



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1376 OF 2001 (O.S.)
IN THE MATTER OF ARBITRATION ACT 1995
AND
IN THE MATTER OF ARBITRATION BETWEEN**

CRESCENT CONSTRUCTION LIMITED APPLICANT

AND

MINISTRY OF LOCAL GOVERNMENT RESPONDENT

RULING

The applicant in this matter is a Civil Engineering Contractor while the respondent is a Government Ministry charged with inter alia the responsibility of improving urban infrastructure.

On 14th July, 1998, the applicant was awarded a contract by the Government of Kenya known as No. PKG. 2 Kenya Urban Transport Infrastructure Project - Dualling of Langata Road for the construction of Langata Road in Nairobi. A copy of the contract document is annexed to the affidavit sworn on 10th September, 2001 by Khatib Ashraf, a director of the applicant company.

In the course of carrying out the project under the contract, the applicant on 2.6.2000 submitted a claim, referred to as Interim Request for Extension of Time and Additional Payment. The letter comprising the claim is annexed to Mr. Ashraf's affidavit and marked as Exhibit "CCL2".

Under the terms of the contract such a claim is to be submitted first to the Project Manager for approval in terms of clause 18.1 of the Conditions of Contract (Exh. 'MWK1' to the Replying Affidavit sworn by Mumina Wa Kyendo, the Assistant Project Engineer). The claim having been rejected by the Project Manager in his letter dated 7.7.2000, the applicant, in accordance with the provisions of Clause 24 of the Conditions of Contract, referred the matter to the Adjudicator for his decision. By virtue of Clause 24, what is supposed to be referred to the Adjudicator for determination is:-

“whether the decision (of the Project Manager) was outside the authority given to the Project Manager by the contract or whether the decision was wrongly taken.”

The reference is to be made within 14 days of the Notification of the Project Manager's decision and the Adjudicator is required to give his decision in writing within 28 days of receipt of a notification of a dispute.

It is, I think, necessary at this stage to observe that the issue of time did not at all feature in the proceedings before the Adjudicator and was raised for the first time in the amended statement of claim submitted to the Arbitrator. Indeed although the Adjudicator recognised the applicant's letter of

13.10.2000, (to the Project Manager requesting for action on the Project Manager's part to the contractor's letter dated 12.7.2000) as notice of the Contractor's intention to refer the dispute for Adjudication on receipt of which, he says in his Adjudication Report, he put in motion the required procedure under the Conditions of Contract by Notifying the parties, it is necessary to bear in mind the fact that upto and including 6.1.2001, the Adjudicator continued to give time to the parties to hold meetings and consultations with a view to reaching an amicable solution to the dispute as, according to him, **'an amicable solution reached between the parties to a contract, without involving a third party is the most satisfactory solution that can ever be achieved.'**

The Adjudicator therefore gave full support to those consultations. That approach in my judgment captures the basic thinking behind the process. It is therefore a matter of regret that the dispute had ultimately to be decided by the arbitrator on a technicality, a method of resolving disputes which in my view the concept of arbitration is designed to replace and avoid.

Be that what it may, the parties having failed to agree on settlement, the adjudicator, as he states, had no option but to proceed with adjudication.

After the Adjudicator had considered the decision of the Project Manager, he made his findings as appears in a Report dated 17.1.2001 (annexture 'CCL4' to Mr. Ashraj affidavit) The main conclusions of the Report are that:-

"a) the contractor's claims for extension of time on relocation/installation of services and delays due to design changes and/or additional instructions as per provision of the contract are justified.

b) the contractor was entitled to cost reimbursement due to a) above which were to be based on verified resources availed on site solely for the Project's implementation."

and based on those findings, the applicant was awarded 120 days extension of time and Shs.40,000,000/= additional payment.

The respondent was aggrieved by the Adjudicator's decision and referred the matter to arbitration pursuant to Clause 25 of the Conditions of Contract. After hearing the matter, the Arbitrator made an award headed "Award No. 1 Preliminary issue on Adjudicator's Jurisdiction" dated 13th August, 2001. He decided that:-

"1. The Project Manager's decision is final and binding under Claim No. 2 of Contract P KG2 – Dualling of Langata Road.

