Karen One Development Limited v Nipsan Construction Company Limited (Miscellaneous Application E664 of 2022) [2023] KEHC 17333 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E664 OF 2022

A MABEYA, J

MAY 12, 2023

BETWEEN

KAREN ONE DEVELOPMENT LIMITED .... PLAINTIFF

AND

NIPSAN CONSTRUCTION COMPANY LIMITED .... DEFENDANT

RULING

1. The application before Court is the plaintiff's Originating summons dated 20/9/2022. It is expressed to be brought under section 17(6) of the *Arbitration Act* No 4 of 1995, Rule 3(1) of the *Arbitration Rules* 1997, Section 1A, 1B and 3A of the *Civil Procedure Act* CAP 21 laws of Kenya. Order 52 rule 7 of the *Civil Procedure Rules*.

2. The plaintiff sought orders to set aside the ruling/preliminary award delivered by the arbitrator on 24/8/2022 and consequently uphold the plaintiff's preliminary objection dated 1/8/2022. The plaintiff also sought for costs of the application.

3. The grounds for the application were set out on the face of the application and the supporting affidavit of Farhana Hassanali dated 20/9/.2022. It was contended that the defendant had instituted arbitral proceedings against the plaintiff via an amended statement of claim dated 4/4/2022 for a sum of Kshs. 39,471,668.00/=.

4. That their construction contract under clause 45.3 had provided that the arbitral proceedings would not be commenced before giving notice of 90 days to the opposing party. It was averred that the notice of the dispute was issued by a letter dated 21/9/2020 which was outside the prescribed time. That the arbitral tribunal was constituted six years after the cause of action had arisen and the same was outside the period prescribed by the contract.

5. It was against this background that the plaintiff filed a preliminary objection on 1/8/2022 challenging the arbitral proceedings. That a ruling was delivered by the tribunal on 24/8/2022 dismissing the plaintiff's objection. It was the plaintiff's case that it had challenged the jurisdiction of the tribunal on the basis that the arbitral proceedings were against the limitation provided for by the contract as well as law.

6. The application was opposed through the affidavit dated 13/10/2022 sworn by the managing director of the defendant Mr. Chandrakant Karsan Rabadiya. He stated that the dispute arose after the plaintiff refused to finalize and prepare final accounts of the project. He observed that the plaintiff had raised a preliminary objection on the grounds that the arbitration had been commenced out of time.

7. That the arbitrator stated that the preliminary objection did not raise a point of law as the issues raised had challenged facts that had to be tested and ascertained. He stated that the application had been filed to curtail the arbitral proceedings and urged the court to dismiss the same.

8. The application was canvassed by way of written submissions. The plaintiff submitted that it had raised the preliminary objection challenging the jurisdiction of the tribunal on the grounds that the claim was statute barred. It was submitted that clauses 45.1, 45.2 and 45.3 of the contract provided that the defendant was required to give a notice of the dispute within 90 days after the discovery of the issue pertaining the dispute. That the dismissal of the preliminary objection on the ground that the objection raised issues of fact was erroneous.

9. On its part, the defendant submitted that the arbitral proceedings started in September 2020 and according to the *limitation of actions Act*, the time stopped running the time the notice to appoint an arbitrator was served upon the other party. Counsel submitted that the preliminary objection did not raise a point of law.

10. I have considered the application, the response and the submissions on record. The plaintiff's complaint is that the tribunal erred in dismissing its objection which was two pronged. It had challenged the jurisdiction of the arbitrator on the basis that the claim had been brought outside the limitation period of 6 years and secondly, that the defendant did not give a 90days notice as required under the contract.

11. The background to this case is that, on 15/11/2011 the parties entered into an agreement for the construction of an office block complex. The Practical Completion Certificate was issued on 30/6/2014 confirming that 24/2/2014 was the practical completion date. Certificate Nos. 24 and 25 were paid on 18/12 and 4/7/2017, respectively. There seems to have been correspondence between the parties but the same was not disclosed to this Court.

12. On the first issue of limitation of time, section 4 of the *Limitation of Actions Act* provides: -

> " 4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:
>
> a. actions founded on contract;
>
> b. ..."

13. On this issue, the tribunal observed that correspondence demonstrated that the parties were in communication and there was no 6 year lapse of communication with the claimant. That the 6-year period was not yet over.

14. Actions relating to contracts can only be brought before the lapse of six years from the time the cause of action accrued. In South Nyanza Sugar Company Limited v Dickson Aoro Owuor (2019) eKLR, the court held that: -

> " ... It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period."

15. Similarly, in Allan P. Karanja *Wathigo vs C.M.C. Holdings Company Ltd* [2007] eKLR, the court held that: -

> " I feel that it is important to emphasize the fact that the time stipulated in the *Limitation of Actions Act*, only begins to run from the date when the cause of action accrues. That may or may not be the date when parties execute a contract or agreement.
>
> I wish to point out that ordinarily, the execution of an agreement, does not, by itself, give rise to a cause of action. It is usually when one or the other party to such an agreement breaches the said agreement that a cause of action accrues."

16. Based on the circumstances of the case, it is clear that the practical completion was in February, 2014. The final accounts were supposed to be prepared within 6 months thereafter. The same was not prepared. There is no evidence that the same was demanded for. Time started running against the claim on 25/8/2014.

17. However, the limitation set in section 4 of the *Limitation of Actions Act* is qualified. Where there is an acknowledgement or part payment. See section 23 of the *Limitation of Actions Act*. By making payments past September, 2014, as late as 2017, that was an acknowledgment of the debt. Accordingly, time started to rune when the last payment was made, that is 2017. The claim was therefore not time barred under the *Limitation of Actions Act*.

