



Creative Innovations Limited v Seyani Brothers & Company (K) Limited (Commercial Case E157 of 2023) [2023] KEHC 23516 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E157 OF 2023**

**DAS MAJANJA, J
OCTOBER 13, 2023**

BETWEEN

CREATIVE INNOVATIONS LIMITED PLAINTIFF

AND

SEYANI BROTHERS & COMPANY (K) LIMITED DEFENDANT

RULING

1. The parties entered into a Joint Building Council April 1999 Edition, Agreement and Conditions of Contract for Building Works dated 01.06.2017 (“the Contract”) for the erection and construction of a commercial development on property LR No. 209/11539, Mombasa Road, Nairobi. The Plaintiff, as the Employer was to pay the Defendant, as the Contractor the contract sum of Kshs. 177,501,476.10 for the project.
2. A dispute regarding performance of the Contract arose. The Defendant claimed Kshs. 132,599,486.79 from the Plaintiff on account of unpaid certified amounts, external works not certified but included in the draft final account, payment due to sub-contractors, extended preliminaries and interest on the delay in the payment of the outstanding amount. The matter was referred to arbitration. The Arbitrator was appointed by the Architectural Association of Kenya on 16.12.2022 to deal with the dispute.
3. The Plaintiff challenged the Arbitrator’s jurisdiction through its application dated 25.01.2023. It averred that the Defendant who had referred the matter to arbitration failed to issue the mandatory notice of dispute within 90 days of the occurrence or discovery of the event leading to the dispute as required under Clause 45.3 of the Contract. That the notice of dispute and the notice to appoint an arbitrator dated 12.08.2022 was fatally defective , illegal, unlawful and contrary to the Contract as the said notice of dispute had to be issued within 90 days of the occurrence or discovery of the matter or issue giving rise to the dispute under Clause 45.3, and thereafter, the parties attempt to resolve the



matter amicably under Clause 45.4 of the Contract, failure to which the notice to appoint an arbitrator is issued under clause 45.1 of the Contract.

4. The Plaintiff further contended that the notice of dispute and the notice to appoint an arbitrator was further fatally defective in that it claimed a global sum of Kshs 103,091,224.72 which is contrary to the Contract as each event claimed in the demand notice dated 04.07.2022 and the notice of dispute, had to have had a separate notice of dispute issued within 90 days of the occurrence or discovery of the matter or issue giving rise to the dispute under clause 45.3 of the Contract, which was never issued. The Plaintiff therefore stated that the claim and demand by the Defendant were time-barred under Clause 45.3 of the Contract, the claim, dispute or difference having arisen and no notice of dispute having been issued within 90 days as required by the Contract. As the claim was time-barred, the Plaintiff contended that the Arbitrator lacked jurisdiction to hear and determine the dispute as expressed by the parties in Clause 45.3.
5. The Plaintiff pointed out that the Defendant's admission in the letter dated 04.07.2022 that the events giving rise to the dispute occurred over 22 months earlier, and the issue of the notice of dispute and notice to appoint the arbitrator on 12.08.2022 over 23 months from which the events giving rise to the dispute occurred was dispositive of the issue of jurisdiction. The Plaintiff reiterated that the Arbitrator lacked jurisdiction by virtue of Clause 45.3 of the Contract and the failure by the Defendant to issue a notice of dispute within 90 days of the occurrence or discovery of each of the matters/issues giving rise to the dispute as required by Clause 45.3 of the Contract.
6. The Defendant opposed the application. It averred that the dispute between the parties is in relation to non-payment of the claimed sums and that payment is in the first instance governed by Clause 34 of the Contract which has provided for a contractual mechanism for dealing with delays in payment at Clause 34.6 by providing for interest on delayed payment. That the Contract does not provide for a period after which delay in payment becomes non-payment or converts into a dispute and therefore, the fact that a payment remains outstanding does not amount to a dispute but only exposes the Plaintiff to interest on delayed payment, which is a remedy enjoyed by the Defendant under Clause 34.6 of the Contract.
7. The Defendant contended that no dispute arose within the period of 22 months stated by the Plaintiff because the remedy of interest on delayed payment was operating and the Plaintiff had not stated that it would not make the payment. That the dispute arose after the demand notice dated 04.07.2022 was issued with a clear timeline for payment and that in view of the Demand Letter and the 14 days notified for payment, the event giving rise to the dispute arose when the outstanding amount was not paid by the 14th day after the notice was issued which was on 18.07.2022. It stated that the Notice of Dispute was given on 12.08.2022, which was 25 days from 18.07.2022 the date of the occurrence of the event giving rise to the dispute and that 25 days was well within the contractual time limit of 90 days for notification of disputes. The Defendant therefore urged the Arbitrator to find that the Plaintiff had not proved that the Defendant notified a dispute outside the 90 days' contractual period to warrant ousting the Arbitrator's jurisdiction.
8. In its reply, the Plaintiff disputed the Defendant's averment that the dispute arose on 18.07.2022 and stated that the dispute arose way earlier on 27.09.2021 while the null and void notice of dispute was only issued on 12.08.2022 together with a notice commencing arbitration by seeking to appoint an arbitrator.
9. After considering the parties' pleadings and submissions, the Arbitrator published an award on jurisdiction on 03.03.2023 ("the Award"). The Arbitrator first declined to admit the demand letter dated 13.09.2021 that the Plaintiff had introduced in its reply to the Defendant and stated that this



was an ambush and amounted to new material not originally pleaded and that the Defendant did not have a chance to be heard on it. The letter was therefore expunged and was not considered part of the record in the reply. The Arbitrator therefore found that the Plaintiff's contention that the claim was time barred by not giving notice after occurrence or discovery of the matter was not specific in that it had not provided the exact time lines when the occurrence or discovery of the matter occurred, the date the matter or issue came up and when it became a dispute. That the Defendant correctly stated that a claim does not become a dispute if it is not settled as there are remedies for non-settlement under Clause 34.6 and that it only becomes a dispute if it is demanded and the demand denied or ignored. As to the question of giving notice for each claim, the Arbitrator found that there is only one claim on payment and therefore the notice is for one claim of payment with different sub-headings flowing from the Final Account.

10. The Arbitrator also stated that the Contract and in the [Arbitration Act](#), the Arbitrator has been given power to do that which is more than in ordinary legal contracts and that this is due to the nature of arbitration, that ADR is arbitrated by people with skills in the trade in which they are appointed to resolve the disputes. The Arbitrator stated that he had looked and interrogated Sub-clause 45.3 and had not seen anywhere it suggests if the timelines are not followed then any alleged Claim for payment of work done and or materials delivered for the works of the other party would become time barred and that the matter cannot be heard and determined by an arbitrator as provided in their dispute resolution Clause and that claims for payments are covered under Clause 34.0.
11. The Arbitrator relied on section 29(4) of the [Arbitration Act](#) and Clause 45.9 of the Contract to conclude that he had powers to review any requirement in the Contract and that by reviewing the requirement in Clause 45.3 and 45.5, he allowed the matter to be heard and determined on merit but not to extinguish the claim on technicality, that is if it were to be held that the notice was not properly issued. The Arbitrator accepted the Defendant's submission that it issued notice as per Clause 45.3 and thus, held that Defendant's notice of dispute was given within the prescribed period of 90 days in accordance with the Contract. In sum, the Arbitrator affirmed jurisdiction to hear and determine the dispute.
12. The Plaintiff is dissatisfied with the Award and has now approached the court by way of an Originating Summons dated 13.04.2023 made under section 17 of the [Arbitration Act](#) and Rule 3 of the [Arbitration Rules](#), 1997. It seeks the determination of the question whether the Arbitrator has jurisdiction to hear and determine the reference under the Contract. The application is grounded on facts set out on its face together with the supporting affidavit of the Plaintiff's Finance Director, Sanjay Ramniklal Shah, sworn on 13.07.2023. The Defendant opposes the application through the replying affidavit sworn by its director, Hirji Khimji Seyani sworn 12.05.2023. The parties have also filed their respective submissions in support of their arguments which more or less mirror their positions taken before the Arbitrator and which I have already summarized above.

Analysis and Determination

13. The Plaintiff has invoked section 17(6) of the [Arbitration Act](#) which provides:

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.
14. As such an application is concerned with jurisdiction, the court is required 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 (See *West Mount Investments Limited v Tridev Builders Company Limited* ML HCCC No. 230 of 2016 (OS) [2017] eKLR).

15. The Plaintiff's application is based on the ground that the Defendant did not issue a notice of dispute within 90 days from the date the dispute arose and that the consequence of this is that no arbitration could commence. It submits that the dispute arose on 27.09.2021 as per the Defendant's letter dated 13.09.2021 and as such, the notice of dispute ought to have been issued by 27.12.2021 as per Clause 45.3 of the Contract. Thus, the Plaintiff contended that the notice to concur on the appointment of an arbitrator dated 12.08.2022 is null and void to commence and continue arbitration proceedings.
16. The arbitration agreement in the Contract is common to the parties and provides 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 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 the 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.
 - 45.4 Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.
 - 45.5 In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.
 - 45.6 Notwithstanding anything stated herein the following matters may be referred to arbitration before the practical completion of the Works or abandonment of the Works or termination of the contract by either party.
 - 45.6.1 The appointment of a replacement Architect, Quantity Surveyor or Engineer upon the said persons ceasing to act.



- 45.6.2 Whether or not the issue of an instruction by the Architect is empowered by these conditions.
- 45.6.3 Whether or not a certificate has been improperly withheld or is not in accordance with these conditions.
- 45.6.4 Any dispute or difference arising in respect of war risks or war damage.
- 45.7 All other matters in dispute shall only be referred to arbitration after the practical completion or alleged practical completion of the Works, or abandonment of the Works, or termination or alleged termination of the Contract, unless the Employer and the Contractor agree otherwise in writing.
- 45.8 The Arbitrator shall, without prejudice to the generality of his powers, have powers to direct such measurements, computations, tests, or valuations as may in his opinion be desirable in order to determine the rights of the parties and assess and award any sums which ought to have been the subject of or included in the certificate.
- 45.9 The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.
- 45.10 The award of such Arbitrator shall be final and binding upon the parties.
17. I agree with the Plaintiff that the court, in a number of decisions has had the chance to interrogate the import of Clause 45 above and the notices to be issued therein (see *West Mount Investments Limited v Tridev Builders Company Limited* (supra), *Kenya Airfreight Handling Ltd (KAHL) v Model Builders and Civil Engineers (K) Limited* ML HCCC No. 548 of 2016 (OS) [2017] eKLR and *Sonile Holdings Limited v Vinayak Builders Limited; Simon Sali Malonza (Interested Party)* ML HCCC No. 110 of 2019 (OS) [2020] eKLR . In *West Mount Investments Limited v Tridev Builders Company Limited* (Supra) Onguto J., held as follows:
- (33) In casu, Clause 45 anticipates two notices in my view. Under sub clause 1, a notice commencing arbitration is expected to be given with the applying party requesting for an arbitrator to be appointed. This is in line with section 22 of the Act as to commencement of arbitration. Before the commencement though, there is a preceding notice to be given to notify a party of the dispute. Under Clause 45.3 of the JBC Agreement it is relatively clear that for the arbitration process to be commenced an applying party had to notify the other party of the dispute or controversy within ninety (90) days of the occurrence or discovery of the matter or issue giving rise to the dispute.
18. From the aforesaid dicta it is clear that the notice of the dispute precedes the notice commencing arbitration. In this case, the Plaintiff avers that the notice of the dispute was as per the Defendant's letter dated 13.09.2021. However, the Arbitrator expunged this letter from the record of pleadings stating that the Plaintiff had ambushed the Defendant and introduced this letter in its reply when it had initially stated that the dispute arose as per the Defendant's letter dated 04.07.2022.



19. While it is true that in its application before the Arbitrator, the Plaintiff averred that it was notified of the dispute as per the Defendant's letter of 04.07.2022 and that no notice was issued for over 22 months in respect of each of the claims in the said letter as admitted by the Defendant, and therefore the claim was time-barred under clause 45.3 of the Contract, no mention was made of the letter dated 13.09.2021. However, in its reply to the Defendant, pursuant to leave granted by the Arbitrator, the Plaintiff appeared to change its position and now referred to the letter of 13.09.2021 and not that of 04.07.2022. While I agree with the Arbitrator that this might have been an ambush to the Defendant as it had made its response based on the Plaintiff's initial averment that the notice of dispute was as per the letter of 04.07.2022, the said letter of 13.09.2021 is not new and was not denied by the Defendant. This court cannot ignore the letter simply because it was introduced later on in the arbitration proceedings. The court in considering an application under section 17 of the *Arbitration Act*, exercises original and not appellate jurisdiction. Further, since such an application is concerned with jurisdiction of the arbitral tribunal, it is entitled to consider all the material before it. In *West Mount Investments Limited v Tridev Builders Company Limited* (*supra*) the court explained the position as follows:

"[W]here the arbitral forum determines that it has jurisdiction then any party aggrieved may apply to the High Court to decide the matter of jurisdiction. It must be pointed out that the High Court determines the issue a fresh and in its original jurisdiction. The language of Section 17(6) of the Act does not point to an appeal or review of the arbitral forum's decision. It is an application lodged under Rule 3 of the Arbitration Rules 1997 through an originating summons returnable before the judge in chambers with a specific question as to jurisdiction stated.

23. As already pointed out, the application to the High Court under Section 17(6) of 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."

20. From the record, I find and hold that the letter dated 13.09.2021 that gave rise to a dispute, 14 days from that date, being 27.09.2021 actually exists and is valid. The Defendant thus had 90 days from 27.09.2021 to issue the notice of dispute before issuing the notice commencing arbitration. This was clearly not done meaning that the claim was contractually barred. In *Kenya Airfreight Handling Ltd (KAHL) v Model Builders and Civil Engineers (K) Limited* (*supra*) the court explained why this contractual time bar is present in such contracts as follows:

(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.



21. It is for the above reasons that I find that the Defendant failed to issue a notice of dispute within 90 days from the date the dispute arose, which was 27.09.2021. This was outside the time limited by Clause 45.3 of the Contract and consequently, the Defendant having failed to comply with Clause 45.3 thereof could not invoke Clause 45.1 to commence arbitration proceedings. The Plaintiff has discharged its burden of establishing that the Arbitrator did not have any jurisdiction to entertain any claim in so far as his appointment was grounded on the letter dated 12.08.2022 or any such letter issued after 27.12.2021 when the 90-day contractual period came to an end after the dispute arose.
22. The Plaintiff submitted that the Arbitrator is incompetent and biased to handle the reference based on how the Award was made. As I have already found that the Arbitrator lacked jurisdiction to entertain the claim, it is not necessary to address the issue of competence and impartiality of the Arbitrator.
23. Let me just add and state that while the dispute between the parties may not be resolved by arbitration under the Contract, the parties are still free to proceed to court or any other forum if they so agree. In the circumstances, any comment on any other issues may prejudice the rights of the parties. (See [*Sonile Holdings Limited v Vinayak Builders Limited* \(supra\)](#)).

Disposition

24. For the reasons I have set out, I allow the Plaintiff's Originating Summons dated 13.04.2023 and make the following final orders:
 1. It is hereby declared that the Sole Arbitrator does not have jurisdiction to hear and determine the dispute between the plaintiff and defendant as declared by the Defendant by the letter dated 12.08.2022 and/or any other letter issued subsequently after 27.12.2021.
 2. The ruling of the arbitrator dated 03.03.2023 be and is hereby set aside.
 3. The Defendant shall bear the costs of the arbitration.
 4. The Defendant shall pay the Plaintiff's costs of this suit assessed at Kshs. 200,000.00.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2023

D. S. MAJANJA

JUDGE

