



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 115 OF 2019

BILL ROTICH.....1ST PLAINTIFF

ENG. DORON WEBER.....2ND PLAINTIFF

VERSUS

MAHAN LIMITED.....DEFENDANT

RULING

1. Through the application dated 10th May 2019, the applicants seek orders for the appointment of a sole arbitrator to hear and dispose of the dispute between the parties herein. The applicants also pray for the costs of the application.

2. The application is supported by the 2nd applicant's affidavits and is premised on the grounds that: -

a) There exists an Agreement concluded in January 2018 between the parties, which Agreement elect's arbitration by a sole arbitrator, as mode of dispute resolution;

b) Under the Schedule at Clause 2.2 of the Agreement, for services, already offered, the applicants are entitled to payment of a maximum 4.5% of all the payment made to the respondent by the Kenya Rural Roads Authority (KeRRA), within 7 days of receipt of payment from Kenya Rural Roads Authority.

c) The respondent has so far received from Kenya Rural Roads Authority, 10% advent payment of the total of Kshs 1,769,287.00, i.e. Kshs 176, 953,728.70 on account of the following contracts.

i. RWC 484 Kshs 710,924,885.00

ii. RWC 485 Kshs 548,437,496.00

iii. RWC 494 Kshs 510,174, 906.00

d) The partial payments above invoke a pro rata payment of 2% as per contract, aggregating Kshs 35,390,745.00. The respondent has however neglected to pay the said contracted sum, in contravention of the Agreement, and continues to decline to pay despite demands;

e) The respondent has written to the applicants indicating that is shall not honour the agreement, therefore a dispute has arisen, which the applicants desire resolution of by arbitration, at the earliest;

f) The respondent has since declaration of the dispute herein been awarded RWC 506, with a contract amount of Kshs 705,323,102.00.

g) Accordingly, the final sum due to the applicants, per Agreement from the respondent is 4.5 % of the contract sum of Kshs 2,443,502,222.00 which is Kshs 109,957,599.99. This sum is however only awarded through arbitration proceedings for which the applicants seek appoint of sole arbitrator.

h) The Agreement of the parties only provides for appointment of a sole arbitrator; which appointment is to be by mutual agreement of the parties. Parties have failed to settle the dispute amicably, and have failed mutually agree on a sole arbitrator,

hence invocation of court's jurisdiction under Section 12(9) of the Arbitration Act, 1995.

3. The respondent opposed the application through the replying affidavit and further affidavit of respondents Director **Mr. Ganjvar Behrooz** who avers that the agreement, annexure "DW1", is a forgery as was established through the forensic analysis of the agreement by the Directorate of Criminal Investigations (DCI) in annexure "GB- (a)". He further avers that the Directorate of Criminal Investigations is seized with the forgery investigation.

4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the application is merited. I find that the determination of the main issue falls on the issue of the jurisdiction of this court to entertain the application and the validity of the agreement in question.

5. The respondent challenged the agreement, on which the arbitration clause is founded, on the basis that it is a forgery. According to the respondent, this court should not allow the application for appointment of an arbitrator owing to the alleged illegality of agreement.

6. The applicants, on the other hand, contended that the issue of the validity of the agreement is an issue bordering on the jurisdiction of the arbitrator which is a matter that only the arbitrator can determine. For this argument, the applicants relied on the decision in **Kenya Airports Parking Services Ltd & Another v Municipal Council of Mombasa** [2010] eKLR wherein when confronted with a similar case, the court considered the decision of the Court of Appeal in **Adopt- A- Light Ltd v Magnate Ventures Ltd & 3 Others** [2009] e KLR and held: -

"It is clear from the above decisions of the Court of Appeal, that this court cannot intervene and consider matters to do with the merit of the dispute between the plaintiffs and the defendant. That is an issue that is squarely within the province of the arbitrator. I decline the invitation by the defendant to consider issues regarding the validity of the agreement between the plaintiffs and the defendant. That issue shall be determined by the arbitrator."

".....the principle of separability of an arbitrator clause in an agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself. As stated in the above U.S case, the issue as to the validity of the agreement is an issue that the arbitrator has jurisdiction to deal with."

7. It was submitted that forgery is an issue that touches on validity or legality of the agreement which touches on the jurisdiction of the arbitrator, and which only the arbitrator can determine.

