Nyegenye v Dapalk Consortium Company Limited (Miscellaneous Civil Application E001 of 2024) [2024] KEHC 5878 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5878 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

MISCELLANEOUS CIVIL APPLICATION E001 OF 2024

WM MUSYOKA, J

MAY 24, 2024

BETWEEN

JEREMIAH NYEGENYE ..... APPLICANT

AND

DAPALK CONSORTIUM COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. I am tasked with determining the Originating summons herein, dated 25th January 2024. It seeks that the ruling of the arbitrator, QS Kobia Misheck Michubu, rendered on 18th January 2024, be set aside, and that the court finds that the preliminary objection, raised in the arbitral proceedings, dated 17th November 2023, was merited. The Originating Summons was amended, on 4th March 2024, to re-frame the issues, without changing the factual background.

2. The background is set out in the grounds on the face of the Originating Summons, and the facts deposed in the affidavit of the applicant, sworn on 25th January 2024. Essentially, the 2 parties entered into an agreement for construction of a building. The same was to be undertaken within 32 weeks, commencing on 31st January 2022. The applicant then terminated the contract, on 6th December 2022, on grounds that the respondent was 10 months late, and had not commenced the works. It would appear that the parties reached some sort of understanding, for the applicant says that the construction of the building was completed on 10th July 2023, and on 10th October 2023, the respondent was given the final accounts.

3. The matter was referred to arbitration, on 5th July 2023, by the respondent, for determination of questions relating to the value of the work that had been done, prior to the contract being terminated; the reasonable time to share a final account of work done by the contractor after termination of the contract; and the justifiability of a denial of a 1 month extension of time to complete the works. A preliminary objection was raised, dated 17th November 2023, on grounds that the issues raised did not disclose a dispute, there was no dispute between the parties, and the arbitrator lacked jurisdiction to

entertain the matters before him. A ruling was delivered on that preliminary objection, declaring that there was jurisdiction. The applicant sought to appeal, but the arbitrator insisted on going ahead with the proceedings, hence this Originating Summons.

4. The respondent reacted to the Originating Summons, vide an affidavit sworn by Paul Odhiambo Oswago, its director, on 4th March 2024. He avers that it was the delay by the applicant to furnish them with final accounts that necessitated the referral of the matter to arbitration. He states that the said final accounts were only availed 1 month after the respondent had referred the matter to an arbitrator. He states that the arbitrator gave them time to negotiate, after the preliminary objection was raised, and argues that the fact that the accounts by both sides were not in tandem meant that there was a dispute for resolution by the arbitrator, who is an expert in the field in dispute between the parties.

5. Directions were given on 6th March 2024, for disposal of the Originating Summons by written submissions. Both sides filed their respective written submissions.

6. The appellant has flagged 4 issues for determination, being what was it that the respondent had presented to the arbitrator to determine, whether the issues it had raised disclosed a reasonable dispute, whether the preliminary objection placed before the arbitrator was merited, and whether the ruling of the arbitrator ought to be set aside. *Kenya Agricultural and Livestock Research Organisation v Okoko* [2022] eKLR (Aburili, J) is cited. The respondent has identified 2 issues, whether there was a dispute between the parties, and whether the arbitrator had jurisdiction over the matter. *Wilson Olal & 5 others v Attorney General & 2 others* [2017] eKLR (Mativo, J) is relied upon.

7. These proceedings challenge arbitral proceedings, and that then should lead to the question, what the parameters for referring matters to arbitration are. The law on this is section 4 of the *Arbitration Act*, Cap 49, Laws of Kenya, which provides that an arbitration agreement may be in the form of an arbitration clause in a contract, or it may be an independent separate agreement; and it must take a written form.

8. The parties herein entered into an agreement founded on the Agreement and Conditions of Contract for Building Works (the 1999 edition), published by the Joint Building Council of Kenya. Clause 45.0 of that Agreement carries an arbitration clause, in the sense that it provides for settlement of disputes, and arbitration is identified as the mechanism of dispute resolution, and the procedure is outlined in there.

