



MC Builder Limited v Formula One Garage Limited (Miscellaneous Application 267 of 2018) [2021] KEHC 198 (KLR) (Commercial and Tax) (5 November 2021) (Ruling)

Neutral citation: [2021] KEHC 198 (KLR)

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

MISCELLANEOUS APPLICATION 267 OF 2018

MW MUIGAI, J

NOVEMBER 5, 2021

BETWEEN

MC BUILDER LIMITED CLAIMANT

AND

FORMULA ONE GARAGE LIMITED DEFENDANT

RULING

1. An Order setting aside the Award by the Arbitrator dated 5th May 2018 dismissing the Preliminary Objection dated 12th January 2018, and substituting it with an Order of the High Court upholding the Preliminary Objection dated 12th January 2018 and striking out the Counterclaim dated 27th November 2017.
2. Which Application was supported by the sworn Affidavit of Hardev Singh Kalsi dated 8th June 2018 and based on the grounds that;
 1. The parties to the arbitration, who are parties herein covenanted in a Construction Agreement under the Agreement and Conditions of Contract for Building Works published by the Joint Building Council, Kenya, (the Agreement);
 2. The parties were thus all bound by the Agreement; Clause 45.1 of the Agreement enjoined that for any dispute to be resolved, by way of arbitration, any aggrieved party was to mandatorily issue a notice in writing to the other party, "declaring the dispute'. It was only after the dispute is so declared that



an arbitrator would be appointed to adjudicate the dispute. Clause 45.1 of the Agreement proceeds as follows:

'In case of 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....'

3. The Respondent herein filed a Counterclaim, in essence a dispute for determination against the Applicant, without having first issued any notice to the Applicant for declaration of the dispute for constitution of arbitrator under Clause 45.1. The Arbitrator, was never appointed and/or designated to hear and determine the Counterclaim dated 27th November 2017.

4. Clause 45.3 of the Agreement is the limitation of time clause. It provides as follows:

'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.'

5. The Counterclaim dated 27th November 2017, made claims over alleged grievances of on or about August 2014, and others that are beyond the ninety (90) days limitation period, from the date of discovery. Accordingly, the claims in the Counterclaim are all and wholly time barred.

6. In Arbitration practice, the Arbitrators are enjoined to interpret and enforce the Agreements of parties strictly and therefore has no jurisdiction to adjudicate on the Counterclaim dated 27th November 2017.

7. The Arbitration leading to this Application was as a result of declaration of a specific dispute by the Applicant, which resulted in the appointment of the Arbitrator to adjudicate the specific dispute as already declared by the Applicant.

8. In the Award the Arbitrator failed to recognize and enforce strictly the provisions of the Agreement, Clauses 45.1 and 45.3. Accordingly, the Arbitrator failed to recognize that she has no jurisdiction to adjudicate over the Counterclaim dated 27th November 2017.

9. The Applicant is under a real risk of being prejudiced and suffering, including its right to a fair adjudication if the aforementioned Award is allowed to stand, unless the Court intervenes.

REPLYING AFFIDAVIT



3 The Application was opposed vide the sworn Affidavit of Sandeep Jandu dated 17th August 2018 and stated that;

1. At the initial stage of the dispute the Respondent did not agree to the jurisdiction of the Arbitrator and in deed made it known clear vide a letter dated 28th November 2016 (Marked "SJ-1" is a copy of the said letter).
2. It is only when the parties met for the Preliminary meeting on or around 18th May 2018 with the Arbitrator did the issue of the Arbitrator's jurisdiction was to be agreed and parties thereafter executed an Arbitration Agreement referring the Dispute to the Arbitrator and thereby granting the Arbitrator exclusive full jurisdiction (Marked "SJ-2" is a copy of the said Agreement).
3. On the onset of the Arbitration, the Claimant had knowledge that the Respondent intended to file a Counterclaim and never raised any objection thereto.
4. The Claimant totally mislead the Court that the Arbitrator has no jurisdiction to adjudicate on the Counterclaim dated 27th November 2017 when the Claimant consented to the Arbitrator adjudicating to the counterclaim and the same is clearly captured in the Arbitrator's order for Direction No. 2 (Marked "SJ-3" is a copy of the said order).
5. On 9th June 2017 pursuant to a Preliminary Meeting held at the Arbitrator's office the parties by consent agreed on the dispute on the following terms:

Point 6. Outline of the dispute and identification of issues in the Dispute Claimant's outline of issues:

"A dispute has risen from the contract signed with the Respondent. The claim is for approximately Kshs. 7,000,000.00. That all the documents to be filed have highlighted the Respondent's case and issues clearly. Respondent's Outline of Issues: "That the parties entered into contract to construct a building. That there were numerous problems with the building alongside collapse and delays making the contract inoperable. That the Claimant left site necessitating the Respondent to get another contractor to complete the works. That the retention has not been paid to the contractor. That there is a counterclaim to the tune of Kshs.18, 000, 000.00."

