



**Ruwatex Limited v Consulting; Cabinet Secretary, Ministry of Finance
& 3 others (Interested Parties) (Commercial Case E888 of 2021)
[2024] KEHC 11081 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E888 OF 2021
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

RUWATEX LIMITED PLAINTIFF

AND

TY.PSA CONSULTING RESPONDENT

AND

CABINET SECRETARY, MINISTRY OF FINANCE INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

PRECISION CAPITAL LIMITED INTERESTED PARTY

KENYA TRADE INVESTMENT CENTER LIMITED INTERESTED PARTY

RULING

Introduction and Background

1. The Plaintiff/Applicant has approached the Court by the Notice of Motion dated 21st June 2024 made under sections 1A, 1B & 3A of the *Civil Procedure Act*(Chapter 21 of the Laws of Kenya), section 3 (2)(c), 3 (2)(d) & 12(7) of the *Arbitration Act*(Chapter 49 of the Laws of Kenya) and Order 46 Rule 5 of the Civil Procedure Rules, 2010 seeking inter alia that the court appoints an Arbitrator and that it determines the seat of arbitration. The application is supported by the affidavit of Kelvin Mogeni, the advocate in conduct of this matter on behalf of the Applicant.



2. It is opposed by the Defendant/Respondent through the replying affidavit of its Managing Director, Joaquin Barba Zalvide. The application was disposed by way of written submissions which are on record.
3. It is common ground that on 24th July 2023, the court ordered the Applicant to initiate arbitral proceedings within 90 days from the said date in accordance with the parties Agreement. By this application, the Applicant claims that it endeavored to commence the Arbitral proceedings but that its efforts to appoint an arbitrator have been futile as the Respondent has been uncooperative in the process of trying to appoint an Arbitrator and determine the seat of arbitration. That the Plaintiff has on multiple occasions tried to engage the International Chamber of Commerce, Kenyan Section, and has not received any feedback or response despite an advance payment of USD 3,000 being paid together with the request for arbitration.
4. The Respondent avers that Arbitration Agreement is silent on the seat of arbitration and the parties have been unable to reach an agreement on the same and that it will be a travesty of justice visited upon the Applicant if the application is not allowed as prayed.
5. In response, the Respondent contends that the application is devoid of merit and ought to be dismissed with costs to the Respondent. It asserts that the Arbitration Agreement has a clear dispute resolution mechanism that the Agreement shall be governed by the laws of the home base country of the Respondent as the Consultant and shall be governed by the Spanish law. That if any dispute arises out of or in connection with the Agreement, the Parties shall within 14 days of the written request from one Party to the other, meet in a good faith effort to resolve the dispute. If the dispute is not resolved at that meeting, the Parties shall attempt to settle by mediation, and failing that, by arbitration. That any arbitration arising out of or in connection with this Agreement shall be settled under the Rules of Arbitration of the International Chamber of Commerce (“the ICC Rules”) by one or more arbitrators appointed in accordance with the said rules. Further, that the venue shall be agreed upon between the Parties.
6. The Respondent claims that the Applicant has intentionally failed to initiate the arbitration proceedings in accordance with the Agreement and that the ICC Rules clearly outlines the procedure for commencing arbitration. It avers that the ICC Rules establish that Arbitral proceedings must be initiated by addressing the application to the Secretariat at any offices specified in the Internal Rules namely Paris, Abu Dhabi, Hong Kong, New York, Sao Paolo or Singapore. In the alternative, the Applicant can simply commence the arbitration by making an application through the online platform known as Case Connect. However, the Respondent claims that the Applicant has intentionally failed to commence the arbitration through either of the stated procedures. That by a letter dated 12th October 2023, the Respondent wrote to the Applicant’s advocates outlining the procedure for commencing arbitral proceedings and further advised the Applicant to comply with the ICC Rules but that the Applicant’s request did not comply with the same since the Request for Arbitration is a substantive document under the ICC Rules and not a letter. That the Applicant failed to comply with the ICC Rules and did not make any efforts to comply with the same on commencement of arbitration and the Respondent, through its Advocates informed the Applicant of the same in a letter dated 26th October 2023.
7. The Respondent states that the Applicant is well aware that the Kenya section of the International Chamber of Commerce is not a named office for the purposes of commencing an arbitration procedure as per the ICC Rules and that a non-refundable filing fee of USD 5,000 must be accompanied by the application for commencement of arbitration. The Respondent states that it requested for proof of payment of the deposit of USD 5000 made to the International Chamber of Commerce but the



Applicant failed and neglected to provide the same to the Respondent. Therefore, the Applicant has intentionally not complied with the International Chamber of Commerce procedures in order that the arbitration process can commence.

8. The Respondent avers that parties are bound by their own Contracts and courts cannot re-write or vary a contract between parties. It restates that as per the Agreement, any dispute shall be referred to arbitration under the ICC Rules, with the seat of arbitration to be agreed upon by the parties. The ICC Rules provide that in the event of a disagreement, the seat of arbitration will be determined by the arbitral tribunal immediately after submission of the application. That the Respondent is a Spanish corporate entity based in Spain as provided in the Particular Conditions of the parties' Agreement and the applicable law is Spanish law, as per the Agreement and it is therefore only just and proper for the seat of arbitration to be in Spain.
9. The Respondent claims that the Applicant has deliberately and blatantly failed to abide by the ICC Rules with the sole aim of extending the judicial process sine die to ensure that the injunction measures remain in place and that the Applicant is now seeking the Court's directions to have arbitral procedure conducted in Kenya contrary to the arbitration clause in the Agreement. For these reasons, the Respondent urges the court to dismiss the application.

