



REPUBLIC OF KENYA



**Royal Ngao Holdings Limited v N K Brothers Limited & another (Civil Case 156 of 2019)
[2021] KEHC 275 (KLR) (Commercial and Tax) (17 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 156 OF 2019
F TUIYOTT, J
NOVEMBER 17, 2021**

BETWEEN

ROYAL NGAO HOLDINGS LIMITED APPLICANT

AND

N K BROTHERS LIMITED 1ST RESPONDENT

ALLAN ODHIAMBO OTIENO 2ND RESPONDENT

RULING

1. This Court is asked to determine the Notice of Motion dated 31st July 2019 which seeks that this suit be struck out and that parties be directed to proceed with Arbitration before the Hon. Steven Oundo.
2. Royal Ngao Holdings Limited (the Respondent or Royal) is the owner of a property in the Upper Hill area of Nairobi. That the property is registered as LR No. 209/11077. Desirous of developing it into a fifteen storey office block, it contracted N. K. Brothers Limited (N. K. Brothers or the Applicant) to construct the proposed building. The terms of engagement for construction were reduced into an Agreement dated 3rd October 2011 (the Agreement).
3. In the course of time a dispute arose between the parties, Royal accusing N. K. Brothers of delay in completing the project. Roped into it is Allan Odhiambo Otieno (Otieno). He is said to have been the Managing Director of Dimensions Architects and Interior Designers Limited and is accused by Royal of fraudulently authorizing extensions to the contractor. He is sued in his personal capacity.
4. In the application before Court, N. K. Brothers asserts that, displeased with the state of affairs, Royal Ngao, on 28th September 2018, issued a notice and declared a dispute pursuant to clause 45 of the agreement and N. K. Brothers concurred. However, there was a disagreement on the appointment of



the arbitrator and that following the route of clause 45.1, the President of the Architectural Association appointed Hon. Steven Oundo as arbitrator.

5. Upon the appointment of the Arbitrator, Royal raised an objection to the jurisdiction of the Arbitrator to hear the matter. Just before raising that objection, Royal filed this suit on 12th July 2019. That objection has been decided. It was dismissed by the Arbitrator and a challenge to the Arbitrator's decision similarly dismissed in Nairobi Misc. Civil Application No. E 683 of 2020 Royal Ngao Holdings Limited vs N. K. Brothers Limited (hereinafter the originating summons). This Court will be making reference to those proceedings.
6. N. K. Brother's argument is simply that clause 45 of the agreement ousts the jurisdiction of this Court to hear and determine this dispute and that having initiated and commenced the Arbitration proceedings, then the claim by Royal that the Arbitrator has no jurisdiction is an act of approbation and reprobation.
7. In opposing the application, Royal reiterates that it has never submitted to the jurisdiction of Hon. Steven Oundo and that the alleged Arbitrator has no jurisdiction to determine the dispute. Second, that this suit involves Allan Otieno who is not and has never been party to the alleged Arbitration. Last, that the Arbitration proceedings are contrary to the provisions of clause 45.3 of the Agreement requiring a notice of a dispute be issued within 90 days of completion of works. It being contended that the dispute arose sometimes on 30th August 2017.
8. It seems to me that N. K. Brother's unsuccessful bid to challenge the jurisdiction of the Arbitrator in the originating summons must have a bearing to the outcome of this matter. In a Notice of Motion dated 16th July 2019, N. K. Brothers beseeched the Court to declare that the Arbitral Tribunal constituted of Steven Oundo had no jurisdiction to hear or determine the present dispute. The basis was that no notice of a dispute was given by the claimant within ninety (90) days of completion of the works and that was counter the mandatory provisions of clause 45.3 of the Agreement. N. K. Brothers also challenged the appointment of the Steven Oundo as arbitrator. In addition, that the 2nd Defendant herein was not a party to the agreement between the parties rendering an arbitration a nullity in the circumstances.
9. Indeed, it is easy to discern that the grounds raised in the objection proceedings before the Arbitrator are those taken up by N. K. Brothers to resist the application now before Court. The Arbitrator dealt with those issues and found no merit on them.
10. On its part, the High Court, in a Ruling of 13th October 2020 by Hon. Lady Justice Kasango, upheld the decision of the Arbitrator. The first reason was that the originating summons was filed out of the time provided under section 17(6) of the *Arbitration Act*. Another was a finding by the Court that even if the notice of dispute was outside the time stipulated in the Arbitration Agreement, Royal which had initiated the Arbitration process had waived its right to objection on the basis of the ninety days period. The Court held: -

“ [27]. Royal is barred, by virtue of that Section, from raising the objection of jurisdiction on the basis of noncompliance of Clause 45.3 of the Agreement. And further Royal having given the Notice of Dispute cannot be permitted to approbate and reprobate. Royal having given Notice of Dispute cannot be permitted to resile from that Notice. See the case Royal Bank of Canada v. Hirsche Herefords, 2012 ABQB 32 (CanLII):

“The terms approbation and reprobation are associated with the equitable principle of election rather than the common law election principle: Piers



Feltham, et al, *The Law Relating to Estoppel by Representation* 4th ed. (Butterworths, London: 2004) at p. 360. The doctrine of estoppel of approbation and reprobation requires, from Halsbury's Laws of England (4th ed. Reissue 2003) Vol. 16(2) at para. 962:

1. That the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and
2. That he will not be regarded, in general at any rate, as having so elected unless he has taken the benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

[30] Procedural choices can engage the principle of approbation and reprobation. In *Halagan v. Reifel* (25 November 1997) Vancouver C940538 (B.C.S.C.) the doctrine of approbation and reprobation applied to an attempt by defendant to enforce inconsistent rights regarding the release of shares from escrow. A plaintiff was not allowed to resile from relief obtained at trial in *Topgro Greenhouses Ltd. v. Houweling*, 2009 BCCA 469, 58 C.B.R. (5th) 161. Similarly, the Court in *Iron v. Saskatchewan (Minister of the Environment and Public Safety)* (1993), 1993 CanLII 6744 (SK CA), 109 Sask.R. 49, 103 D.L.R. (4th) 585 (C.A.) prevented the appellant from taking contradictory positions at trial and on appeal. There, the appellant accepted the Court's jurisdiction, received a negative decision and then sought to challenge the Court's jurisdiction. In each of these cases, a party enjoyed a benefit as a result of a procedural choice from which it later attempted to resile.”

A dispute was correctly, therefore, declared by Royal on 28th September 2018 and the arbitrator Mr Steven Oundo was lawfully appointed by the Chairman of AAK. Mr Steven Oundo has jurisdiction to hear and determine the dispute between the parties.”

11. Of further note is that N. K. Brother's attempt to have that ruling reviewed was declined by Hon. Mabeya J on 15th April 2021.
12. The net effect of the outcome of originating summons is that the Arbitral Tribunal has jurisdiction to hear and determine the dispute now before this Court. To allow N. K. Brother's resistance to that jurisdiction would be an abuse of Court process and perhaps an outcome that would bring disrepute to the proceedings in these two matters.
13. In the end, I allow the application dated 31st July 2019. Costs to the Applicant.

DATED AND SIGNED THIS 11TH DAY OF NOVEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

