REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMECIAL & TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E 683 OF 2020

IN THE MATTER OF THE ARBITRATION ACT NO 4 OF 1995

BETWEEN

ROYAL NGAO HOLDINGS LIMITED.....APPLICANT

VERSUS

N.K. BROTHERS LIMITED.....RESPONDENT

JUDGMENT

1. **ROYAL NGAO HOLDINGS LIMITED** (hereinafter Royal) has filed an originating summon based on Section 17 (6) of the Arbitration Act Cap 49.

2. There are two main issues to determine in this matter. Firstly, is the issue whether this action has been filed in contravention of the timelines in section 17(6) of Cap 49. The second issue is whether the arbitral tribunal has jurisdiction to hear and determine the parties dispute.

3. By a joint Building Council Standard Agreement dated 2nd September 2011 (hereinafter the Agreement) Royal contracted N.K. Brothers Limited (hereinafter NK) to construct a five storey office block, six parking silos and one floor extention on L.R No. 209/11077 Upperhill Nairobi.

4. There is consensus that a dispute arose. Royal contends that a dispute arose between the parties in August 2017 on two issues, namely on the balance owed to NK and on Royal's claim that there were unnecessary delays, inefficiencies, incapacity and fraud by NK and a third party namely Mr Allan Odhiambo Otieno (hereinafter Otieno). In that regard that various meetings and exchanges were held by Royal and NK but they were unable to arrive at an agreement. That in 2018 NK invoking clause 45.3 of the Agreement wrote to the Chairman of the Architectural Association of Kenya (AAK) to appoint an arbitrator to determine the dispute. The Chairman of the Architectural Association Kenya appointed Mr Steven Oundo as a sole arbitrator. Royal filed an application before the arbitrator dated 16th July 2019 challenging the arbitrator's jurisdiction. By a Ruling dated 10th December 2019 the sole arbitrator found he had jurisdiction to hear and determine the dispute.

5. There is no dispute that Royal issues Notice of Dispute to NK dated 28th September 2018 and requested NK's concurrence that the dispute be submitted to arbitration. NK through letter dated 2nd October 2018 concurred to arbitration and requested Royal to propose name of arbitrator. Because parties failed to agree on an arbitrator NK wrote to AAK for the appointment of arbitrator.

6. Royal's argument before the arbitrator and before this court is that its Notice of Dispute dated 28th September 2018 was out of time as provided under clause 45.3 of the Agreement.

7. In opposition NK submitted that the present action before this court was filed out of time provided under section 17 (6) of Cap 49.

8. Further NK argued that it does not admit the dispute arose on 20th January 2016, when the works were completed, or when the certificate or practical completion was issued. That rather it is Royal that declared a dispute and is estopped from denying having done it.

ANALYSIS AND DETERMINATION

9. Royals objection is based on the provision of clause 45.3 of the Agreement. It provides:

> ***"45.3 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. "***

10. Royal challenged the arbitrator's jurisdiction on the basis that the Notice of Dispute it issued, dated 28th September 2018, was out of time as provided in clause 45.3 of the Agreement. That the dispute between the parties first arose in August 2017 and accordingly that Notice of Dispute was beyond the 90 days provided under clause 45.3 of the Agreement.

11. The sole arbitrator after hearing the parties published its Ruling dated 10th December 2019. NK has opposed this action on one of the ground that it was filed in contravention of Section 17 (6) of Cap 49. That section provides:

> ***"(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter."*** (Emphasis mine)

12. NK submitted that the Arbitral Tribunal having issued a notice to the parties that the Ruling dated 10th December 2019 was ready Royal lodged this action out of time as provided under section 17(6) of Cap 49, that is it was not filed within 30 days from the date of arbitrator's Ruling. Indeed the Originating summons, hereof was filed on 24th April 2020.

13. Royal responded by denying in its submissions that the notice of the Ruling was issued by the arbitrator in December 2019 but through its affidavit sworn by Davit Jo Nyakang'o deponed that indeed the arbitrator communicated to the parties of his Ruling in December 2019. In view of that admission by Royal that the arbitrator gave notice of his Ruling in December 2019, that is 10th December 2019, did Royal file this present action contrary to section 17(6) of Cap 49?

14. Section 17 (6) of Cap 49 in my view requires a party who is dissatisfied with the arbitrator's Ruling on jurisdiction to apply to the High Court within 30 days of the notice of the arbitrator's Ruling. To repeat section 17 (6) requires an application to be filed in the High Court "within 30 days after having received notice of that Ruling". Royal admits through the affidavit of David Jo Nyakang'o that notice was received by Royal in December 2019. It follows that this action which was filed on 24th April 2020 was filed outside the period set out in section 17(6). Royal erred to have relied on the case **KENYA PORTS AUTHORITY V BASELINE ARCHITECTS & 3 OTHERS (2014) eKLR,** because in this case the arbitrator determined his jurisdiction while considering clause A.7 of the 4th schedule of the Architechs and Quantity Surveyors Act, not under Arbitration. In the **DEWDROP ENTERPRISES LTD V HAREE CONSTRUCTION LTD (2009) eKLR**, which Royal also relied upon, the limitation to filing an application before the High Court was considered as provided under Section 35(3) of Cap 49. Those cases are therefore distinguishable to this matter before me. In this case time to file this action in the High Court began to run from the time the sole arbitrators gave notice that his Ruling was ready for delivery. Time did not, as Royal argued, begin to run when the Ruling was released to it.

