Dinesh Construction Ltd v County Assembly of Kisumu (Arbitration Cause E004 of 2022) [2023] KEHC 17294 (KLR) (Commercial and Tax) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17294 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E004 OF 2022

PN GICHOHI, J

MAY 11, 2023

IN THE MATTER OF AN ARBITRATION

BETWEEN

DINESH CONSTRUCTION LTD ..... CLAIMANT

AND

COUNTY ASSEMBLY OF KISUMU ..... RESPONDENT

(Arising out of a Contract dated October 14, 2014 for the construction of County Assembly Offices for the employer.)

RULING

1. The background of this matter is that the Respondent and the Claimant entered into an agreement dated October 14, 2014 for the construction and completion of the proposed County Assembly building situated at Milimani area in Kisumu. The Contract Was Kshs 745 ,000,000/= .

2. The Agreement contained a clause on how a dispute that may arise between the parties would be resolved. Specifically, that was clause 37.1 of the Agreement which provided as follows:

> " In case any dispute or difference shall arise between the Employer or the Project Manager on his behalf and the Contractor either during the progress or after completion or termination of the works , such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an arbitrator within thirty days of notice. The dispute shall be referred to arbitration and final decision of the person to be agreed between the parties. Failing to agreement to concur on the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of any of the following professional institutions;

i. Architectural Association of Kenya

ii. Institute of Quantity Surveyors of Kenya

iii. Association of Consulting Engineers of Kenya

iv. Chartered institute of Arbitrators (Kenya Chapter)

v. Institution of Engineers of Kenya."

3. A dispute did arise between the parties and pursuant to the above clause, the Claimant referred the dispute to arbitration and there being no concurrence on the appointment of the Arbitrator, the Chairman of the Architectural Association of Kenya appointed QS Tom Oketch as the Sole Arbitrator who commenced the process of hearing of the dispute.

4. It is then that the Respondent filed a Preliminary Objection and sought that the Claimant's claim be dismissed with costs to the Respondent for reasons that:-

    1. The entire proceedings and the Claimant's claim are predicated on illegality and is against public policy, the underlying contract having been entered in violation of the pertinent provisions of Public Procurement and Asset Disposal Act .

    2. Contrary to Section 4 of the *Arbitration Act, 1995*, Section 34 of *Limitation of Actions Act* Cap 22, and the general principles of arbitration, the claim and proceedings herein are inherently defective, legally defective and void ab initio, the right of claim having lapsed in January 2015 and the claim caught up by statute of limitations.

    3. The claim and the entire proceedings are an abuse of the law and unfair to the Respondent , the Claimant now purporting to commence arbitration against the Respondent over seven years from the date when the alleged right of action accrued and in violation of Art 50 and 159 of the *Constitution of Kenya* requiring just and timely determination of disputes.

    4. The Tribunal lacks jurisdiction in the circumstances and under Section 17 of the *Arbitration Act* to determine the dispute for which the cause of action has lapse under operation of statute of limitations.

    5. The cause of action having abated, there is no dispute for which the Tribunal could preside over for determination.

    6. The Claimant failed to comply with a mandatory pre-condition to referring a dispute to arbitration; making a declaration under Clause 37. 4 within 90 days of the grounds or facts leading to a dispute arising thus the claim must fail for skipping vital mandatory pre- condition.

    7. Without prejudice to the foregoing, the Claimant's claim was brought after the expiry of the validity period (April 25, 2016) when the contract had already lapsed , and is caught up by the doctrine of latches thus denying the Tribunal jurisdiction over it.

    8. The entire claim and the proceedings are an abuse of the process of the Tribunal, the provisions of the *Constitution* and relevant laws of Kenya.

