



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 474 & 475 OF 2017 (OS)

IN THE MATTER OF ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT (CAP 21) LAWS OF KENYA

AND

IN THE MATTER OF THE GOVERNMENT CONTRACTS ACT

AND

IN THE MATTER OF ARBITRATION OVER THE ERECTION AND COMPLETION OF BUILDINGS FOR STUDENT FACILITIES AND STAFF HOUSES AT NAIVASHA PHASE III NATIONAL YOUTH SERVICE

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS TO DISMISS THE ARBITRATION PROCEEDINGS

BETWEEN

THE HONOURABLE ATTORNEY GENERAL.....APPLICANT

VERSUS

N. K. BROTHERS LTD.....1ST RESPONDENT

QS CHARLES J. MWAURA, ARBITRATOR.....2ND RESPONDENT

STEG CONSULTANTS3RD RESPONDENT

J U D G M E N T

1. The Attorney General (A.G) has filed through an Originating Summons a Notice of Motion dated 8th November 2017, the subject of this Judgment. That application is brought under Section 17 of the Arbitration Act Cap 49. There are two prayers in the application that fall for consideration hereof. They are:

(i) THAT the appointment of QS Charles J. Mwaura as Arbitrator by the President, Architectural Association of Kenya in the matter between N. K. Brothers Limited and The National Youth Service Ministry of Devolution of the Government of the Republic of Kenya, be set aside.

(ii) THAT a permanent injunction do issue against any or any further proceedings of the Arbitral proceedings referred to Charles J. Mwaura, as Arbitrator by the President, Architectural Association of Kenya in the matter between N.K. Brothers Ltd and National Youth Service, Ministry of Devolution of the Government of the Republic of Kenya.

BACK GROUND

2. The 1st Respondent, N.K. Brothers Limited (hereinafter N.K.) responded to invitation to tender for erection and completion of building for student facilities and staff houses at Naivasha National Youth Service Camp Phase III.

3. The invitation to tender stated that the contract that would be entered would be the Republic of Kenya Ministry of Works Contract Agreement [1970 Edition]

4. N.K. was successful in its bid. N.K. executed the contract and forwarded it for execution but the contract was never returned to N.K. executed.

5. N.K. notwithstanding the non executed contract began to carry out the work on site and during the period of those works N.K. communicated with the Permanent Secretary in the Office of the President. In those correspondences there were references made to specific clauses of the contract. Further by letter dated 20th June 1991 the Ministry of Works wrote to N.K. requiring N.K. to abide by clauses of the contract as follows:

“This is to advise that according to Clause 22 and 23 of the Conditions of Contract between yourselves and the Government you are required to maintain a valid Insurance cover against the stipulated injuries and loses until proper conclusion of this contract. Any deviation from the requirements of these Clauses will be treated as a breach of the contract by yourselves.”

6. From the correspondences it is clear that the parties, N.K. and the Ministry, referred to clauses of the contract without any attention being drawn by either party that the contract had not been executed.

7. The said contract provided for an arbitration in case a dispute arose.

8. A dispute arose and since the parties were unable to agree on the appointment of an Arbitrator the Architectural Association of Kenya appointed QS Kairu Bachia to arbitrate over the dispute.

9. The A.G. raised a Preliminary Objection to the appointment of that Arbitrator. The Arbitrator, in accordance with Section 17 of Cap 49, delivered a Ruling on 2nd October 2017. In summary the Arbitrator Ruled as follows:

Ruling

Given the foregoing, and having considered the application by the Respondent, response by the Claimant and documents placed before me, I, QS C.J. MWAURA, NOW RULE AND DIRECT THAT:-

(a) On balance of probability there is a binding contract between the Claimant and Respondent and the conditions of contract are those attached to the Republic of Kenya Ministry of Works Contract Agreement (1970) specified.

(b) The contract aforesaid has an arbitration clause at Clause 32.

(c) The Arbitrator was validly appointed and has jurisdiction to hear and determine the dispute between the parties.

(d) Costs to be in the course.

The Seat of arbitration is Nairobi, Kenya.

Made and Published by my hand at Nairobi on this 2nd day of October 2017.

10. It is that Ruling the A.G. now seeks to challenge before this Court.

DISCUSSION

11. The Arbitral Tribunal was right to have ruled on its competence to proceed with the arbitration. This was reiterated in the case:

Kabew Kenya Limited V Inabensa – Kenya [2016] eKLR viz:

“Safaricom Limited Vs Ocean view Beach Hotel Limited [2010] eKLR thus:

“Although the English Arbitration Act, 1996 is not exactly modeled on the Model Law unlike our Act, I fully endorse the principles as outlined in the CHANNEL CASE (Supra) because they are in line with the Arbitral Tribunal’s jurisdiction as set out in Section 17 of the Arbitration Act of Kenya. The Section gives an Arbitral Tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an Arbitral Tribunal except by way of appeal under Section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior Court did act contrary to the provisions of Section 17 and in particular violated the principle known as “competence/competence” which means the power of an Arbitral Tribunal to decide or rule on its own jurisdiction...”

12. The Arbitrator having ruled on his competence the aggrieved party, to that Ruling was required to apply to the High Court within 30 days of the date of that Ruling. This is what Section 17 (6) of Cap 49 provides:

“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.”

13. The 30 days to challenge the Arbitrator’s Ruling fell on 1st November 2017. The challenge, the subject of this judgment, was filed on 30th November 2017. That filing was clearly out of the period set by statute. It is because of that, that the challenge by Notice of Motion dated 8th November 2017, but filed in Court on 30th November 2017 fails.

DETERMINATION

14. The Notice of Motion dated 8th November 2017 therefore having so failed is dismissed. The costs thereof shall follow the event because no submissions were made that the costs should be awarded otherwise.

15. In the end this action and more particularly the Notice of Motion dated 8th November 2017 are hereby dismissed with costs to the 1st Respondent.

16. Order accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **COUNSEL FOR THE APPLICANT**

.....**COUNSEL FOR THE 1ST RESPONDENT**

.....**COUNSEL FOR THE 2ND RESPONDENT**

.....**COUNSEL FOR THE 3RD RESPONDENT**