6. According to Article 45.1 of the Agreement and Conditions for Building works published by the Joint Building Council Kenya NOT BOTH parties need to notify each other of the dispute by either party.



7. Section 3(7) and Section 24(1) of the *Arbitration Act* provide for the filing of a Counterclaim. The Claimant is therefore estopped from raising the issues in this Application by virtue of Section 5 of the *Arbitration Act* because the Claimant waived its right to object by failing to raise its objection to such noncompliance without delay.
8. Further, Section 17(2) of the *Arbitration Act* precludes the Claimant from raising an objection on the jurisdiction of the Arbitrator to hear the Counterclaim.
9. The Claimant has failed to demonstrate how it will be grossly prejudiced and further that public policy and the rules of justice mandate a Tribunal to give a fair chance of hearing to all parties.
10. The Arbitration clause in this case contemplates all disputes being referred to arbitration by a sole arbitrator and this includes Counterclaims.

4 This Court delivered Ruling on 28th September 2018 and ordered as follows;

1. The Arbitrator had/has jurisdiction to hear and determine the claim and counterclaim.
2. The Notice of Counterclaim was time barred but the Applicant waived right to raise and claim the counterclaim was time-barred as the parties signed the Arbitration agreement and agreed on the dispute and the authority of Arbitrator.
3. The merits or demerits of the Award of 5th May 2018 under Section 35 of the *Arbitration Act* in the absence of provision of a complete award in terms of Section 32 of the *Arbitration Act* cannot be determined at this stage.
4. The Applicant and/or Respondent to furnish the Court through Deputy Registrar Commercial Division a complete copy of the award of 5th May 2018 for onward transmission to the Court to enable the Court complete the Ruling within 14 days from today.

5 The Parties Claimant & Respondent complied with the order to provide the Court with a certified copy of the Final Award published on

in compliance with Section 36 (3) of *Arbitration Act* that provides;

Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—

- (a) the original arbitral award or a duly certified copy of it; and
- (b) the original arbitration agreement or a duly certified copy of it

6 The remaining issue for determination whether the Final Award should be set aside on grounds prescribed under Section 35 of *Arbitration Act*.

APPLICANT'S SUBMISSIONS



7 It was the Applicant's submission that the Arbitrator was appointed on the basis of a Notice of Declaration of Dispute dated 25th August 2015 issued in accordance with Clause 45.1 of the Agreement and Conditions of Contract for Building Works published by the joint Building Council Kenya, which agreement is binding on both the parties hereto and which fact the Respondent has not laid any dispute to before the Court.

8 The Court in *Kenya Tea Development Agency Ltd & 7 others versus Savings Tea Brokers Limited [2015] eKLR* stated; -

"Accordingly, the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law."

9 The Arbitrator had no jurisdiction to expand and/or determine disputes that have not been declared in accordance with Clause 45.1 of the agreement as such any digression and/or expansion on the jurisdiction manifest disregard to the Arbitrator's authority or misconduct.

10 In *Mustill & Boyd's Commercial Arbitration 2nd Edition at page 641* and *Halsbury's Laws of England Vol. 11 4th Edition at para 622*, the role and conduct of an Arbitrator is clearly set out by the learned authors as follows;

"An Arbitrator who acts in manifest disregard of the contracts acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialized branch of law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from the Contract amounts not only a manifest disregard to his authority or misconduct on his part but may be tantamount to a mala fide action."

