



**Italbuild Imports Limited v Central Bank of Kenya & 2 others (Miscellaneous Case E1107 of 2020) [2021] KEHC 140 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CASE E1107 OF 2020  
F TUIYOTT, J  
OCTOBER 14, 2021**

**BETWEEN**

**ITALBUILD IMPORTS LIMITED ..... PLAINTIFF**

**AND**

**CENTRAL BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**QUANTI-BILL CONSULTS CO. LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EDON CONSULTANTS INTERNATIONAL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. In determining the matter before Court, it is inevitable that I reflect on the role and scope of a Court in a request made under section 28 of the *Arbitration Act* which reads:-

“Court assistance in taking evidence

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence.”

2. This provision, in our statute, replicates Article 27 of the *UNCITRAL Model Law on International Commercial Arbitration* which provides:-

“Court assistance in taking evidence

The arbitral tribunal, or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”



3. In understanding what a Court ought to consider on receipt of a request under section 28, I find great assistance from a text “Analytical Commentary on draft text of a Model Law on International Commercial Arbitration A/CN.9/264. In which on Article 27 (our Section 28) it reads:-

“ Article 27 calls upon the courts to render assistance in taking evidence, in particular by compelling appearance of a witness, production of a document or access to a property for inspection. Such assistance, although not frequently sought in practice and at times sought for dilatory purposes, is considered useful in view of the fact that the arbitral tribunal, under the model law and most existing laws, does not itself possess powers of compulsion.....”

“...The court may, within its competence and according to its rules on taking evidence, execute the request in either of the following ways: It may take the evidence itself (e.g. hear the witness, obtain the document or access to property and, unless the arbitrators and parties were present, communicate the results to the arbitral tribunal), or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion.”

4. Unlike a Court, an Arbitral Tribunal will not have power to compel appearance of a witness or production or inspection of documents and so section 28 fills in this gap through the intercession of the Court. That is the objective of the provision and this is just one instance where, because of lack of compulsive power by the Arbitral Tribunal, the arbitration process must fall back to the Court. See, for example section 18(2) and 18(3) of the Act.
5. The words of section 28 seem wide enough to empower the High Court to take evidence on behalf of the Tribunal and thereafter pass it on to the Arbitral Tribunal. Indeed, the Analytical commentary directly adverts to this. However, it seems that the Arbitral process may be better served if the Court, once satisfied that the request is merited, simply exerts its compulsive power by making an order that the evidence be presented directly to the Arbitral Tribunal. This is because, ultimately, it is the Tribunal that is the master of the facts and determines the matter and it is imperative that it receives and appreciates the evidence first hand. The Tribunal may in the process make interventions to seek clarification or may be called upon to rule on the relevance or otherwise of evidence.
6. As is clear from the provisions, the High Court will only consider a request after the Arbitral Tribunal has given approval for such request. The necessity for this green light from the Tribunal seems rather obvious. It is the Tribunal which hears and determines the matter and it is the Tribunal which should determine whether the evidence sought to be led or produced is necessary. It seems desirable that before a request is approved by Arbitral Tribunal, it should take full arguments on the matter and give a ruling as to why it approves the request. That said, as long as it is clear that an Arbitral Tribunal has approved the request, then the Court should consider it. This discussion has a direct bearing on the circumscribed role of the High Court in a section 28 request.
7. It is not for the Court to determine whether or not the evidence sought is relevant. That prerogative, it needs to be emphasized, belongs to the Arbitral Tribunal. In this regard is the following useful passage from paragraph 6 of Article 27 of the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration:-

“ Article 27 is silent with respect to the court’s role in determining whether it should exercise its discretion in favour of providing the assistance requested by the applicant. One question of practical importance is whether the court should review the relevance or usefulness of the evidence sought by the applicant. One court has ruled that such an inquiry would be



inappropriate, “because the request issues from the arbitral tribunal itself or has the approval of the arbitral tribunal and the role of the court is merely to exercise for the arbitral tribunal the compulsion power which the arbitral tribunal may not have”<sup>551</sup> (see above, section on article 9, para. 9). A Canadian court stated that the purpose of article 27 is to assist the arbitral tribunal in its search for the truth. That court held that courts could assist an arbitral tribunal with obtaining examination for discovery evidence from third parties and that limiting the scope of examinations for discovery in arbitral proceedings cannot be justified on the basis that arbitration is not parallel to the court system.”