2. The Adjudicator had no jurisdiction over claim No. 2 of the subject Contract.

3. The Respondent shall pay the Claimant's costs and the costs of this arbitration upon a party and party basis, failing agreement, to be taxed, and

4. The Respondent shall also pay and bear the costs of this my Award which I tax and settle at Kshs.170,000/= or if such costs have already been paid by the Claimant forthwith repay such costs to the Claimant."

That award is the subject matter of this application, the complaint against it, which has been brought by way of an originating summons taken under section 35(2) (iv) of the Arbitration Act, being that it contains a decision or decisions on matters beyond the scope of the reference to arbitrator and should therefore be set aside in its entirety.

Before arriving at his findings the Arbitrator allowed the parties to file what he calls points of claim and Defence. This is reflected in paragraph 9.0 of the Award. He proceeded further and allowed an amendment to what he says was the claimant's claim. It is my opinion that in allowing the parties to take all those actions, the Arbitrator had completely lost sight of the mandate given to him under the contract.

In my view, what was before the Arbitrator was not a fresh matter by virtue of which he could invite the parties to make their respective statements of claim, defences, replies or amendments and the like. Such a course of action would only be permissible in an ordinary arbitration commenced afresh before the Arbitrator, which the instant matter was not. The reference to the Arbitrator in this matter was the continuation of a process under the conditions of contract between the parties as provided in Clauses 24 and 25. The Arbitrator was therefore not entitled to invoke the Rules of the Chartered Institute of Arbitrators (Kenya Branch) to justify his non compliance with the express provisions of the contract.

That process of dispute resolution in the instant case commenced with the submission by the applicant of his claim to the Project Manager and was followed by reference to the adjudicator. All this is provided for under the Conditions of the Contract. After that, what was subsequently referred to the Arbitrator was not a fresh matter pursuant to which new pleadings (so to speak) such as statements of claim, defence, amendments could be made. In terms of clauses 24 and 25 of the Conditions of Contract, the only matter before him was the decision of the Adjudicator. Accordingly by receiving such pleadings, the Arbitrator not only changed the whole character of the matter before him but also went beyond the scope of the reference and dealt with a matter which was not properly before him.

In his award, the Arbitrator says that the dispute was not referred to the Adjudicator on time and in accordance with the Terms of the contract. My reading of the documents availed to me shows that the issue of time was never raised before the adjudicator. Although this is not a civil suit, I think it is generally accepted that a party who omits to raise an issue in the first instance should not be permitted to raise it later in subsequent proceedings relating to the same matter. Given that position, the respondent should not have been allowed to raise the issue of time before the arbitrator, since it did not raise it before the adjudicator.

The decision of Commissioner Ransley in Kenya Wildlife Services vs. Associated Construction Co. Ltd. where the contract between the parties was similar to that between the applicant and the respondent was referred to by learned Counsel for the respondent. However, if the authority proves anything, it is that what the Arbitrator has to deal with is the decision of the Adjudicator and not anything else, which is raised afresh before the arbitrator. The learned Commissioner stated:-

“It is clear that the matter was referred to the Arbitrator in accordance with the provisions of clause 25.2 of the Agreement for the purpose of determining whether or not the Adjudicator was correct in his decision that he had no jurisdiction to deal with the substantive matters in dispute as the defendant had not referred the matter to him within the period of 14 days referred to in Clause 24.1 of the Agreement.”

and in page 7

“The parties have agreed to the terms of the Agreement and are bound by them. It is well settled that a court will not rewrite a contract for the parties. I have therefore to determine.”

The contract in the instant suit provides that the Arbitrator shall deal with the decision of the Adjudicator and not some fresh issues raised before him.

There is no doubt in my mind that the ruling of Commissioner Ransley reinforces the view that only matter which the Arbitrator is permitted to arbitrate upon is the decision of the Adjudicator. Accordingly it should be obvious that the arbitrator goes beyond the scope of his reference if as was the case in this matter, he deals with matters outside that decision.

In any event, by allowing the respondent to raise that issue as well as others, the Arbitrator made the proceedings before him open ended and took them outside the provisions of the contract between the applicant and the respondent.

For the above reasons, I find that the arbitral award contains a decision or decisions on matters beyond the scope of the reference to arbitrator. Accordingly, I set it aside with costs to the applicant.

Dated at Nairobi this 20th day of December, 2001.

T. MBALUTO

JUDGE