



WS Insight (K) Limited v Parbat Siyani Construction Limited & another (Commercial Arbitration Cause E025 of 2023) [2024] KEHC 5568 (KLR) (Commercial and Tax) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E025 OF 2023**

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

WS INSIGHT (K) LIMITED APPLICANT

AND

PARBAT SIYANI CONSTRUCTION LIMITED 1ST RESPONDENT

THAARA LIMITED 2ND RESPONDENT

RULING

1. On 23.09.2014, the 1st Respondent (“Parbat”) as the Contractor and the 2nd Respondent (“Thaara”) as the Employer/Client signed the standard Joint Building Council (“JBC”) Agreement and Conditions of Contract for Building Works for the construction to completion of the proposed Rosslyn Riviera Shopping Mall along Limuru Road on Land Reference 21/1/56 and for a contract sum of Kshs. 1,528,991,899.05 (“the Main Contract”). Subsequently, Parbat and the Applicant (“WS Insight”) entered into two sub-contracts all dated 13.07.2015 for the design, installation and commissioning of security systems, fire and safety systems, backbone infrastructure installations and WLAN installations for the contract sums of Kshs. 18, 861,737.00 and Kshs. 72,023,860.00 respectively (“the Sub-Contracts”).
2. In due course, a dispute arose over the performance of the Sub-Contracts where WS Insight claimed that the Respondents had neglected to pay it Kshs. 12,114,485 being the final account and retention sums due to it. The dispute was referred to arbitration where Eng. Basil Ononbhara Odigie was appointed as the arbitrator (“the Arbitrator”) to determine the same and after examining the documents and considering the submissions made in the written addresses, the oral evidence and arguments, and all authorities brought to his notice by the counsel on both sides, he published an Award on 27.03.2023 (“the Award”). In his disposition, the Arbitrator directed Thaara to pay WS Insight *inter alia* Kshs.10,321,928,00 being the outstanding balance on its Final Account,



KShs.1,792,557 being the Retention due, Kshs. 2,290,059.71 being the costs of the arbitration, interest at the rate of 12.78% per annum on the amounts awarded on the Final Account from 31.08.2018 until date of the Award, interest at the rate of 12.78% per annum on the amounts awarded on the Retention from 28.02.2019 until date of the Award, interest at the rate of 12.78% per annum on the sum of Kshs. 4,432,577.00 from 31.08.2018 to 16.12.2021 and interest calculated at Court rates on the amounts awarded on the Final Account, Retention and Costs of the arbitration from the date of the Award until full and final payment of the Award.

3. The Award has triggered the filing of two applications for the court's determination. WS Insight seeks to enforce the Award as a decree of the court through its Chamber Summons dated 19.04.2023 made under section 36 of the Arbitration Act. This application is supported by the grounds on its face and the supporting affidavit and supplementary affidavit of WS Insight's Head of Finance, Joseph Thuku sworn on 19.04.2023 and 16.05.2023 respectively. Parbat also supports the application through the replying affidavit sworn on 07.06.2023 by its employee Bipin Maru. Thaara opposes the application through its Grounds of Opposition dated 05.05.2023.
4. On its part, Thaara has filed the Chamber Summons dated 05.05.2023 that is made under sections 35 of the Arbitration Act and seeks to set aside the Award. The application is supported by the grounds on its face and the supporting affidavit of Peter Nderitu Gethi, Thaara's Managing Director, sworn on 05.05.2023. WS Insight opposes this application through the replying affidavit of Joseph Thuku sworn on 16.05.2023 and it is also opposed by Parbat through the replying affidavit of Bipin Maru sworn on 07.06.2023. The parties have also filed written submissions in support of their respective arguments which I shall make relevant references to in my analysis and determination.

Analysis and Determination

5. I propose to first deal with Thaara's application to set aside the Award as this will determine if at all WS Insight's application to enforce the Award will be considered. The court's jurisdiction to set aside an arbitral award is demarcated and delimited by section 35(2) of the Arbitration Act which part material to Thaara's application provides as follows:

35. Application for setting aside arbitral award

(1)

(2) An arbitral award may be set aside by the High Court only if—

a. the party making the application furnishes proof—

i.