Analysis and Determination

10. I have carefully considered the rival pleadings and written submissions of the parties and I note that the court is being called upon to determine whether it should appoint an arbitrator in line with Order 45 Rule 6 of the Rules and in addition to also determine the seat of arbitration.
11. It is the Applicant's position is that the parties have failed to agree on the appointment of an arbitrator and hence the invocation of the aforementioned provision which provides in part that the court can appoint an arbitrator '....where the parties cannot agree within thirty days with respect to the appointment of an arbitrator..' However, the Respondent has rebutted by stating that it is the Applicant who has not followed the procedure of commencing the arbitral proceedings as provided for in the Arbitration Agreement and thus deliberately frustrating the process.
12. In the agreement between the parties, the parties agree that their arbitration is to be settled under the ICC Rules by one or more arbitrators appointed in accordance with the said Rules and that the seat of arbitration is to be agreed between the parties. The Respondent stated that the ICC Rules establish that Arbitral proceedings must be initiated by addressing the application to the Secretariat at any offices specified in the Internal Rules namely Paris, Abu Dhabi, Hong Kong, New York, Sao Paolo or Singapore. In the alternative, the Applicant can commence the arbitration by making an application through the online platform known as Case Connect.
13. I note that the Applicant did not controvert this position and I have gone through the said ICC Rules which have been annexed by the Respondent in its deposition and I find that this is indeed the correct position. Article 3(1) therein provides that all written communication submitted by any party must be sent to the Secretariat and Article 4(1) provides that a request for arbitration must also be submitted to the Secretariat "at any of the offices specified in the Internal Rules" and the Applicant did not dispute that Kenya is not one of the named Secretariat offices.
14. I note that the Applicant's letter seeking the appointment of an arbitrator and essentially "commencing the arbitration" is addressed to the International Chamber of Commerce, Kenya Section whose offices are located in Nairobi. It therefore follows that the Applicant has not followed the correct procedure in commencing the arbitration as the application has not been lodged with the Secretariat as required by the ICC Rules



15. The Respondent also stated that the ICC Rules provide that the Applicant pay a non-refundable fee of USD 5,000 but that the Applicant has not paid the same. Instead, the Applicant has provided proof that it has paid only USD 3,000. The Applicant did not rebut this position or provide proof of payment of the USD 5,000 and I have gone through Appendix III of the ICC Rules and confirmed that indeed “Each request to commence an arbitration pursuant to the Rules must be accompanied by a filing fee of US\$ 5,000...” Even going by the Applicant’s deposition, its application will fall short as it stated that it only paid USD 3,000. With the above, I am inclined to agree with the Respondent that the Applicant has not followed the procedure as per the ICC Rules in commencing the arbitration.
16. On the seat of arbitration, both parties made requests to each other with the Applicant opting for Nairobi, Kenya whereas the Respondent opting for Spain. When the parties cannot agree on the seat of arbitration, I agree with the Respondent that Article 18 of the ICC Rules provides that the same shall be fixed and determined by the International Court of Arbitration of the International Chamber of Commerce and/or the arbitral tribunal and not this court.
17. It is therefore my net findings that the Applicant has not fully commenced the arbitration in line with the parties’ Agreement and in accordance with the ICC Rules cited above, that provides for the appointment of an arbitrator and the seat of arbitration. Whereas I agree that the *Arbitration Act* allows the court to intervene and appoint an arbitrator for parties, such an intervention is circumscribed and an applicant must demonstrate that efforts were made to comply with the applicable procedure set out in the parties’ agreement, the Act or the Rules thereunder but the same failed (See In re Application for Appointment of an Arbitrator (Miscellaneous Application *E28 of 2022*) [2022] KEHC 13294 (KLR) (20 September 2022) (Ruling) and *Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited (Interested Party) (Petition E001 of 2021)* [2022] KEHC 48 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)]

Disposition

18. To this end, it is my opinion that the Plaintiff/Applicant’s Notice of Motion dated 21st June 2024 inviting this court to appoint an arbitrator cannot stand. Parties having chosen to settle their disputes through Arbitration as per the ICC Rules should proceed and do so in accordance with the Arbitration rules therein. As pointed earlier in this decision, the rules set out the procedure to be followed when a party seeks to commence arbitral proceedings.
19. For the avoidance of doubt, the court notes two major steps to be taken. Firstly, the parties are to deposit a payment of USD 5,000 to the ICC and Secondly notify any of its regional offices located in the named offices under the Rules cited hereinbefore in this determination.
20. The Courts position remains as per its Ruling of 24th June 2023 in which the parties were directed to procedurally commence the arbitration proceedings in accordance with the agreement between the parties. The court will therefore decline the invitation being made by the present application to get involved in the process of arbitration. Parties are therefore directed to proceed and commence the arbitration as envisioned in their agreement in which they set out for themselves.
21. For avoidance of doubt, the Applicant should pay the filing fee of \$5,000, or the balance thereof and direct its letter seeking the appointment of an arbitrator to the International Court of Arbitration of the International Chamber of Commerce Secretariat at any offices specified in the Internal Rules namely Paris, Abu Dhabi, Hong Kong, New York, Sao Paulo or Singapore. In the alternative, the Applicant can commence the arbitration by making an application through the ICC online platform known as Case Connect.



22. The matter shall be mentioned in six months to confirm the progress made by the parties and issue further directions. The interim orders of protection issued by the court on 1st November 2021 and extended on 14th October 2022 shall remain in force until such time the matter is mentioned before the court.

23. Each party to bear its own costs. It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 19th DAY of SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Gitonga holding brief for Mr. Mogeni for the Applicant.
2. Ms. Miima holding brief for Ms. Onyango for the Respondent.
3. Amos - Court Assistant

