



**S & M Properties Limited v MBA Construction Limited (Commercial Appeal E022 of 2022) [2023] KEHC 3952 (KLR) (Commercial and Tax) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E022 OF 2022**

**A MABEYA, J**

**MAY 5, 2023**

**BETWEEN**

**S & M PROPERTIES LIMITED ..... APPELLANT**

**AND**

**MBA CONSTRUCTION LIMITED ..... RESPONDENT**

*(Being an Appeal from the whole of the Ruling of the Hon. D.M Kivuti Principal Magistrate delivered on 4/2/2022 in Civil Suit No. E1473 of 2021 at the Chief Magistrate's Court at Nairobi)*

**JUDGMENT**

1. The respondent filed the lower court suit against the appellant seeking payment of Kshs. 3,930,111/= and interest from 13/6/2018 until payment in full.
2. The appellant responded by filing the application dated 6/4/2021 seeking orders that the dispute be referred to arbitration in accordance with clause 45 of the agreement dated 7/2/2017.
3. The respondent opposed the application and the parties filed written submissions. Vide a ruling dated 4/2/2022, the trial court dismissed the application.
4. The appellant was aggrieved by that decision and filed the instant appeal vide the memorandum of appeal dated 1/3/2022 seeking to set aside the said ruling and have its application in the court below allowed.
5. The appeal was based on 5 grounds, the main being that the trial court erred in failing to consider the clause 45 of the contract between the parties. It was also contended that the trial court applied wrong principles, failed to consider the evidence on record, misapplied the law on separability and



- autonomy of an arbitration clause, and misinterpreted the law in finding that the appellant did not ably demonstrate that the dispute ought to be referred to arbitration.
6. The appeal was canvassed by way of written submissions. Those of the appellants were dated 16/5/2022 whereas those of the respondent were dated 24/5/2022. This Court has considered those submissions alongside together with entire record.
  7. The main issue for determination is whether the lower court's ruling ought to be set aside and the dispute between the parties referred to arbitration.
  8. The appellant submitted that clause 45 of the agreement amounts to an arbitration agreement as provided for under section 4 of the *Arbitration Act*. That though the parties mutually terminated the contract, all disputes concerning the works whether abandoned or completed were to be referred to arbitration as per clause 45 of the JBC agreement. That the respondent's dispute as per the plaint dated 11/1/2021 claimed for payment of the works allegedly completed under the main contract and the appellant denied, thus there was a dispute between the parties.
  9. That in terms of section 17(1)(a) of the *Arbitration Act*, an arbitral clause is independent of the other terms of the contract and therefore survived the termination of the contract.
  10. The respondent's case on the other hand was that the agreement of 7/2/2017 was terminated by clause 6 of the second agreement of 14/5/2018, That therefore, the arbitration contract had no effect as per section 6(1) of the *Arbitration Act*. It was submitted that the mutual termination agreement rendered the arbitral clause and the entire agreement invalid.
  11. That the appellant also repudiated clause 45 by failing to adhere to the process set out therein. The clause required that a dispute be notified in writing by either party together with a request to submit it to arbitration and agree to the appointment of an arbitrator within 30 days of the notice.
  12. That the appellant was also in breach of clause 45.3 which stopped a party from commencing any dispute unless a notice of dispute had been issued within 90 days of the discovery of dispute. That clause 45.4 also provided that the parties were to first attempt an amicable settlement without a third-party before commencing arbitration thus the appellant was in further breach thereof. That all these indicated that the appellant had no intention of adhering to the arbitral clause in the terminated contract.
  13. In determining the issue before me, section 6(1) of the *Arbitration Act* No. 4 of 1995 is key. It provides: -
    - (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—
      - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
      - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
  14. The provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is “null and void, inoperative or incapable of being performed,” and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration. Where a party alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.



15. In *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR, the Court of Appeal held that the Court will consider whether the application is filed on time, whether there are any legal impediments to the validity, operation or performance of the arbitration agreement and whether there exists a dispute capable of being referred to arbitration. This was a similar finding to the Court of Appeal's interpretation of section 6 (1) in *Charles Njogu Loftly v Bedouin Enterprises Ltd* [2005] eKLR.
16. It is not in dispute that the appellant complied with provisions of section 6(1) of the *Act* by filing the application at the time of entering appearance. The dispute is whether the arbitral clause in the main JBC contract was terminated by the mutually terminating contract of 14/5/2018.
17. Clause 45.1 of the contract dated 7/2/2017 provided that: -

“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 30 days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties...”
18. The above clause amounted to an arbitration agreement under section 4 of the *Arbitration Act* and was binding upon the parties during the progress of the works and after completion or abandonment of the works.
19. This Court has carefully considered the mutually terminating contract and notes that it terminated the works by the appellant and made provision as to payment of the works done after the final accounts were taken. It was however silent on the issue of dispute resolution which had been provided for under clause 45 of the JBC contract.
20. Having not made any provision on dispute resolution, the only logical conclusion is that the parties intended the arbitration clause to continue being in force until the same was expressly terminated. The parties intended to be bound by the arbitral agreement even after completion or abandonment of the works as was the case here. The termination of the works did not affect the arbitral clause. Any dispute between the parties was therefore bound to be referred to arbitration.
21. In *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission* (2006) eKLR, the court held that: -

“An arbitration clause which forms part of the contract shall be treated as an independent agreement from the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.”
22. In *Midland Finance & Securities Globetel Inc v Attorney General & Another* (2008) eKLR, it was held that: -

“This means that the arbitration clause is regarded as constituting a separate and autonomous contract. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole. By surviving termination of the main contract, the clause constitutes the necessary agreement by the parties, that any dispute between them should be referred to arbitration.”



23. The foregoing buttresses the separability and independence of an arbitration agreement from the main contract. It means that, notwithstanding the nullity of the main contract or the termination thereof, the arbitration agreement still remains valid.
24. From the foregoing, it is this Court's finding that the arbitral clause in the JBC contract survived the termination and remained binding upon the parties. Suffice is to add that in the circumstances of this case, the parties could only be spared that clause if they had expressly terminated the arbitral contract and indicated their intention not to refer any future disputes arising from their contract to arbitration.
25. It was the respondent's contention that the appellant failed to adhere to the procedure laid down under clause 45.1 thereby indicating an intention not to be bound by the clause. This Court, however notes that it was the respondent who instigated the suit in the lower court and not the appellant. The procedures set out in clause 45 could not therefore be undertaken by the appellant.
26. It was for the respondent to first adhere to the elaborate procedure under clause 45.1 beginning with a notice of dispute and request to submit the dispute to arbitration. It was the respondent who was in breach of clause 45.1 aforesaid and not the appellant.
27. It is this Court's finding that the trial court erred in failing to refer the dispute to arbitration. Consequently, the appeal is hereby allowed.
28. The ruling made on 4/2/2022 is hereby set aside and substituted with an order allowing the appellant's application dated 6/4/2021. The dispute is hereby referred to arbitration in terms of clause 45 of the contract. The appellant will have the costs here and below.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