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

iii.; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or



- b. the High Court finds that—
 - i.
 - ii. the award is in conflict with the public policy of Kenya.

6. Thaara states that the Award is void for want of jurisdiction in that there was no contract or arbitration agreement between itself and WS Insight as required under sections 3 and 4 of the Arbitration Act, rendering the Award as against Thaara to be null and void. That the reference to arbitration was based solely on the Sub-Contract between WS Insight and Parbat which Thaara is not a party to and contains the arbitration clause which was invoked to refer the matter to arbitration.
7. Thaara further argues that the Award dealt with a dispute not contemplated by or falling within the terms of the reference to arbitration, as it contains decisions on matters beyond the scope of reference to arbitration as it went outside the contract between WS Insight and Parbat and thus the arbitrator went beyond the scope of the reference to arbitration and exceeded his jurisdiction, rendering the Award to be null and void. That the question of whether there was a collateral agreement between WS Insight and Thaara was not referred to the Arbitrator and even assuming that there was a collateral contract between WS Insight and Thaara, which is denied, this collateral contract did not have an arbitration clause or agreement as contemplated under sections 3 and 4 of the Arbitration Act rendering the Award as against Thaara to be null and void.
8. Thaara's further contended that the Award is contrary to the public policy of Kenya in that the Arbitrator seriously eroded the constitutionally sanctioned principle of freedom of contract and parties' rights to contract as only they deem fit, that the Award purports to impose contractual obligations on Thaara when WS Insight and Thaara had not entered into any contractual agreements and that the Arbitrator purported to imply, infer and/or find that there was an arbitration agreement between WS Insight and Thaara contrary to the express provisions of section 3 and 4 of the Arbitration Act. Further, that the Arbitrator purported to find that Thaara was bound by an arbitration agreement as contained in a contract signed between the WS Insight and Parbat.
9. In dismissing the above contentions, WS Insight contended that Thaara, through its agent, Barker & Barton Kenya LLP issued two letters dated 13.07.2015 respectively to WS Insight being; Appointment as Nominated sub-contractor for the design, installation and commissioning of the security systems, fire and safety systems, backbone infrastructure installations and WLAN installations for the development; and Appointment as a Nominated Supplier for the development project. That through the said letters, Thaara's agent Barker & Barton Kenya LLP was very clear that they were writing on behalf of their client, Thaara and Barker & Barton were clear that Thaara had accepted WS Insight's offers. That it was a requirement that WS Insight must enter into a Nominated Sub-Contract Agreement and Nominated Supplier Agreement with Parbat hence the Sub-Contracts.
10. WS Insight avers that in addition to the contracted supplies and services set out in the Sub-Contracts, Thaara requested, and WS Insight supplied additional systems and services to the development project and that Parbat authorized and Thaara made direct payments to WS Insight for completed and certified work to the tune of Kshs. 109,376,196.28 on account of the Sub-Contracts. WS Insight asserts that as a matter of fact and as late as 16.12.2021, Thaara paid WS Insight Kshs. 4,317,941.00 yet Thaara keeps insisting that there is no contract between itself and WS Insight even though they clearly know there is as they have directly paid WS Insight on numerous occasions.
11. WS Insight states that it claimed for payments for the additional systems and services and retention at the commissioning and handover of the completed systems to Thaara hence the arbitration where WS Insight depones that all the issues in dispute between the parties were conclusively determined. WS



Insight avers that the sums awarded in the Award are significant and recoverable from Thaara because WS Insight is entitled to them under the Sub-Contracts.

12. WS Insight contends that the role of the Court is only supervisory, and its jurisdiction may only be invoked in very specific situations as stipulated in the *Arbitration Act* and that Thaara is inviting this Court to consider the merits of the Award. WS Insight states that the Arbitrator determined all the issues listed by Thaara on the basis of the evidence presented before him by all the parties and he also considered the submissions rendered by the parties' respective Counsels and took his time to address all the issues raised by all the parties and gave detailed reasons for his conclusion. That Thaara did not object to any of the documents produced by WS Insight and they, therefore, formed part of the evidence that the Arbitrator needed to consider in determining the dispute between the parties. WS Insight adds that the Arbitrator considered and determined the issue of whether there was privity of contract between WS Insight and Thaara and also determined the question of whether there was a collateral agreement between WS Insight and Thaara and found that it indeed existed. That the Kenya Courts have accepted collateral contracts between a party to a contract and a third party to be of exception to the doctrine of privity of contract.
13. WS Insight asserts that as a matter of fact, the Respondents had an agreement for direct payments to sub-contractors including WS Insight and this established a direct duty and obligation for payments due to it by Thaara and that there is evidence of direct payments by Thaara to WS Insight including a payment of Kshs.4,317,940.75 on account of Interim Certificate No. 26 from Thaara on 16.12.2021. Further, that there were variations to the supply Sub-Contract which were copied to Thaara in accordance with Clause 30.4 of the Contract and these variations were also approved by Thaara as contemplated under Clause 30.2 of the Contract. That Thaara requested for a system audit be conducted by its agent, Pinkerton Kenya Ltd of the equipment supplied by WS Insight and ordered for a valuation of the works by the said agents and that the total valuation of Kshs. 121,490,678.93 was agreed upon between WS Insight and the Project Managers Barker & Barton (Kenya) LLP and Thaara's Agents, Pinkertons Kenya Ltd.
14. WS Insight avers that the total valuation included the original scope of work plus the variations and reiterates that Thaara has paid Kshs. 109,376,196.28 which is more than the certified amounts and therefore it is evident that there were valid variations and the supply of additional equipment.
15. WS Insight states that Paragraphs 31.4 and 31.5 of the Sub-Contracts provide for the way forward where a sub-contractor is aggrieved by the actions or inaction of the employer. The contractor is required to allow the sub-contractor to use the contractor's name and if necessary, join the sub-contractor in arbitration proceedings against the employer to decide the matters in dispute or in difference and that in the absence of cooperation from Parbat, WS Insight had no option than to enjoin both Respondents in these proceedings so that the matters in dispute are resolved with finality. That Rule 29 CI Arb *Arbitration Rules* 2020 allow for consolidation of arbitrations involving the same parties where the arbitrations may be consolidated in the interest of efficiency and that the arbitration clause in the Contract and the Sub-Contracts are similar in all material aspects.
16. WS Insight reiterates that the Arbitrator tackled and determined the issue of whether there existed a contract and Arbitration Agreement between WS Insight and Thaara and held that there was indeed a binding contract formed between them and the Arbitrator also determined the question of whether there was a collateral agreement between them. Thus, it cannot be stated that the Arbitrator went on a frolic of his own and that finding otherwise would require the court to scrutinize the Arbitrator's analysis of issues of fact and law which would be tantamount to sitting on appeal of the Award, yet it is clear from the provisions of sections 10 and 39 of *Arbitration Act* that the Court has no powers to do so. Further, that the Court cannot interfere with the way the Arbitrator dealt with the evidence before him



- because that was well within his jurisdiction and that they are matters this Court cannot reconsider, the rationale being that parties opted to go the arbitration way to resolve their disputes. That to interfere would place the Court in the position of a court of appeal, which is against the principle of finality that informs the preference of arbitration to litigation by disputants in commercial contracts.
17. WS Insight asserts that Thaara cannot separate the Contract and the Sub-Contracts and that in the present case, there was an agreement between the Parbat and Thaara that Thaara makes direct payments to WS Insight and Thaara has failed to fulfil the contractual obligations to pay for completed work. That in determining whether the Arbitrator went beyond the scope of the reference to arbitration, or whether the award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. However, it reiterates the responses above and states that the Court is barred from determining those matters because it is not sitting on appeal but on WS Insight's call for enforcement of the Award, subject of these proceedings against Thaara. Further to the foregoing, that the arbitration agreement/ clause entered into between the parties was sufficient under section 3 of the [Arbitration Act](#) and Thaara is estopped from running away from it at this stage of proceedings. That pursuant to section 4(4) of the [Arbitration Act](#), it is recognized that the contract could make reference to another document which contained the arbitration clause and that the Sub-Contracts are part of the Contract.
 18. In sum, WS Insight states that the Contract, the Sub-Contracts and the two letters dated 13.07.2015, identify the existence of the relationship between the WS Insight and Thaara and that public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts, and all, subject only to challenge within the narrow confines of section 35 of the [Arbitration Act](#). In view of the foregoing, it urges the court to dismiss the application with costs.
 19. Parbat opposes the application by stating that the genesis of the dispute before the Arbitrator was for payment for the additional supplies and services rendered by WS Insight over and above what was provided for in the Sub-Contracts it entered into with Parbat. Parbat states that having achieved practical completion of the development project, it moved out of the site but that unknown to them, WS Insight and Thaara were dealing directly in respect of the additional supplies for a sum of Kshs. 12,114,485.38.
 20. Parbat reiterates WS Insight's averments that it was a term of the supply Sub-Contract that the Sub-Contract would be supplemental to the Contract and it then follows that Thaara is privy to the supply Sub-Contract and it cannot be heard to purport to distant itself from the arbitration clause in the Sub-Contract agreement. Parbat also reiterates that the Arbitrator is the master of facts and therefore his holding that Thaara is liable to pay should not be set aside and that it would be unconscionable and unjust to set aside the Award, the effect of which would be to allow Thaara to walk away from its obligations to pay for the additional services which it received.
 21. I have gone through the parties' arguments and submissions as highlighted above. Thaara first challenges the Award on the preliminary issue that there was no arbitration agreement or contract between itself and WS Insight hence the same ought not to have been referred to arbitration in the first place. In the Award, the Arbitrator stated that Thaara had raised this issue as a preliminary objection but the Arbitrator reserved this determination in the Award pursuant to section 17 of the [Arbitration Act](#). I agree with Thaara's submissions that in [University of Nairobi v Nyoro Construction Company Limited & another](#) [2021] KEHC 380 (KLR), the court held that if the issue of jurisdiction been reserved for and dealt with in the Award on merits, then the party aggrieved would be entitled to apply to set aside the Award under section 35 of the [Arbitration Act](#) as in the present case.



22. In the Award, the Arbitrator held that from the exchanges between WS Insight and Thaara, there was an offer and acceptance which intimated the parties' intention to enter into a contract. That a contract was indeed formed between them and that the same came into force prior to that between WS Insight and Parbat and it was a fact that Thaara advised WS Insight to, "provide an advance payment bond in favour of Thaara Limited" in accordance with the Main Contract requirements as well as any other documents required for the completion and execution of the "nominated supplier sub-contract" before Parbat acted on the instructions to enter into contract with WS Insight. The Arbitrator thus held that this was irrefutable proof of the existence of nominated supplier sub-contract between WS Insight and Thaara.
23. The Arbitrator thus determined that it has jurisdiction because there is privity of contract between WS Insight and Thaara. On whether the tribunal had jurisdiction to hear and determine the matter, the Arbitrator held that the Respondents had an agreement for direct payments to sub-contractors including WS Insight and this established a direct duty and obligation for payments due to WS Insight on the part of Thaara and thus, a collateral contract was formed. That there was evidence of these direct payments by Thaara to WS Insight and that Paragraphs 31.4 and 31.5 of the Sub-contracts provided for the way forward where a sub-contractor is aggrieved by the actions or inaction of the employer. The contractor was required to allow the sub-contractor to use the contractor's name and if necessary, join the sub-contractor in arbitration proceedings against the employer to decide the matters in dispute or in difference. That in the absence of cooperation from Parbat, WS Insight had no option than to join both Respondents in the proceedings so that the matters in dispute are resolved with finality.
24. A reading of the Sub-Contracts more so Clause 1.2 reveal that they were supplemental to the Main Contract between Parbat and Thaara. Clause 31.0 of the Sub-Contracts further state that disputes between the contractor, Parbat and the sub-contractor, WS Insight were to be resolved by way of arbitration. Sub-clauses 31.4 and 31.5 provide in part that, "Where the Sub-Contractor is aggrieved by..... any action or inaction of the Employer.....then; Subject to the Sub-Contractor giving the Contractor such indemnity and security as the Contractor may reasonably require, the contractor shall allow the Sub-Contractor to use the Contractor's name and, if necessary, shall join the Sub-Contractor in arbitration proceedings against the Employer to decide the matters in dispute or in difference".
25. The aforementioned provision gives out a scenario where the sub-contractor, WS Insight can have a claim against the Employer, Thaara and that the claim must be resolved by way of an arbitration. It is therefore my finding that as per the Sub-Contracts, there existed an arbitration agreement between WS Insight and Thaara for any dispute WS Insight might have had against Thaara. The Arbitrator found as a matter of evidence and fact that Thaara had authority to make direct payments to WS Insight and that if Thaara failed to make such payments, then WS Insight was entitled to invoke Clause 31.0 above against it. My aforementioned finding disposes with Thaara's first ground in the negative.
26. On the second ground that the Award deals with a dispute not contemplated by and falling beyond the scope of the reference to arbitration, I agree with Thaara's submission that the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR observed as follows:

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because,



as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

27. I have already stated above that as per the arbitration clause in the Sub-Contracts, if the sub-contractor is aggrieved by “any action of inaction of the Employer.....” then the sub-contractor is entitled to institute arbitration proceedings against the Employer. The wording above is wide and does not seem to restrict the type of action or inaction the sub-contractor is aggrieved with that may or may not be referred to arbitration for determination. In this case, WS Insight was aggrieved by the inaction of Thaara not making payment in respect of the final account and retention. Therefore, from the onset, it could not be stated that the Arbitrator dealt with issues not contemplated in the arbitration agreement because such an inaction was indeed contemplated by the parties to give rise to a dispute that is to be resolved by arbitration. Thaara had further stated that the question of whether there was a collateral agreement between WS Insight and Thaara was not referred to the Arbitrator, thus he went beyond the scope of the reference to arbitration and exceeded his jurisdiction, rendering the Award to be null and void.
28. However, going through the Award, I note that one of the issues Parbat presented for the Arbitrator's determination was, “Whether the sums in dispute are outside the scope of the arbitration agreement in view of the fact that they arose from an arrangement between the Claimant and the 2nd Respondent to which the 1st Respondent was not a party.” This issue would obviously have led the Arbitrator to determine whether there was another agreement between WS Insight and Thaara and if so, whether Parbat was a party to it. It is therefore my finding that the issue of whether there was a collateral agreement between WS Insight and Thaara was presented by Parbat and the Arbitrator was entitled to make a determination on it. This ground by Thaara therefore fails.
29. Finally, Thaara had assailed the Award for being in conflict with public policy and based its argument on the fact that there existed no arbitration agreement between WS Insight and Thaara. However, I have found that there actually existed an arbitration agreement between WS Insight and Thaara in the Sub-Contracts and therefore, the Award is not contrary to public policy as the same was based on the arbitration agreement between the parties. This ground also fails.
30. My overall findings above disposes Thaara's application to set aside in the negative meaning that the court can now determine WS Insight's application that seeks to enforce and recognize the Award as a judgment and decree of the court. Under section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the *Arbitration Act*. The High Court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards in the following terms:
 - 36 (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37
 - (2) ...
 - (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish
 - (a) the original arbitral award or a duly certified copy of it; and
 - (b) the original arbitration agreement or a duly certified copy of it.
 - (4)



(5)

31. Section 37 of the *Arbitration Act* sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award which grounds mirror those in section 35 for setting aside an award. In its opposition to the application, Thaara has advanced the same grounds it had relied on to set aside the Award. However, since I have already determined that its opposition of the Award is not merited, the same cannot hold against WS Insight's application. Thaara had also stated that the duly certified copy of the arbitration agreement had not been furnished but I note that WS Insight has furnished the Sub-Contracts where the arbitration agreement is contained. I find no other valid reason for the court to refuse to recognize and enforce the Award. The contents of the Award are common to the parties and thus, the conditions precedent for enforcing the Award have been met.

Disposition

32. For the reasons I have set out above, I now make the following orders:
- a. The 2nd Respondent's application dated 05.05.2023 is dismissed.
 - b. The Applicant's application dated 19.04.2023 is allowed with the consequent result that the final award of the Arbitrator Eng. Basil Ononbhara Odigie dated 27.03.2023 be and is hereby recognized and adopted as a decree of the Court and leave is granted to the Applicant to enforce it as such.
 - c. The 2nd Respondent shall pay costs of the Applicant assessed at Kshs. 100,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2024.

A. MABEYA

JUDGE

