



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 4 OF 2018 (O.S)

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

COUNTY GOVERNMENT OF NYERI.....APPLICANT

-VERSUS-

EUSTACE GAKUI GITONGA.....RESPONDENT

RULING

1. The application before me is the Origination Summons dated 1st March 2018 seeking for orders brought under Section 17 (6) of the Arbitration Act no. 4 of 1995, Rule 3(2) of the Arbitration Rules 1997 and sections 1A, 1B, 3, 3A and 63 (e) of the CPR and all other enabling provisions of the law. It seeks orders:

a) ...spent

b) *This Court be pleased to set aside the preliminary award of Eng. Runji Ngware, the arbitrator, delivered on 2nd January, 2018 in a dispute between the applicant and the respondent.*

c) *The respondent does bear the costs of this application and the arbitral proceedings before the arbitrator.*

2. The grounds for the application are set out on the face of the application and the supporting affidavit of Mr. Gachichio Wachira, the applicant's County Secretary, who deponed thus; -

a) *The applicant called for expression of interest for the designing and development of a cultural museum Tender Number NCG/CULTURE/1/2013-2014 in January, 2014.*

b) *The pre-qualified persons including the respondent received standard tender documents including sample contract forms from the applicant to enable them submit suitable proposals and to know the kind of contract the successful bidder would be signing with the applicant.*

c) *Upon assessment of the proposals received, the applicant via its letter dated 26th May 2014 offered the respondent award of the said tender and was required to accept the same within seven (7) days.*

d) *The applicant has no record of any written acceptance of award of tender from the Respondent as required in the applicants said letter dated 26th May 2014.*

e) *The respondent has not produced any letter of acceptance of award of the tender stamped received by the applicant.*

f) *A written acceptance of award of tender is a key step and requirement in the applicant's tendering practice as it enables the applicant to keep track of existing binding relationships. This written acceptance of award is also a precursor to a detailed contract with a successful bidder.*

g) *For failure to return an acceptance, there is no written contract concluded between the parties according to Section 85(2) and (3) of the Public Procurement and Disposal Act No.3 of 2005 (Now repealed).*

h) *The above cited provisions of law required that contracts by public entities resulting from procurement by way of request for proposals must be in writing.*

i) The applicant was not aware of the ongoing works regarding the designing and development of a cultural museum Tender Number NCG/CULTURE/1/2013-2014 until 30th September, 2014 when the respondent requested the applicant for partial payment for works done.

j) The applicant did not honour the said request for payment since it was not aware of any ongoing works regarding the said tender and further that it has a legal duty to prudently manage public funds.

k) The applicant initiated the process to verify the authenticity of the request for payment by the Respondent whereby its officers held meeting to check the genuineness of the respondent's claim.

l) The verification process established the following:-

i) No contract was signed between the parties regarding the subject tender

ii) There was no site handing over report

iii) There was no project manager nor was there a project management team

iv) There was no inspection and acceptance report on the works

m) The respondent proceeded unilaterally to refer the dispute to arbitration in reliance of an arbitration clause in an unexecuted standard contract forms issued to pre-qualified persons whereby Eng. Runji Ngware was appointed as the sole arbitrator by the chairman Chartered Institute of Arbitrators, Kenya Branch.

n) The applicant raised a preliminary objection to the jurisdiction of the arbitrator due to lack of a valid arbitration agreement according to section 4 of the Arbitration Act No.4 of 1995 Laws of Kenya. The arbitrator ruled through a preliminary award that he had jurisdiction.

o) The jurisdiction of an arbitrator emanates from an arbitration agreement which agreement must conform with the requirements under the said section 4 of the Arbitration Act No. 4 of 1995 Laws of Kenya.

p) Parties have neither signed an agreement with an arbitration clause neither have they signed a separate arbitration agreement. The exchange of letters and other communications do not provide a record for an arbitration agreement. For this reason, the applicant has not responded to the respondent statement of claim before the arbitrator.

q) The arbitrator erred in misunderstanding the unsigned standard contract forms and the offer of award for arbitration agreement.

r) Time has passed within which this application ought to have been filed but the court has power to enlarge time. The delay is not inordinate and excusable. Article 159(2)(d) of the Constitution requires the court to proceed without undue regard to procedural technicalities and it is in the interest of justice that the application be heard and determined.

The application is opposed through the respondents affidavit sworn on 12th April 2018; That:

a) The suit emanated from "Expression of Interest" advertised by the applicant in "The Standard" newspaper on 31st January, 2014 to all qualified persons for development of a cultural museum. The said advertisement provided all the details and requirements of the proposed project

b) In April 2014 the applicant issued the respondent with tender documents reference no. NCG/CULTURE/1/2013 (restricted tendering) after the respondent paid the requisite fees. Subsequently the respondent submitted a bid comprising of the design, technical and financial aspects of the project at the quoted sum of **Kshs. 10,231,000/-**.

a) By a letter dated 26th May 2014 the applicant accepted the respondent's bid and communicated such acceptance and required the respondent to provide a performance bond of 5% of the contract sum.

b) The respondent communicated to the applicant via a letter dated 29th May 2014 as requested and provided a performance bond.

c) Upon acceptance of the respondent's bid by the applicant, the respondent embarked on the construction of the cultural museum and on 30th September 2014, the respondent invoiced the applicant for **Kshs. 7,983,062/-** for work done and services rendered in execution of the contract.

d) On account of nonpayment of the said **Kshs. 7,983,062/-** despite demands made, the respondent resorted to the Standard Request for proposal document availed by the applicant which contains the general terms and conditions of the contract. The said document in clause 7.2 provides for a mechanism for resolution of disputes by way of arbitration and the manner for appointment of such arbitrator.

e) The applicant having failed or refused to pay the amount claimed the respondent requested the Chairman of the Kenya Institute of Arbitrators to appoint an arbitrator. Eng. Runji Ngware was appointed as the sole arbitrator.

f) The respondent lodged an application before the arbitrator raising the issue of jurisdiction of the arbitrator on the grounds that there was no contract in existence between the parties. On 2nd January 2018 the arbitrator made a partial award confirming that there was a valid contract between the parties in accordance with section 4 of the Arbitration Act 1995.

g) According to section 17(6) of the Arbitration Act any party dissatisfied with a determination by an arbitrator is required to apply to the High Court within a period of thirty (30) days from the date of the ruling.

h) The instant application was filed on 1st March 2018 without leave of the court or extension of the period provided by statute and hence misconceived and incompetent.