8. On its part, the respondent argued that forgery is a serious issue that can only be determined by court and that the arbitrator lacks the jurisdiction to hear and determine it. The respondent cited the decision in **Laiser Communication Limited & 5 Others v Safaricom Limited** [2016] eKLR wherein it was held: -

"The learned judge erred in holding that allegations of fraud do not rob an arbitrator of his jurisdiction despite sufficient evidence by the appellants showing that the fraudulent claims went beyond the level of mere allegations. In addition, the claim is founded on contract and tort, in particular defamation, fraud, restitution, unjust enrichment, restrictive trade practices, abuse of dominant position and public policy issues. These are issues that are beyond the arbitral scope and it is only the court which is vested with sufficient jurisdiction to deal with them. In view of the seriousness of the matters raided, the suit can only be properly advanced in court."

9. The respondent also submitted that this court lacks the jurisdiction to entertain the instant application by dint of the provisions of Arbitration (Amendment) Act 2009 (hereinafter "**the Act**") that limits the jurisdiction of the court to reviewing grievance by a party in default to have the appointment of an arbitrator set aside under Section 12(5) of the Act. For this argument the respondent relied on the decision in **Wachiuri Wahome v Kenya Automobile Repairs Association** [2011] e KLR; -

"I am of the considered opinion that a plain and obvious reading of the above section does not, in the present circumstances, empower the court to appoint an arbitrator for the parties. I say so because the applicant has not followed the steps in arbitration that would anchor the present application. The applicant was required, on notifying the respondent that a dispute has occurred, to propose an arbitrator under Clause (j) of the agreement between the parties. If the other side failed to concur in that appointment or make an appointment within 14 days of notice, then the other party (such as the applicant herein) would appoint a sole arbitrator. Section 12 of the Arbitration Act would then come into play. Under Section 12(5) the other party would then be entitled to seek the court's order to set aside the appointment. The high court may then grant, for good cause, that prayer."

Jurisdiction.

10. It is trite that jurisdiction is everything without which the court has no power to take a single step in proceeding with a matter but must down its tools. (see **Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited (1989) KLR 1.**)

11. Section 12(1) -(9) of the Act stipulates as follows: -

"(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;

(b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and

(c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed. (3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) —

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —

(a) make the required appointment; and

(b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

(5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.

(6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.

(7) The High Court, if it grants an application under subsection (5), may, (8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.

(9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.”

12. A simple reading of the above provisions shows that it is not within the purview of the court to appoint an arbitrator for the parties except where the appointment of an arbitrator by the aggrieved party has been set aside. In such an eventuality, Section 12(7) stipulates that the court may, by consent of the parties or on the application of either party, appoint a sole arbitrator.

13. As clearly outlined in the case of *Wachiuri Wahome* (supra) the steps to be followed in appointment of the arbitrator required the applicant to notify the respondent of the dispute and to propose an arbitrator. Under the said section, should the respondent fail to concur with the appointment, or make an appointment within 14 days, then the applicant would go ahead and appoint an arbitrator. It is only after such appointment of an arbitrator that an aggrieved party can seek the court’s intervention to set aside the appointment. In the instant case, the applicants did not demonstrate that they followed the procedure provided for under Section 12 of the Act so as to warrant this court’s intervention. Having regard to the clear provisions of Section 12 of the Act, I find that this court lacks the jurisdiction to appoint the arbitrator.

Validity of the agreement.

14. My finding on the issue of jurisdiction would have been sufficient to determine this matter but I am still minded to consider the issue of the agreement.

15. I have perused the respondent’s annexure marked “**GB –(a)**” and I note that in the said annexure the Director of Criminal Investigation, (forensic document examiner) states that the agreement in question is a forged document.

16. The applicant did not contest the forensic document examiner’s report or produce another report to confirm the authenticity of the said document. Instead, the applicant seeks orders of this court to appoint an arbitrator based on an agreement that has for all intents and purposes been declared a forgery.

17. My finding is that owing to the serious allegations of forgery, bordering on fraud as stated by the forensic document examiner, the dispute can only be properly adjudicated in court.

18. For the reasons that I have stated in this ruling, I find that the originating summons dated 10th May 2019 is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Mukuha for Bwire for the Applicant

Mr. Tum for the Respondent

Court Assistant: Sylvia