, theapplication is caught up by the doctrine of res judicata since once amatter is withdrawn, a litigant can't bring it again under the guise of adifferent matter. As for the consent alluded to by Mr. Oyatsi, seniorcounsel submitted that consent cannot confer jurisdiction where thereis none. He then referred to s.35(3) and submitted that this application having been filed on 6 November, 2003, this was after 3months since the date of the award was 19th July, 2003 and it waspublished on 21st July, 2003.

Mr. Gautama then referred to the principles of natural justicewhich he said were crystal clear, but he sought to distinguish theauthorities cited by Mr. Oyatsi on the ground that they did not havemeaning and relevance to arbitration. He finally submitted that thismatter was argued fully before the arbitrator and if the point which isthe subject matter of this application was raised in the claimants finalsubmissions, there was nothing to prevent the present applicant fromraising the matter with the arbitrator at that time. He thereforeconcluded by submitting that the application has no merit, but if it hasany then it is time barred.

In his reply, Mr. Oyatsi argued that O.XXIV of the CivilProcedure Rules was applicable by virtue of rule 11 of the ArbitrationRules, 1997, and that therefore the issue of res judicata did not applysince the appeal was withdrawn before it was heard. On limitation,he argued that the parties had agreed that the applicant was at libertyto bring a fresh application, and the application filed is competent.The issue of the

architect's certificates was never raised in the pleadings, not even at the trial, but only in submissions long afterclose of pleadings and after trial. He urged the court to allow theapplication.

After hearing both counsel, this court is of the view that themain issues for resolution are whether the arbitrator's award wasmade without giving the applicant the opportunity to present its caseon the point of the architects certificates; if so, whether the rules ofnatural justice were thereby breached; whether the application is resjudicata and whether it is time barred.

Looking at the documents on record, the arbitrator's awardstates in paragraph 3.3 (c) (v) page 5 that while clause 22 of thecontract between the parties permits deduction of liquidated damagesfrom monies due to the contractor, this can only be after the architectcertifies in writing that in his opinion the works ought to have beencomplete by the contract completion date or any completion dateextended under clause 23. In this matter, the works were notcomplete by the contract completion date, and the applicant hereincan only be paid liquidated damages if there is an architect'scertificate. In the award, the arbitrator says:

"- The claimant in his final submission of 8th may2003 paragraph 21 (d) claims that no suchcertificate was issued by the architect.

- The respondent's final submission of 26th May,2003 has not challenged this claim

- In the absence of evidence to the contrary thearchitect did not issue the certificate required byclause 22 stating that in his opinion the worksought reasonably to have been completed by aparticular date."

In these circumstances, the applicant is not entitled to liquidated

damages. It is for this reason that the applicant now contends thatthe architect's certificate was never an issue.

It is noteworthy that the claimant's final submission is dated 8thMay, 2003 while the respondent's final submission is dated 26th May,2003. This means that the respondent should have seen theclaimant's contention before the respondent filed its finalsubmissions. But they did not respond to it. Mr. Oyatsi says, it wasraised for the first time in those submissions but it was not an issuebetween the parties. There is authority in QUALCAST LTD. v

HAYNES {1959} 2 All ER. 38 to suggest that where a particular pointis not pleaded, it would be wrong to draw inferences adverse to oneof the parties which might well have been answered in evidence if thepoint had been pleaded. Applying that observation to this matter, thepoint on the architect's certificate was not pleaded, nor was it raisedexcept in the submissions long after the pleadings and trial wereconcluded. One is tempted to conclude that there was no basis uponwhich the claimant made the submission, which was upheld by thearbitrator to the detriment of the applicant herein, and that theapplicant should have been given an opportunity to counter theallegation by suitable evidence before drawing adverse inferenceswhich were prejudicial to the applicant.

I agree with Mr. Gautama that the rules of natural justice arecrystal clear. The arbitrator found against the applicant on a matteron which the parties were not heard. Without belabouring the rules ofnatural justice, the applicant should have been accorded anopportunity to be heard before the arbitrator came to an adverseconclusion which was prejudicial to the applicant.

With regard to the originating Notice of Appeal which waswithdrawn on 28th October, 2003, it will do well to remember that that

motion was withdrawn before it could be heard. My understanding of the doctrine of res judicata is that it applies where a previous matter has been heard and adjudicated upon. It presupposes that there are two opposing parties, that there is a definite issue between them, that there is a court competent to decide the issue, and that within its competence, the court has done so. Once a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties. That did not happen to the Originating Notice of Motion. With respect, res judicata is not applicable to this application.

This brings me to the last point - limitation section 35 (3) of the Arbitration Act, 1995 states-

"An application for setting aside the arbitralaward may not be made after 3 months haveelapsed from the date on which the party makingthat application had received the arbitralaward..."

The application herein is dated 5th November, 2003 and wasfiled in court on 6th November, 2003. The award herein was dated19th July, 2003 and published on 21st July, 2003. This applicationwas therefore made after three months had elapsed from the date on which the applicant had received the arbitral award. Mr. Oyatsireferred to the consent order of the parties on 28th October, 2003, bywhich the applicant was granted liberty to file whatever applicationthey wished. Unfortunately I don't think this consent was such acarte blanche as would entitle the applicant to file the application atany time it wished, even when the filing was done out of time and inflagrant breach of express statutory provisions. I don't think that anynumber of agreements between the parties could possibly conferjurisdiction which is denied by statute.

Mr. Gautama rested his submissions on a quasi prophetic notewhen he said that this application has no merit at all and if it did, it isclearly time barred. I think that the application has a lot of merit,unfortunately it is time barred. For that one reason, the applicationmust fail, and it is accordingly dismissed with costs to the respondent.It is so ordered.Dated and delivered at Nairobi this 12th day of march 2004

L. NJAGI

JUDGE