



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 382 OF 2016**

**DOCH COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....DEFENDANT/RESPONDENT**

**RULING**

**BACKGROUND**

1. The plaintiff/applicant sued the defendant for breach of contract through a plaint dated 21<sup>st</sup> September 2016 seeking following orders:

*a) An order declaring the letter of termination by the defendant to the plaintiff dated 22/8/2016, unlawful, null and void and having no legal effect.*

*b) This Honourable court be pleased to grant a temporary injunction restraining the defendant/respondent either by itself or through its employees or agents from continuing or carrying on any further or other construction work relating to the rehabilitation of the runway, the Apron, the car Park and other associated works at its Nanyuki Civil Airstrip, and connected to the Agreement Number KAA/ES/NANYUKI/931/C made on 3/9/2014 between the defendant and the plaintiff, pending hearing and determination of the application herein inter-partes.*

*c) This Honourable court be pleased to grant a temporary injunction restraining the defendant/respondent either by itself or through its employees or agents from continuing or carrying on any further or other civil work at the defendant's Nanyuki Civil Airstrip and that relate to or is connected to works specified in the defendant's contract Number KAA/ES/NANYUKI/931/C awarded earlier to the plaintiff pending the hearing and determination of the suit herein.*

*d) Cost of this suit.*

2. At the first mention of the case on 26<sup>th</sup> September 2016, the existence of an arbitration clause in the contract between the parties herein was discussed and upon hearing the submissions of the parties, Amin J. made the following orders:

*1. Parties to agree a single joint arbitrator within 30 days.*

*2. The chosen arbitrator shall be a member of the Association of consulting engineers. In the event that the parties are unable to agree the chairman of person holding the appropriate position to appoint the arbitration within 45 days.*

*3. Plaintiff to file and serve a list of 3 proposed arbitrators within 14 days.*

*4. Defendant to indicate agreement/opposition within 14 days of service.*

*5. Costs reserved.*

*6. Suit is stayed pending hearing and resolution of the dispute by Arbitration as set out above.*

3. The said orders precipitated the filing of the application dated 17<sup>th</sup> April 2019 that is the subject of this ruling.

#### **Applicant's case.**

4. Through the application dated 17<sup>th</sup> April 2019, the applicant seeks the following orders:

*1. That the parties herein be at liberty to appoint an arbitrator within 30 days in accordance with the contract between the parties herein dated 3<sup>rd</sup> September 2014.*

*2. That failure by the parties herein to appoint an arbitrator in terms of prayer 1 herein above, that an order does issue compelling the institution of Engineers of Kenya to appoint an arbitrator within 30 days thereof.*

*3. That cost of this application be provided for.*

5. The application is supported by the affidavit of the applicant's Director **Johnson Wachira Waithaka** and is premised in the grounds that:

*1) That parties were to appoint a single joint Arbitrator within 30 days pursuant to the orders of Justice Amin Farah dated 13<sup>th</sup> October 2016.*

*2) That failure to that appointment, the Chairman of chairperson of the Association of Consulting Engineers of Kenya was to appoint an Arbitrator within 45 days accordance to the orders of Justice Amin Farah of 13<sup>th</sup> October 2016.*

*3) That the envisaged appointment did not take place and the orders by Justice Amin Farah therefore lapsed.*

*4) That the association of Consulting Engineers of Kenya through a letter dated 2<sup>nd</sup> June 2017 identified three persons amongst whom the parties could appoint as an Arbitrator.*

*5) That the parties have been unable to formally conclude the process of formal appointment of the Arbitrator, despite the fact that the parties have agreed on one Engineer Peter Scott as the intended Arbitrator, Engineer Scott being a member of the Association of Consulting Engineering of Kenya and the Institution of Engineers of Kenya.*

*6) That the parties have agreed on Engineer Peter Scott as Arbitrator in this matter.*

*7) That whilst the parties have agreed on Engineer Peter Scott as Arbitrator, we have been unable to conclude the formal process of his appointment since the parties are at variance with regards to the letter of appointment, since the respondent/defendant herein insists on wording the letter of appointment as being on recommendation of the Association of Consulting Engineers of Kenya while the plaintiff/applicant holds the view that the Association of consulting Engineers of Kenya is obligated to appoint an Arbitrator and not to recommend on.*

*8) That during the course of trying to appoint an Arbitrator, it was discovered that the Association of Consulting Engineers of Kenya has members accredited as Arbitrators as compared to the Institution of Engineers of Kenya.*

*9) That nevertheless, the primary obligation under the contract between the parties herein dated 3/9/2014 and in law, with regards to the appointment of an Arbitrator, vests with the parties herein.*

6. At the hearing of the application, **Mr. Ogada**, learned counsel for the applicant submitted that the orders issued by Amin J. had expired due to effluxion of time as the parties had not agreed upon an arbitrator within the period of 45 days granted by the court.

7. Counsel submitted that due to the effluxion of time, the parties find themselves in the same place that they were before the orders were issued thus necessitating the filing of the instant application.

#### **Respondent's case.**

8. The respondent opposed the application through the replying affidavit of its advocate, **Mr. Jeremy Njenga** who avers that the application is frivolous, vexatious, and an abuse of the process of court. He argued that the subject suit should not have been filed in court in the first place as the agreement giving rise to the dispute was explicit on the recourse to be adopted by the parties in the event of a dispute, which is arbitration.