5. Upon the parties filing their submissions, the Arbitrator published the Ruling dated December 14, 2021 dismissing the Preliminary Objection. Aggrieved by that ruling, the Respondent filed before this Court Originating Summons dated January 14, 2022 together with a supporting affidavit sworn by Owen Ojuok on December 31, 2022 and Chamber Summons dated January 14, 2022 under certificate of urgency through the firm of Wasuna & Co advocates seeking orders that;

1. Spent

2. Spent.

3. Pending hearing and determination of the Plaintiff/ Applicant's Originating Summons, there be s a stay of proceedings of the subject Arbitration matter.

4. Costs of and incidental to this application be provided for.

5. The grounds thereof are that the Arbitrator dismissed the Preliminary Objection on the grounds that the matters raised could not be determined without going into facts and evidence and hence did not meet principles of a preliminary objection but went ahead to conclude that the contract was illegal and that the claim was not time barred .

6. The Respondent further states that the decision by the Arbitrator was contradictory and inconsistent amounting to determining the dispute on merit but at preliminary stage. The Respondent therefore states that it will be needless to subject taxpayers' resources in defending the claim on merit based on the said ruling and this would amount to wastage of public resources.

7. In reply and through the firm of Nyaanga and Mugisha Advocates, the Claimant filed an affidavit sworn by Dinesh K. Mbachu on February 9, 2022 reiterating the background of the Claimant's claim, the Preliminary Objection, the submissions before the Tribunal, and supported the Ruling by the Arbitrator that the Preliminary Objection did not meet the requirements of a Preliminary Objection .

8. He further states that any reference to evidence by the Tribunal did not invalidate the initial finding the Preliminary Objection did not meet the requirements of a Preliminary Objection as it required the ascertainment of various facts and not based purely on points of law.

Sumbmissions

9. Parties filed and exchanged submissions as a means of disposal of this Application and Originating Summons. The firm of Wasuna & Co advocates filed theirs dated May 26, 2022 listing issues six issues for determination. Counsel reiterated the background of the matter and on the issue of whether the Tribunal had jurisdiction to determine the issue where the claim is time barred, counsel referred to Clause 37.3 and 24 .6 of the Agreement and terming Clause 37.3 as in the nature of statute of limitation, he submitted that failure by the Respondent to honour the limitation was fatal.

10. While citing the case of *Gathoni v Kenya Cooperative Creameries Limited* Civil Application No. 112 od 1981, *Peter Ouma Onyango v Mats Karlsson* [2021]eKLR , *Kenya Airfreight Handling Ltd (KAHL) V Model Builders and Civil Engineers (K) Limited* [2017] eKLR and *Naftali Onyango v National Bank of Kenya* [2005] eKLR, counsel submits that limitations in the arbitration clauses are not in vain. He urges the Court to find the delay by the Respondent to initiate or prosecute the claim inexcusable.

11. In their submissions dated July 6, 2022, counsel from the firm of Nyaanga and Mugisha Advocates urged the Court to note the description of parties herein and as initiated by the firm of Wasuna & Co advocates in this matter and intimated that for purposes of submissions, they opted to refer the parties as Appellants and Respondent respectively.

12. On the Six issues for determination by this court as listed in the Originating Summons , counsel cited the case of *West Mount Investments Limited v Tridev Builders Company Limited* [2017]eKLR where High Court stated that where the arbitral forum determines it has jurisdiction, then a party aggrieved

may apply to High Court to decide on the matter of jurisdiction under Section 17 (6) of *Arbitration Act* and Rule 3 of the *Arbitration Rules 1997* and not a review or appeal. Counsel however submits that the Application dated 14th January is unmerited, unsubstantiated and failed to show how the Tribunal erred in the impugned ruling.

13. While also emphasising the material in the replying affidavit, counsel lists two issues for determination that is;

    1. Whether the Application dated January 14, 2022 is merited.

    2. Who should bear the costs of this application.

14. Retaliating the Preliminary Objection before the Tribunal was not strictly on points of law to qualify as a preliminary objection, counsel relied on the case of *David Karobia v Charles Nderitu Gitoi & another* [2018] eKLR and the Supreme Court pronouncement in the case of *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* [2015] eKLR on what should be a preliminary objection and submitted that the Arbitrator was correct in dismissing the Preliminary Objection. Counsel therefore urged the court to dismiss this application with costs to the Respondent for being incompetent, defective and without merit.