9. The conflict herein, between these 2 parties, relates to whether or not a dispute had arisen which could be referred to arbitration. The law on arbitration states that by executing an agreement, which carries an arbitration clause, the parties to that agreement are bound by the said arbitration clause, unless the party who moves the court can establish or prove that there was duress, misrepresentation or coercion during the execution of the agreement. I note that none of the parties hereto raise an issue around duress, misrepresentation or coercion. Section 6 of the *Arbitration Act* allows intervention, by the court, to matters that are subject to an arbitration agreement. However, this provision relates only to those situations where a matter is filed in court, before referral to arbitration, where there is an arbitration clause, in an agreement, instead of having the matter referred to arbitration first, as per that clause. The court may refer the matter to arbitration, unless it finds that the arbitration agreement was null and void, or that there was no dispute for reference to arbitration. Section 6 does not apply here, as the parties hereto did not start with the court, but rather started with the arbitrator, and it is from the arbitration that they are bringing the matter to court.

10. Secondly, the intervention of the court is limited, in cases where a matter is already before an arbitrator. Under section 7(2) of the *Arbitration Act*, where the arbitrator has already ruled on any matter, relevant to the application, the court shall treat that ruling, or any finding of fact in the course of that

ruling, conclusive. The instant Originating Summons has been brought after the matter has already been referred to arbitration, and the arbitrator has already assumed jurisdiction, and after the arbitral tribunal has delivered a ruling on whether there was a dispute meriting referral, and whether it has jurisdiction. These are the same issues that the applicant is placing before me, by way of the Originating Summons, dated 25th January 2024, as amended on 4th March 2024. By dint of section 7(2), these issues have been finally determined by the arbitrator, and I shall treat those determinations as final.

11. *Chania Gardens Limited v Gibi Construction Company and another* [2015] eKLR (Gikonyo, J) dealt with that, when it was found and held that where there is a valid arbitration clause, all issues falling within the jurisdiction of the arbitrator, should be decided by the arbitral tribunal, and the court should not intervene. Court intervention interferes with the jurisdiction of the arbitrator to hear and determine disputes that rightly fall within his jurisdiction. See also *Telcom (K) Ltd v Kamconsult Ltd* [2001] 2 EA 574 (Ringera, J)

12. The position of the arbitrator vis-à-vis that of the court should be understood in the context of Article 159(2)(c) of *the Constitution*, which entrenches arbitration as one of the forms of dispute resolution in Kenya. Significantly, that provision states that the forms of alternative dispute resolution, identified in the provision, are to be promoted. Very often, court intervention into arbitral processes impedes them, instead of promoting them, contrary to the spirit of Article 159(2)(c) of *the Constitution*. Court intervention should only be, as stated in Euromec International Limited v Shandong Taikai Power Engineering Company Limited [2021] KEHC 93 (KLR) (Mativo, J), where the *Arbitration Act* allows such intervention; and where public interest demands it, on account of substantial injustice being likely to be occasioned. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* [2019] eKLR KESC 11 (KLR) (Maraga CJ&P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) countenances judicial intervention in exceptional circumstances.

13. In view of the above, the hands of this court are tied. It is to intervene only where the relevant statute allows it, or where public interest requires it, or where exceptional circumstances exist. Looking at the application before me, I do not see anything that comes close to any of the 3. Consequently, I find no basis upon which I should intervene in the arbitral proceedings between the parties hereto, in the manner proposed in the Originating Summons, dated 25th January 2024, and amended on 4th March 2024. The same is for dismissal, and I hereby dismiss it. The stay order, that I had granted herein on 26th January 2024, is hereby discharged. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 24TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. C. Nyegenye, instructed by Calistus & Company, Advocates for the applicant.

Mr. Apollo, instructed by Apollo Bwana & Company, Advocates for the respondent.