8. That is not to say that the role of the Court is mechanical and is simply to accept every request. The Court will not compel the taking of evidence which is contrary to public policy of Kenya or which contravenes statute and the constitution.
9. With the above in mind, the Court is now in a position to consider the originating summons dated 23<sup>rd</sup> September 2020 which is for the following orders:-
  1. WHETHER and how the representative of the Consultants in the project, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein should present evidence as witnesses of fact in the Matter of Arbitration between Italtbuild Imports Limited and Central Bank Limited.
  2. WHETHER summons should issue to the representatives of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as witnesses in the Matter of Arbitration between Italtbuild Imports Limited and Central Bank Limited.
  3. WHO is entitled to the costs of this summons?
10. On 19/12/2013, Italtbuild Imports Ltd (the Plaintiff or Italtbuild) entered into a contract with Central Bank of Kenya (the 1<sup>st</sup> Defendant or CBK) for some modernization and creation of workstations. A dispute between the two arose and is before J. Mwai Mathenge, (the Arbitral Tribunal) for resolution.
11. In directions dated 15<sup>th</sup> July 2020 the Arbitral Tribunal ordered:-
  1. The parties shall liaise and agree on the calling of the relevant consultants to appear before the tribunal as witnesses of fact. Should there be no consensus on this, these directions shall serve as leave to the Claimant to apply to the High court for summonses to be issued to ensure the consultants’ appearance in these proceedings for the purpose aforementioned.
12. The consultants referred to in the Directions are Quanti-Bill Consults Co. Ltd (Quanti-Bill or the 2<sup>nd</sup> Defendant) and Edon Consultants International Limited (Edon or the 3<sup>rd</sup> Defendant). Under the contract the two were engaged by CBK as project quantity surveyors and project manager respectively. A response by CBK to the claim by Italtbuild is that the claimants action is premised on certification and approvals issued by the two consultants which were not in accordance with the contract and were in fact in breach of the contractual obligation to the Bank.
13. Resisting the application, CBK argues that the application seeks to compel representatives of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to appear and give evidence on its behalf in breach of the rules embodied in section 107, 108 and 109 of the *Evidence Act*. Further, that in the circumstances of this case the consultants and their representatives are not compellable witnesses. Also submitted is that it is CBK’s sole discretion to determine whether or not to call the consultants as witnesses in the Arbitration and not for Italtbuild to call them as its witnesses.



14. As for the consultants they indicate, through an affidavit sworn on their behalf by on Jeremiah E. D Ndong, that they are not opposed to giving evidence save that it will have to be subject to assent by CBK on the basis of clauses 3.3 of the contract, being a confidentiality clause.
15. This Court has considered the written submissions of counsel for the parties and the brief oral highlights in that respect.
16. It is not disputed that in Direction 1 (set out in paragraph 11 of this decision), the Arbitral Tribunal grants Itabuild liberty to make this request should a consensus on the matter not be reached. It is common ground that there is no consensus. To be observed is that the single Arbitrator did not give a full blown reasoned decision when giving that approval. He merely stated:-

“On calling of consultants as witnesses of fact, it is clear from the documents filed so far, without more, that evidence from the consultants would be relevant to the subject matter of these proceedings.”

He is nevertheless unequivocal that on considering the material before him in respect to the documents filed, the evidence from the consultants would be relevant to the dispute before him.

17. For that reason, this Court would be inclined to grant the assistance sought unless to grant it would be to lend assistance to a process that is contra public policy, statute or the constitution.
18. It is of course true, as submitted by counsel for the 1<sup>st</sup> Defendant, that in respect to its claim the burden to prove it lies with Itabuild. This is a burden cast on Itabuild by the provisions of section 107, 108 and 109 of the *Evidence Act* as read together. However, the Court is not persuaded that by merely requiring that independent contractors of CBK testify on certain relevant issues, then Itabuild purposes to shift the burden of proof to CBK.
19. As to whether the witnesses sought to be exempted from giving evidence because they are not compellable (Part II of the *Evidence Act*), CBK cites section 128 of the *Evidence Act* which reads:-

“Compellability of ordinary witnesses

A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”

20. While citing this provision, CBK has not demonstrated how the witnesses of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will incriminate or tend to incriminate CBK or the two Defendants or expose them or their representatives to prejudice. Indeed, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants themselves do not raise such misapprehension.
21. This Court prefers to think the law is as stated by the Court in *Spero Africa Limited v Independent Electrical and Boundaries Commission* [2019] eKLR (cited by CBK’s counsel) that as a general rule (save where they are statutory exemptions), there is no bar to officers (read independent contractors) of a party being compelled to testify at the instance of an adversary.
22. As to whether Itabuild could rely on other witnesses so as not to vex the two Defendants and their representatives, it is not for this Court to second guess the holding of the Arbitral Tribunal, that on the



basis of the documents before him, evidence of witnesses from the two consultancy firms are relevant to the matter before him. This Court does not sit in review or on appeal over that decision.

23. What is left to consider is whether to grant the request is an affront to the confidentiality clause which reads:-

“3.3 Confidentiality

The Consultant, his sub-consultant(s) and the personnel of either of them shall not, either during the term of this Contract or after the expiration of this Contract, disclose any proprietary or confidential information relating to the Project, the Services, this Contract or the Client’s business or operations without the prior written consent of the Client.”

24. The intention of the confidentiality clause is to protect CBK against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants disclosing any information in respect to the contract to its detriment. Curiously, it has to be observed, that it in responding to the application CBK never raised it at all. It was raised for the first time by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the context that although they were willing to testify that clause may be a bar. CBK then latched on it as a reason to resist the request.
25. What the confidentiality clause protects is proprietary or confidential information. It is not a general non-disclosure agreement. CBK has not demonstrated that the evidence sought by Itabuild enjoys the protection of this clause. At any rate, it would have to be something to raise for consideration before the Arbitral Tribunal.
26. As would now be clear, I am for allowing the request. The application of 23<sup>rd</sup> September 2020 is allowed.

**DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2021**

**F. TUIYOTT**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**A. MABEYA, FCI Arb**

**JUDGE**

**PRESENT:**