9. He avers that this court technically has no jurisdiction to deal with the application at hand including the pending suit which ought to be struck out. He states that the parties have had numerous correspondences and negotiations geared towards agreeing on an arbitrator which negotiations were not successful and that on 3<sup>rd</sup> May 2017, the plaintiff reverted back to court but that through an order issued on 4<sup>th</sup> May 2017, Onguto J. declined to deal with the matter.

10. He further avers that the parties subsequent attempts at agreeing on an arbitrator were yet again, not successful and that the plaintiff threatened to come back to court thereby leading to several mentions before the court. He further avers that despite the plaintiff's decision to refer the case back to court, the defendant made spirited efforts to conclude the case one way or the other and proposed one **Dr. Peter Scott**

as the sole arbitrator through a letter dated 17<sup>th</sup> January 2019 which proposal the plaintiff accepted in their letter dated 21<sup>st</sup> January 2019.

11. He avers that upon agreeing on the arbitrator, the next step was to have a joint appointment letter addressed to the said arbitrator which letter, the defendant prepared but the plaintiff flatly refused to approve the same and ended up filing the present application. He further states that the arbitration clause in the agreement signed by the parties gives the procedure for appointing an arbitrator and does not contain a provision for the court's intervention in the event of a disagreement on such appointment.

12. Defendant's counsel contends that since parties have already agreed on an arbitrator, the prayers sought in the application have no basis. He adds that even if, the orders issued on 13<sup>th</sup> October 2016 have lapsed, the said orders were nevertheless not relevant in view of the fact that the agreement the parties signed contained the procedure of appointment of an arbitrator.

13. At the hearing of the application, **Mr. Njenga**, learned counsel for the respondent submitted that the court lacks jurisdiction to deal with the main suit and the present application because the parties had a contractual relationship reduced into a written agreement which at Clause 14 stipulates that all disputes be referred to arbitration.

14. Counsel submitted that since Amin J. had, in the order dated 13<sup>th</sup> October 2016 ordered for stay of proceedings so that the parties could go to arbitration, the instant application is improperly before the court as the arbitration proceedings have not been undertaken.

#### **Analysis and determination.**

15. I have carefully considered the instant application, the respondent's response, both written and oral submissions made by the counsel and the authorities that they cited.

16. The main issue for determination is whether this court has the jurisdiction to hear and determine the instant application and by extension, the main suit, in light of the existence of the arbitration clause.

17. In the present case, it is not in dispute that the parties herein entered into a written and signed contract which at Clause 14 provides as follows:

***“The parties hereto will endeavour to amicably settle disputes arising out of this agreement. If any dispute difference shall arise between the parties hereto as to the meaning or construction of this agreement or anything herein contained or as to the rights or obligations of either party hereunder or otherwise in connection with this agreement anything to follow hereon which cannot be settled amicably, than in all such cases, the same be offered for decision to a single arbitrator to be appointed by agreement between the parties of failing such agreement within thirty (30) days by an arbitrator to be appointed by the Architectural Association of Kenya, Institute of Quality Surveyors of Kenya. Association of Consulting Engineers of Kenya, Chartered Institute of Arbitrators (Kenya Branch) and Institute of Engineers of Kenya. Each party shall bear its own costs of preparing and presenting its case. The costs of arbitration (including, fees and expenses of the arbitrators) shall be shared equally between the parties UNLESS the award expressly provides otherwise.”***

18. It was therefore not in dispute that the parties herein agreed that all disputes arising out of their agreement would be referred to arbitration. Indeed as I have already stated in this ruling, on 13<sup>th</sup> October 2016, this court, differently constituted, ordered that the matter be referred to arbitration and that the parties were to agree on a single joint arbitrator within 30 days failure of which the chairperson of the appropriate governing body would appoint an arbitrator within 45 days.

19. The applicant argues that its present application is based on the fact that the impugned order by Amin J. has lapsed and that the parties are yet to agree on an arbitrator.

20. My finding is that the parties herein having agreed, in their contract, on the procedure for appointment of an arbitrator, this court has no jurisdiction to deal with the matter of appointment of an arbitrator. My humble view is that the impugned order of Amin J. was not cast in stone but was merely intended to assist the parties expedite the appointment of the arbitrator the said orders do not take away the fact that there is an all inclusive procedure for the appointment of an arbitrator in the contract signed by the parties which the plaintiff cannot wriggle out of through the numerous applications that it has so far filed before this court.

21. Needless to say, I agree with the respondent's submissions that having agreed on the manner of appointing an arbitrator, this courts intervention is not necessary in such a process. I therefore find that the instant application can at best be said to be an abuse of the process of court, if not a diversionary tactic, by a party who is not committed to a process that he had agreed to be bound by.

22. I note that on 17<sup>th</sup> March 2017, a similar approach to involve this court in the process of appointing an arbitrator was rejected by Onguto J. who stated thus:

***“There is nothing to cause the court's intervention under Section 10 of the Arbitration act.***

***The order of 13<sup>th</sup> October 2016 is relatively clear. Let the plaintiff move the Chairperson of the Association of Consulting Engineers as may be appropriate.”***

23. Having regard to my finding in this ruling and the said previous rulings of Onguto J. and Amin J. over the same subject of appointment of an arbitrator, I find that the instant application is not merited and the order that commends itself to me is to dismiss it with costs to the

respondent/defendant.

It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 13<sup>th</sup> day of February 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Oganda for the plaintiff/applicant

Miss Kiarie for Njenga for the defendant/respondent

Court Assistant – Sylvia