15. I take cognizance of the holding by **Justice E.K. O. Ogola** in the case **KENYA PORTS AUTHORITY** (supra) when the learned judge in discussing section 17(6) of Cap 49 stated:

> *"In any case, the section in question is not couched in mandatory terms. Further, there is no provision in the said Act that the aggrieved party is barred from making the relevant application to the High Court once the said thirty days have lapsed. It is also worthy to note that this Court is enjoined to do substantial justice to the parties under* ***section 3A*** *of the* ***Civil Procedure Act."***

16. The only thing I would add to the learned judge's holding above is that a party must in the first instance seek leave to file its application out of time set out in section 17(6). If the court was to find that there was reasonable explanation why the application was not filed within 30 days of the arbitrator's Ruling the court may then permit a party to seek the court's determination of the arbitrator's jurisdiction. In this case Royal did not seek leave to file this action outside the 30 days provided under section 17 (6). The failure to seek such leave is fatal to this action and on that ground along the originating summons is dismissed.

17. The second issue for consideration is whether the arbitral tribunal has jurisdiction to hear and determine the parties dispute.

18. In the case **KENYA AIRFREIGHT HANDLING LTD (KAHL) V MODEL BUILDERS & CIVIL ENGINEERS (K) LTD (2017) eKLR** termed dispute as:

> *"Generally, a dispute arises where there is a claim made to a party and is either rejected or ignored after a reasonable period of time has been afforded. Once the dispute has risen it remains as a dispute until it is either resolved or abandoned. Attempts to amicably settle it do not in my view make it any less a dispute. It is still a dispute. It is not necessary for one party to say it does not agree for there to be deemed or inferred a dispute. As Templeman L.J stated in* ***Elerine Brothers –v- Klinger [1992] 2 All ER 737,1381***

> ***"… if letters are written by the Plaintiff making some request or some demand and the Defendant does not reply, then there is a dispute. It is not necessary for a dispute to arise, that the defendant should write back and say "I don't agree". If, on analysis, what the Plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation"***.

19. The parties in this case did not agree when the dispute between them occurred. NK submitted that although the works were completed on 20th January 2016 it was only after Royal gave Notice of Dispute on 28th September 2018 that the dispute arose.

20. Royal contending that the Notice of Dispute it gave dated 28th September 2018 was out of time as provided under clause 45.3 of the Agreement cited the case **J.B. Phoenix construction limited v Margaret Wairimu Thuo (2017) eKLR** thus:

> ***"11. In the instant case, it is not in controversy that a dispute arose more than one year ago. March 2016, to be more precise. It is also not in controversy that the Defendant who seeks to have the dispute referred to arbitration did not issue any notice under Clause 45.3 of the JBC Agreement. Indeed, no notice has been issued till date by the Defendant. Effectively, the arbitral process was time-barred pursuant to an agreement between the parties which clearly set the time lines for igniting the process of arbitration. On this ground alone, I would deny, the Defendant's Motion."***

21. Royal therefore urges that the arbitral tribunal lacks the jurisdiction to hear and determine the dispute.

22. Jurisdiction is everything. Without it a court has no power to make one more step: see **OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL KENYA LTD (1989)** the court of appeal while approving the above holding in the case Phoenix of **E. A Assurance Company Limited v S.M. Thiga Newspapers Services (2019) eKLR** had this to say on jurisdiction:

> "These words were echoed by this Court in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** in the following words:-
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> ***"In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.***
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> ***…In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer."*** (Emphasis ours)
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> "*Decided cases on this issue are legion and we cannot cite all of them. The case of* ***Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR*** *is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-*
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> ***"When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.***
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> ***We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing."***

23. The above decision demonstrates the importance of a tribunal ensuring it has jurisdiction to hear a matter.

24. In this case as I stated parties are not agreed on when the dispute occurred. I have sighted an email dated 26th March 2018 written by Royal to NK. It was in response to NK's demand for settlement of Ksh 53,477,875.42 by Royal. Royal in that email stated:

> ***"Dear Rajesh***
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> ***I refer to my email dated 6th March 2018 after our meeting of 5th March 2018 and we are surprised to receive the attached letter today from you dated 23rd March 2018. It is obvious that you are not interested in what was discussed and we now have no alternative but to submit our claim for loss of rent arising from the delay that NK Brothers Ltd caused in completing our project on time.***
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> ***We will take this matter for arbitration and you will be hearing from our lawyers shortly."***

25. It is not clear what communication was there between the parties after this email but one get the clear impression that discussions between the parties did continue even after the above email which discussions culminated with Royals Notice of Dispute of 28th September 2018. There is all probability that the dispute occurred after parties discussion failed to resolve their differences.

26. Even if the dispute occurred more than ninety days before Royal gave its notice dated 28th September 2018 I concur with the submissions made by NK that Royal will be taken to have waived its right to object to the ninety days period because it gave the Notice of Dispute well knowing that it was out of time. Section 5 of the Arbitration Act so provide. It provides:

> ***A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance***

without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object. **(Emphasis is mine)**

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:*
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> *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*
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> *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.*
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> *[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.

28. I have perused the plaint filed in case HCCC No 156 of 2019 where Royal has sued NK and Otieno. I find that the claim in that case is separable from the dispute before the arbitral tribunal. That suit can proceed independent of the arbitral process and therefore I do not accept Royal's contention that that high court case is intricately linked to the arbitration.

CONCLUSION

29. It follows that the Originating Summons dated 24th April 2020 is dismissed and therebeing no reason why costs should not follow the event, costs of this matter are awarded to NK Brothers Limited.

30. It follows that the stay issued hereof of the arbitral process is hereby vacated.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of OCTOBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Applicant

For the Respondent:

ORDER

This decision is hereby virtually delivered this 13th day of October, 2020.

MARY KASANGO

JUDGE