11 The Applicant submitted that jurisdiction is everything without it the Arbitrator cannot take a single step, the Arbitrator has to down their tools. The court in exercising its jurisdiction under Section 35(1) and (2)(a)(iv) of the *Arbitration Act* should set aside the Arbitrator's Award which provides;

35. Application for setting aside arbitral award (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). (2) An arbitral award may be set aside by the High Court only if—

the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

12 Further, that the Counterclaim raises issues that occurred and discovered in 2014 and which absolutely fall outside the purview of the present arbitration, a fact that was not contested in any way or form by the Respondent. The time limit under the agreement is ninety days from the date of occurrence of issues giving rise to the dispute. The Respondent filed arbitration proceedings characterized by the Counterclaim after nearly 4 years after the time bar and the Arbitrator ought to have struck it out from the onset of its filing.



- 13 The Applicant never raised any objection to the filing of the Counterclaim as it was the Respondent's right but the point of contention is that the said Counterclaim ought to have pivoted on the dispute declared by the Claimant.
- 14 On whether the said award was in conflict with public policy the Applicant submitted that the Award was marred with elements of illegality in that the Arbitration Award was issued outside the mandate and jurisdiction of the Arbitrator and is circumventing the law and the provisions of the Agreement and Conditions of Contract for Building works published by the Joint Building Council of Kenya. The Award is thus contrary to public policy and should not be recognized and/or enforced.

RESPONDENT'S SUBMISSIONS

- 15 The Respondent submitted that the Claimant misled the Court, the jurisdiction of any Arbitration Tribunal is derived from an Arbitration Agreement. Indeed, an arbitration agreement was drawn and filed with the Arbitration Tribunal on 4th December 2017. The jurisdiction of the Arbitrator is thus fettered by the arbitration agreement, reference and the law.
- 16 Further, that the dispute is a dispute arising out of the contract and even where general, broad, generous and elastic words are used in the Arbitration Agreement, courts will still interpret them by reference to the subject matter of the contract (Article 45.1 of the Agreement and Conditions Contract for Building Works). The parties agreeing to execute the Arbitration Agreement was in lieu with Section 45.7 of the Agreement which provides for dealing with all other matters in dispute.
- 17 Article 45.1 stated that in the event of any dispute, either party (and not both) may notify the other in writing to submit it to arbitration. The Arbitrator was to be appointed within 30 days of the notice date and the dispute couched in wide and broad terms. Where a claim and a counterclaim arise from a single set of facts, a notice of arbitration referring to the claim and to the dispute arising under the said contract has the effect of referring both claim and counterclaim to arbitration. A dispute arising out of the contract was defined by Russell on the Law of Arbitration 17th Edition page 47 as follows;

On the reference of ALL disputes "arising out of the contract" the arbitrator may decide a dispute as to the construction of the contract. Under such a reference the arbitrator also has jurisdiction finally to determine the existence of a custom affecting the rights and liabilities of the parties under the contract where such custom is not inconsistent with the express terms of the contract.

- 18 The Respondent submitted that the Claimant knew since 9th June 2017 that the Respondent would raise a counterclaim, the nature of the counterclaim and the amount being counterclaimed. Further, the same position was highlighted in the order for directions No.3 and 4 respectively thereby giving the Claimant ample opportunity to raise an objection which it failed to do so. Raising a Preliminary Objection after having confirmed the Respondent's position is mischievous and contrary to good legal practice. The Claimant's action falls squarely under Section 5 of the *Arbitration Act* as well as Section 120 of the *Evidence Act*** and as such the Claimant is estopped.

DETERMINATION

- 19 After considering the Application, response and the submissions filed by the parties, the issue for determination is whether the Preliminary objection should be upheld and the counterclaim struck out.
- 20 Section 3 & 4 of *Arbitration Act* which provide as follows;



Arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

Form of arbitration agreement

1. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. An arbitration agreement shall be in writing.
3. An arbitration agreement is in writing if it is contained in—
 - a. a document signed by the parties;

21 Clause 45.1 of the Agreement provided for arbitration with regard to settlement of disputes between the parties. The Respondent also produced an arbitration notice between the parties and referred to in the Award by the Arbitrator as the agreement entered by the parties on 4th December 2017. The said agreement is signed by both parties and shall be hereby referred to the Arbitration Agreement dated 4th December 2017. The Arbitrator relied on Clause B of the said Agreement which stated;

“The parties wish to refer the dispute to arbitration with a view to resolving the Dispute in an efficient, expeditious and inexpensive manner.”