15. In their supplementary submissions dated 26th September 2022, the firm of Wasuna & Co Advocates urged the court to note their interchange in the description of parties and calling it an oversight on their part, counsel urged the court to note that the court was moved under section 17 (6) of the *Arbitration Act* and Rule 3 (10) of the *Arbitration Rules* in both the Chamber Summons and Originating Summons where parties have been referred to as the Plaintiff and the Defendant. While citing the case of *West Mount Investments Limited v Tridev Builders Company Limited* [2017]eKLR, counsel urged the court to invoke Article 159 (2) (d) of the *Constitution* and consider doing substantive justice as opposed to the procedural technicalities therein.

Determination

16. This Court confirms that indeed, when instituting the matter, the subject herein, the Applicant , through its counsel, referred to the matter as

> "An appeal against the entire decision of the Arbitral Tribunal on the Plaintiff's Preliminary Objection to the jurisdiction of the Tribunal delivered by Notice on December 15, 2021."

They also referred County Assembly of Kisumu as Plaintiff and Dinesh Construction limited as the Defendant. They further refer Dinesh Construction limited as the Claimant and County Assembly of Kisumu as the Respondent. In their submissions, they further referred to Appellant's submissions".

17. It would not be an oversight for counsel to file the pleadings as an appeal against the ruling of the Arbitrator and still refer to the same in submissions. That reference in the Originating Summons and Chamber Summons make the Application dated 14th January 2021 incompetent. However, this Court is bound to do substantive justice by determining the real issues in controversy before it as raised by parties and that is the reason the court ignored the references and referred to parties as Claimant and Respondent for ease of clarity.

18. On merit, the jurisdiction of this Court in clearly invoked in the Originating Summons, the substantive law being Section 17 (6) of the *Arbitration Act* No. 4 of 1995 and Rule 3 (1) of the *Arbitration Rules*. Section 17 provides;

> " The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—
>
> (a) ...
>
> (b) ...
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (5) ...
>
> (6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter."

19. The application to High Court is provided for under Rule 3 (1) of the *Arbitration Rules* that

> " Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date."

20. Having complied with those provisions of the law, the issues for consideration by the Court are ;

    1. The Tribunal had jurisdiction to hear and determine the Claimant's Claim.

    2. Who bears the costs of this application.

21. In determining those issues, the Court has to bear in mind that this is not an appeal against the ruling by the Arbitrator though the arguments by the parties seem to be inclined to the direction of an appeal. They both refer to the case of *West Mount Investments Limited v Tridev Builders Company Limited* [2017]eKLR, where Ongoto J faced a similar issue and had this to say :

> " As already pointed out, the application to the High Court under Section 17(6) the Act is not an appeal. The court must then in considering the matter exercise an original jurisdiction and is not beholden to any findings of fact by the arbitral tribunal. The court is to evaluate the evidence, assess it and make its own conclusion while relating the same to the arbitration agreement which the court is also to construe independently. Even if it was to be deemed that an application under Section 17(6) of the Act is an appeal, it would still be a first appeal and the High Court would still be under an obligation to re-evaluate and consider all the evidence and material laid before the arbitral tribunal and make its own conclusions: see Selle v Associated Motor Boat Company [1968] EA 123 and Ramp Ratua & Company Ltd v Wood Products Kenya Ltd CACA No. 117 of 2001.
>
> In my view, for any application under Section 17(6) of the Act the court is to consider four substantive issues. First, is whether there is a valid arbitration agreement. Secondly, is whether the arbitral tribunal is properly constituted and, thirdly, whether matters have been

submitted to arbitration in accordance with the arbitration agreement. Finally, is whether the matters submitted to arbitration fall within the scope of the arbitration agreement."

