



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT. NO. E257 OF 2020 (OS)

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF ARBITRATION OF AN APPLICATION TO

APPOINT A SOLE ARBITRATOR

BETWEEN

PITSTOP TECHNOLOGIES LIMITED.....APPLICANT

AND

DYNAMIC BRANDING VENTURES LIMITED.....RESPONDENT

RULING

1. By the Originating Summons dated 12th March 2020, the applicant has moved the court under **section 7** and **12(9)** of the **Arbitration Act, 2015** (“the **Act**”) seeking orders that the court appoint a sole arbitrator to dispose of the dispute declared by the parties under an agreement dated 12th January 2018 for Website Design and Development (“the Agreement”) which contained the following dispute resolution clause:

[13] Except as specifically provided in this Agreement, the parties agree that any dispute or controversy arising out of, relating to or in connection with the interpretation, validity, construction, performance, breach or termination of this Agreement shall be submitted to binding arbitration to be held in Kenya in accordance with the rules of Communication Authority of Kenya (“the Rules”). The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator’s decision in any court of competent jurisdiction. The parties shall each bear their own attorney fees with respect to such Arbitration but shall share equally the other costs and expenses of arbitration.

2. The application is supported by the affidavit of Andrew Mutua, the applicant’s managing director, sworn on 12th March 2020. He states that a dispute arose regarding payment for services rendered under the Agreement. By a letter dated 17th December 2018, the applicant declared a dispute. Further and by a letter dated 1st April 2019, the applicant proposed three names of arbitrators for consideration by the respondent as sole arbitrator. Since the respondent failed to respond to the proposal, the applicant was constrained to file this application.

3. The matter in issue is whether the court should appoint an arbitrator. Under **section 11** of the **Act**, the parties to an agreement are entitled to appoint an arbitrator. The process of appointment is provided for in **section 12** as follows:

12(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, by consent of the parties or on the application of either party, appoint a sole arbitrator.

(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.

4. **Section 12** of the **Act** recognises party autonomy by giving each party an opportunity to participate in the appointment of the arbitrator. This arbitration clause in the Agreement contemplates the appointment of a sole arbitrator hence under **section 12(2)** of the **Act**, the parties are required to agree on the arbitrator. **Section 12(3)** of the **Act** goes on to provide what happens when a party defaults or does not participate in the appointment. **Section 12(4)** then stipulates that once notice has been given to the other party, the party not in default may appoint the sole arbitrator and the arbitrator so appointed shall determine the matter and make a binding award.

5. At this stage, it is important to point out that the High Court is not involved in the process of appointment of an arbitrator where one party has defaulted. In line with the principle of party autonomy, the process remains in the parties’ hands. It is only after the party has made an appointment under **section 12(4)** of the **Act**, that the party in default is entitled to move the High Court to set aside that appointment. This section buttresses the fact that the party who is not in default is entitled to make an appointment. It is only after the High Court has dealt with the application to set aside the appointment and allowed the application, that it may, by consent of the parties or on the application of either party appoint a sole arbitrator.

6. The process as outlined in **section 12** of the **Act** does not give the High Court original jurisdiction to appoint an arbitrator when the other party is in default. Further **section 12(9)** of the **Act** which the Applicant has been invoked does not apply to the circumstances of this case. The Summons is therefore premature as the process appointment is still in the applicant’s hands (see also **Wachiuri Wahome t/a Adili Communications v Kenya Automotive Repairers Association ML HC No. 1057 of 2010 [2011] eKLR** and **Trustees, Tourism Promotion Services Staff Pension Scheme v GenAfrica Asset Managers ML HC No. 161 of 2018 (OS) [2019] eKLR**).

7. The Originating Summons dated 12th March 2020 is dismissed. Since the respondent did not participate in these proceedings despite being served, there shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 2nd day of OCTOBER 2020

D. S. MAJANJA

JUDGE

Mr Mukuha instructed by Echesa Bwire and Company Advocates for the Applicant.

No appearance of the Respondent.