21 A copy of the Arbitrator’s award dated 5th May 2018 has been produced pursuant to this Court’s orders made on 7th July 2021. A Notice of Preliminary Objection was filed on 12th January 2018 in opposition to the Respondent’s Counterclaim and raised an objection to the Arbitrator’s jurisdiction and the limitation of the Action with regard to the Counterclaim.

22 The issue of jurisdiction is provided for under Section 17(2) of the *Arbitration Act* as follows;

Section 17(2) - A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

23 The issue of jurisdiction ought to have been dealt not later than at the time of submission of the Defense. According to the Arbitrator’s Order for Directions No. 4 the Reply to Defense and Defense to Counterclaim were to be filed on or before 8th November 2017 and on this the Court agrees with Arbitrator’s position that is an issue that ought to have been raised at an earlier stage considering that the Respondent had given brief of the Counterclaim at the preliminary meeting.

24 In the Order for Directions No. 2 paragraph 9 prepared by the Arbitrator on 9th June 2017, the parties agreed on the nature of the dispute which included there being the Claim and the Counterclaim. The Claimant argued that under Clause 45.3 of the Agreement and Conditions of Contract is the limitation of time clause which rendered the Counterclaim time barred as it contained issues that arose in 2014.

25 I wish to bring to the parties’ attention to Clause 5 of the Arbitration Agreement of 4th December 2017. Clause 5 provides as follows;

“This Agreement sets forth the entire agreement between the parties relating to the subject matter hereof and stands in the place of any previous agreement, whether oral or in writing.



The parties agree that no amendment to this Agreement shall be binding upon the parties unless it is in writing and executed by both parties.”

26 Going by the above mentioned Clause, that the parties agreed to be bound by the said Agreement of 4th December 2017 and could not therefore rely on the previous Clauses in Agreement and Conditions of Contract for settlement of disputes. With that said, the present Agreement of 4th December 2017, is silent of the issue of Limitation of Time. The Claimant cannot therefore argue that the Counterclaim was time barred after all the Counterclaim arose from the facts in the Claim.

27 In *National Bank of Kenya Ltd versus Pipeplastic SamKolit (K) Ltd & Anor [2000] eKLR* the Court stated;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract; unless coercion, fraud or undue influence are pleaded and proved...”

28 The parties freely entered into the Arbitration Agreement of 4th December 2017 and given that the issue of Limitation of Time did not arise therein, the Arbitrator in that case had jurisdiction to determine the Application.

29 The parties drew and signed an Agreement of 4th December 2017 on the dispute (s) to be heard and determined by the Arbitrator. The Arbitrator gave directions on filing of pleadings by parties and the timelines and included Defense & Counterclaim.

30 Section 2 (7) *Arbitration Act* provides for filing of Counterclaim is envisaged where;

Where a provision of this Act, other than sections 26 and 33(2)(a), refers to a claim, it also applies to a counterclaim, and where it refers to a defense it also applies to a defense to such counterclaim.

31 Therefore, whereas the Agreement executed by parties set out the dispute(s), it was/is expected that by virtue of directions to file pleadings envisaged filing of Counterclaim.

32 The time bar would not arise unless the Counterclaim was in relation to a completely different matter/issue or dispute away and unrelated to the contractual relationship between parties as it would amount to a separate and different claim/dispute or case to the one Claimant gave notice about and referred to Arbitration.

33 The Arbitrator at Clause 7.2 of the Final Award found on the Counterclaim as follows;

However, I see no evidence before me in the Application to demonstrate that those events were NOT linked to the Contract entered into by parties hence being the matter in the Reference.

34 Secondly, the time-bar if any was overtaken by the mutual Agreement by the parties filed before the Arbitrator under Direction 5 of Arbitration proceedings.

35 The Applicant’s position that the Respondent ought to have issued a similar notice with regard to its dispute as shown in the Counterclaim and the notice ought to be within 90 days. The Counterclaim relates to the circumstances arising from the Contract executed by parties. The Claimant issued notice of dispute and intention to pursue arbitration proceedings to the Respondent/Applicant and Arbitration proceedings commenced.

36 Section 22 of *Arbitration Act* provides;



Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent

- 37 Clearly, multiple notice(s) of dispute(s) related to the Contract executed by parties is not envisaged by the *Arbitration Act*.

DISPOSITION

The upshot of the above is that the Award by the Arbitrator dated 5th May 2018 dismissing the Preliminary Objection dated 12th January 2018 is hereby upheld.

It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH NOVEMBER 2021(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