22. This Court maintains that an application under Section 17 (6) of the *Arbitration Act* is a provision for aggrieved party to appeal a ruling by the Arbitrator however parties would like to disguise it. In determining if the Tribunal had jurisdiction to hear and determine the Claimant's claim, this Court would confine itself first and foremost by ascertaining whether there was an agreement between parties and that the said agreement did bear an arbitration Clause to the effect that if the dispute did arise between the parties, then the dispute will be referred to Arbitration.

23. There is no dispute here that the parties did enter into such an agreement freely and which had an arbitration clause. That Agreement also had a clause on appointment of the Arbitrator and this was also done. The Arbitrator was duly appointed pursuant to the arbitration clause in that agreement.

24. To that extent then, the Arbitrator had jurisdiction to handle the dispute between the parties. The problem arose when the Respondent filed a Preliminary Objection as earlier highlighted by this Court.

25. It should not be lost to parties that the *Arbitration Act* is self-regulating and the Courts should not intervene in matters governed by the Act and that is the essence of Section 10 of the Act. Even as this Court is not sitting on appeal , parties have heavily relied on the ruling of the Arbitrator dismissing the Respondent's Preliminary Objection that the Arbitrator lacked jurisdiction to hear the claim.

26. As there seems to be arguments on whether the objection raised by the Respondent amounted to a Preliminary Objection, it is important to emphasise that the law has been settled as to what constitutes a Preliminary Objection. The Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 stated: -

> " ...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion."[Emphasis added]

27. A preliminary objection should be purely on point of law. It ceases to be a preliminary objection when the Court starts to interrogate the facts and evidence. A plea of limitation in arbitration is provided for under Section 34 of the *Limitation of Actions Act* Cap 22 law of Kenya in the following terms;

    1. This Act and any other written law relating to the limitation of actions apply to arbitrations as they apply to actions.

    2. Where a submission contains a term that no cause of action shall accrue in respect of a matter, the cause of action, for the purposes of this Act and of any other written law relating to the limitation of actions (whether in their application to arbitration or to other proceedings), accrues in respect of any such matter at the time when it would have accrued but for that term in the submission.

    3. For the purposes of this Act and of any other written law relating to the limitation of actions, an arbitration is taken to be commenced when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or to concur in the appointment of an

arbitrator or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him to submit the dispute to the person so named or designated.

4. Any such notice as is referred to in subsection (3) of this section may be served in the manner prescribed for the service of a civil summons, as well as in any other manner provided in the submission.

5. Where the court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the court may further order that the period between the commencement of the arbitration and the date of the order of the court be excluded in computing the period of limitation prescribed for the bringing of an action or commencement of arbitration proceedings with respect to the dispute referred.

6. In relation to an arbitration under a written law, subsections (3) and (4) of this section have effect as if the references to the submission were replaced by references to such provisions of the written law as relate to the arbitration."

28. The Respondent herein argues that that Clause 37.3 as in the nature of statute of limitation and therefore failure to honour it was fatal. On the other hand, the Claimant argues the Respondent's interpretation of Clause 37.3 is flawed in that the Claimant commenced the process of arbitration within 90 days period as required by clause 37.3 of the agreement by giving a notice on June 3, 2019 immediately the dispute arose. It is therefore clear that the Respondent's Preliminary Objection is not a clear point of law. It requires going into facts and evidence to determine if the claim was time barred or not.

While dealing with the preliminary objection, the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR had this to say:

> " It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law...
>
> The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

29. From the material before this Court, and guided by the court of appeal and supreme Court decisions on what constitutes a preliminary objection. This Court is satisfied that what was before the Arbitrator and reiterated before this court is not a preliminary Objection.

30. There is a reason the parties chose to resolve their dispute through arbitration. They should respect that they are bound by that decision. The Respondent should allow the Arbitrator to deal with the matter on merits. Their quest to save taxpayers resources from alleged wastage should not be used as a shortcut to justice.

31. In the upshot, the Originating Summons dated January 14, 2022 is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 11TH DAY OF MAY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Applicant

N/A for Respondent

Alphline Owiwa , Court Assistant