18. Be that as it may, the plaintiff contended that the claim was not maintainable as there was no notice of dispute that was given in terms of the contract. The plaintiff relied on Clause 45 of the contract. That Clause provided as follows: -

> "45.1 In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment 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 the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the The Architectural Association of Kenya, on the request of the applying party.
>
> ....
>
> 45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract.

...

45.3 Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute."

19. That clause was clear. If any party wished to refer any dispute to arbitration, it was incumbent upon it to give notice of the dispute within 90 days of the occurrence of the matter giving rise to the dispute.

20. My understanding of this clause (45.3) is that, once an event occurred which led to a dispute, the aggrieved party should give notice of such within 90 days of that occurrence. That requirement is for good reason. It is meant to put the offending party on notice of the impending consequences.

21. The cases cited by the Plaintiff's Advocates in the submissions come in handy. In *Kenya Airfreight Handling Ltd vs Model Builders & Civil Engineers (K) Ltd* [2017] eKLR, Onguto J held:-

" 30. Both parties submitted before me that the notification anticipated under clause 45.3 was not issued until 27 November 2013. I did not have opportunity to sight this notification, as neither party produced it or availed a copy to the court. The non-production is however not prejudicial to either party as it is not the content that is critical but rather the date of notification, which the parties have agreed was 27 November 2013. I state so as the arbitration agreement does not provide any standard format of the notification contemplated under Clause 45.3 and thus the specific ingredients are also not prescriptive. However, the aim of the time bar clause under Clause 45.3 must be to draw the other party's attention to the existence of a dispute and assist the parties to swiftly deal with the dispute: see *West Mount Investments Ltd –v- Tridev Builders Company Ltd* (Supra) and also The Simonburn [1972] 2 Lloyds R 355. 31. I must point out that in the instant case the notice under Clause 45.3 is not intended to commence arbitration, rather a second notice is anticipated under Clause 45.1. The latter notice can only be given after the expiry of at least 90 days after service of the notice under Clause 45.1. 32. I must also point out that contractual time bar clauses equivalent to clause 45.3 may often appear bad bargains as they limit the parties right to move to the preferred mode of dispute resolution but their aim and purport is crucial in commercial transactions and relationships. Parties should never deal whilst unknown claims await them. Consequently, contractual time bar clauses will be enforced and also strictly applied. I have to strictly enforce the instant clause. 33. I have found that the dispute arose on 18 July 2013. I have also found, on admission by the parties that a notification was given pursuant to Clause 45.3 on 27 November 2013. This was beyond the prescribed time limit. Effectively, when the Respondent triggered the arbitration process and caused the appointment of the arbitrator, an important step in the process had not been undertaken within the prescribed time. 34. Even if the Respondents version that the dispute arose on 27 August 2013 was to be accepted, then still the notification of 27 November 2013 was outside the ninety-day period by some odd day. It does not appear that the time limit was struck as an agreement between the parties. I have no powers to redraw the contract and extend that time-limit."

22. Further, in *West Mount Investments Ltd Vs Tridev Builders Company Ltd* [2017] eKLR, the Court held:-

> "28. West Mount complains that Tridev failed to observe a time limit clause which was to help trigger the dispute resolution clause. West Mount states that Tridev failed to give notice within the time prescribed under clause 45.3 of the JBC Agreement and thus it (Tridev) lost the right to have the dispute resolved through arbitration. According to West Mount it was mandatory that the prescribed period of ninety days is observed otherwise the right to arbitration (over the dispute) was lost. 29. Contractual time bar clauses are a common place in commercial, especially engineering and construction, contracts. They vary from contract to contract. Some state when a claim may be commenced, others state when arbitration or litigation may be instituted. Yet others make notification of dispute a mandatory prerequisite to lodging any claim or commencing any arbitration. The purpose of a contractual time bar clause is to ensure that any dispute that may arise is dealt with swiftly: see The *Simonburn* [1972] 2 Lloyds Rep 355 at 394 per Lord Denning MR. The clauses also help in ensuring that relevant evidence in support of or in opposition to a claim (or dispute) is assembled with samples not destroyed and scenes or sites not altered beyond recognition. Effectively, contractual time bar clauses allow greater commercial certainty with parties able to deal and transact without the potential threat of unknown claims. There is no point in a party keeping a dispute up his sleeve with a "wait and see what happens" attitude while considerable costs and expenses are incurred. 30. As contractual time bar clauses make reasonable commercial sense in administration of contracts and management of risk, courts ordinarily will not and should not interfere especially where the parties have equal bargaining strength. If claims fall foul of such limitation clauses then the claim or the arbitral process may be barred, even where it appears to have been a bad bargain. 31. Where the effect of default is to bar the right to arbitrate or obtain remedy in arbitration, then any arbitral forum constituted despite the default will lack jurisdiction. But where the effect is to extinguish the claim, then the arbitral tribunal, will be possessed with the jurisdiction to decide if the claim is barred i.e. whether it is "a dead claim".

23. From the foregoing, it is clear that the time bar clauses are not only a common feature in commercial transactions, but significant for certainty. They are not mere supplasage in such contracts but they are to be enforced.

24. In the present case, the notice was issued on 21/9/2020. The defendant did not therein indicate when the incident or event that led to the dispute arose. Since however, the monies claimed feel due in or about September, 2014 (or 2017 when the last payment was made), that was hopelessly outside the 90-day period stipulated under clause 45.3 of the contract.

25. That being the case, the arbitrator had no jurisdiction to entertain a dispute that was time barred.

26. In view of the foregoing, I hold that the Originating Summons dated 20/9/2023 is meritorious. Consequently, it is allowed, the preliminary Award delivered by Hon. Stanley Kibathi CI Arb, on 4/8/2022 is hereby set aside and the plaintiffs preliminary objection dated 1/8/2022 upheld.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE