



**Diwafa Investments Ltd v Principal Secretary, State Department for
Housing & another (Miscellaneous Civil Application E020 of 2023)
[2023] KEHC 4017 (KLR) (Commercial and Tax) (5 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E020 OF 2023
JWW MONG'ARE, J
APRIL 5, 2023**

BETWEEN

DIWAFI INVESTMENTS LTD APPLICANT

AND

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR HOUSING 1ST
RESPONDENT**

HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. By a certificate of urgency, the applicant has moved this court through a notice of motion dated January 15, 2023 seeking the following orders;
 1. Spent
 2. That the honourable court does appoint an arbitrator to hear and determine the contractual dispute between the applicant and the respondent.
 3. In the alternative to order 2, that the honourable court directs the appointment of an arbitrator by any appropriate body or authority within 14 days from the date of this order.
 4. That costs of this application be provided for.
2. The application is supported by the grounds set on the face of it and the supporting affidavit of Abdi Sheikh Ahmed sworn on January 13, 2023. The application is opposed and the respondent has filed a replying affidavit sworn by Charles Mwangi Hinga, the Principal Secretary, State Department of Housing and Urban Development.



3. Briefly the facts surrounding this matter revolves around a contractual dispute between the parties where the respondent has refused to release to the applicant, the sum of Kshs 20,000,000/- held as retention sums despite the completion of the contract.
4. The applicant states that it discharged its contractual obligations under the contract under great financial challenges which left it facing financial ruin and a possible insolvency. That in the contract between the parties, there is anticipated a setting up of a dispute board to be set up, in the event of a dispute arising from the contract, to resolve any issues therein.
5. The applicant alleges that attempts to trigger the setting up of the dispute board on its part, has been frustrated by the respondents who have rejected all members proposed by the applicant to the said board, for various reasons, but at the same time, failed to propose any member to trigger the setting up of the said dispute board. That the period for setting up of the dispute has since long lapsed and the only recourse is to refer this matter to arbitration.
6. Subsequently, the matter is in limbo since the particular clause in the contract, being clause No 20.6, which provides that where a dispute board is not set up, any party can refer the matter to arbitration, does not stipulate the manner or modalities of appointment, identity or qualification of an arbitrator, hence the application before this court to unlock the deadlock.
7. The application is opposed and in his replying affidavit, the 1st respondent, while confirming that indeed the contract provided for a dispute board to be set up once a dispute arose, to be appointed jointly by the parties, states that no suitable candidate or candidates acceptable by both parties has been identified.
8. The respondent further contents that the application is premature as the parties have not exhausted the mechanisms anticipated by the contract in resolving the disputes arising from the contract. He further submits that the parties have not failed to identify members to the dispute board as anticipated in the contract but should be allowed time and space to do so. The respondent further argued that parties are legally bound by the terms of the contracts they enter into and to ask the court to decide for them on the issue of the appointment of an arbitrator, that would amount to the court rewriting the contract for them.
9. The parties made oral submissions which I have considered.

Analysis and Determination:

10. I note from the submissions of the parties that the contract from which the dispute arises from was entered into on March 21, 2016 and it is not disputed that the same has been fully executed. That the parties are in agreement that what is pending and from which the dispute arises, is the release of the retention money being a % of the contractual sum of Kshs 25,000,000/-. The applicant submitted that it made a demand for the payment and to which the respondent has ignored and or failed to make good, leaving the applicant no option but to move the court for the appointment of an arbitrator, in line with the terms and conditions of the contract between the parties, which it has now done.
11. I note that the contract under clause 20.3 envisions the establishment of a dispute board to first hear and resolve any dispute between the parties. I also note that attempts at setting up the said dispute board failed on account of the parties failing to agree on its membership. In the said contract, where the dispute board is not set up within the time frame envisioned by it, either party can refer the dispute therein for arbitration. The contract is however silent on the mode of having the process of appointment of the arbitrator set up.



12. It is true that courts have tended to leave parties to contracts to their devices and shy away from interfering with contractual agreements especially where there is no ambiguity. The Court of Appeal however, stated in the case of *National Bank of Kenya Ltd v Pipellastic Samkolit (K) Ltd* [2002] 2 EA 503, at page 507, as follows;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.

While courts will allow parties to be bound by the terms, they put up in the contracts they create for themselves, courts have a duty to help parties resolve issues when called upon.

13. In the case before this court, the matter has been unresolved since 2016, and it appears to me that one party is happy to have the status quo persist hence the repeated rejection of all members proposed to the dispute board to unlock the stalemate. Section 12 of the *Arbitration Act* has set up elaborate steps of the appointment of an arbitrator especially where parties find it difficult to agree. Section 12 provides as follows; 12. Appointment of arbitrators

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6. The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.

7. The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.

8. A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.

9. The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

14. To my mind, to allow the situation to persist is to render an injustice to the party who has declared a dispute and requires the issue to be resolved to allow payment of the retention sum or a determination of the same. I am therefore persuaded that under section 12 of the *Arbitration Act*, 1995, cited above, the court has the relevant power to either appoint an arbitrator or direct a relevant body appoint an arbitrator taking into consideration the nature of the contract and the technical skills necessary therein.

15. Flowing the above finding, I hold and find that this application is merited and I shall allow it. The dispute remaining unresolved on the retention funds shall be resolved through arbitration by a sole arbitrator with knowledge and the relevant technical skills and know-how of the construction industry and relevant skills in arbitration of similar matters, taking into account the nature of the contract and the dispute at hand.



16. The sole arbitrator shall be appointed by the Chartered Institute of Arbitrators Kenya chapter (CIArb) within 14 days from the date of this order. Further, the cost of arbitration once agreed upon by the parties and the arbitrator, as set out in the Act, shall be paid by both parties equally.

17. Each party to bear their costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF APRIL 2023.

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J. W. W. MONG'ARE

JUDGE

IN THE PRESENCE OF: -

Mr. Brian Khaemba for the Applicant.

No appearance for the Respondents.

Sylvia- Court Assistant