Parties agreed to canvass the application by way of written submissions. The issues for determination are:

a) Whether the court can extend time for lodging this application as provided under section 17 (6) of the arbitration Act.

b) Whether there is a contract for arbitration between the parties that clothed the arbitrator with the jurisdiction to entertain the dispute

The Applicant's submissions

3. It is argued for the applicant that the court has discretion to extend time and grant leave for the OS out of time. That the arbitrator's jurisdiction is predicated on the existence of a contract entered into by the parties involved. And the delay was not inordinate and was in any event caused by counsel for the applicant, a sin that ought not to be visited on the applicant.

4. Reliance was placed on Article 159(2)(d) of the Constitution which vests the court with the inherent jurisdiction to do justice, and on the case of Said Sweilem Gheithan Saanum vs Commissioner of Lands (Being sued through the Attorney General) & 5 Others [2015]eKLR where the court noted that courts had demonstrated through past decisions that 'it is without doubt that courts will readily excuse a mistake of counsel if it affords a justifiable, expeditious, and holistic disposal of the matter'. On the issue of extension of time the applicant relied on Kamau Njendu t/a Gitutho Associates vs Consolidated Bank of Kenya Ltd [2014] eKLR. In that case the court was of the view that, in view of what courts have held about jurisdiction, a three-month delay in the filing of the appeal could be excused because the matter at hand challenged the jurisdiction on the arbitrator.

5. It is also argued that there was no contract between the parties containing an arbitration clause, which would confer jurisdiction on the arbitrator. That no arbitration agreement as defined by the section 3 of the Arbitration Act 1995 existed between the parties, or contract as envisaged and required by the Public Procurement and Disposal of assets Act 2005 sections 83(1), 84(1) and (2) and 85(3).

6. And section 68 (3) of the Public Procurement and Disposal Act, 2005 which provides; -

"No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into."

7. The applicant also relied on Republic vs Permanent Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017]eKLR where the court stated;-

"It is however too presumptuous in light of the provisions of section 36 of the Act for the tenderer to assume that a contract will definitely be entered into and proceed with the commencement of the project"

The Respondent's submissions

8. The respondent relying on section 17(6) of the Arbitration Act which states "***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.***" maintains that this court has no jurisdiction to deal with the matter in any other manner other than as provided for by the Act. That not even the provisions of sections 1A, 1B, 3, 3A of the Civil Procedure Act are applicable to arbitration proceedings and they cannot be relied on for any relief in light of the limitation set by Section 10 of the Arbitration Act thus;- "***Except as provided in this Act, no court shall intervene in matters governed by this Act***" and after the 30 days expired, this court's jurisdiction expired. For this the respondent relied on the Court of Appeal decision in Anne Mumbi Hinga vs Victoria Njoki Gathara [2016]eKLR where the Court of Appeal stated that "***all the provisions including the Civil Procedure Act and Rules do not apply to arbitral proceedings because s. 10 of the Arbitration Act makes the Arbitration Act a complete code.... The superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This included entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or the judgment decree arising from the award. ...No application of the CPR would be regarded as appropriate if its effect would be to deny the an award finality and speedy enforcement ... and all applications filed against the award ...should have been struck out by the court suo motu because jurisdiction is everything as so eloquently put in the case of Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited 1989 KLR 1***" and also Nyutu Agrovet Ltd vs Airtel Network Ltd [2015]eKLR , High Court Misc. Application No.278 of 2017 Kenyatta International Convention Centre vs Greenstar Systems Ltd where the court was of the same view.

Analysis and Determination

a) Whether this court has jurisdiction to entertain the instant case.

The issue for determination is whether the arbitrator had jurisdiction to make the award he did. In his own ruling delivered on the 2nd January 2017, he found he had Jurisdiction, prompting this appeal under s. 17(6) of the Arbitration Act. The same way the words of Nyarangi JA in **Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** that "...Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction" ...apply to this court, it is the same way that they apply to the arbitrator. This court's Jurisdiction to deal with the issue at hand is conferred by the same s. 17(6). Therefor it cannot be said that s. 10 again takes it away. S. 10 is very specific, and so is the case of **Ann Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR** which I found distinguishable the issue therein was setting aside of an arbitral award under the Arbitration Act. In the Court of Appeal decision **Nyutu Agrovet Ltd vs Airtel Networks Ltd (2015)**, the Court interpreted the said Section 10 of the Arbitration Act as follows:-

***"Matters governed by the Act are the ones touching on the formation of arbitration agreements, which are contracts between the parties voluntarily executed, which the court cannot remake for them; determining arbitrators; going for the arbitration itself; the issuance of the award so on and so forth. But then for one reason or another a matter may arise that requires the courts to intervene, and that may include questions of law arising in a domestic arbitration."* (emphasis mine)**

The authorities cited also speak to interference with a final award. There is no final award here as the jurisdiction of the arbitrator is under attack. That fact alone distinguishes this matter from the others where s. 10 would strictly be applicable. I am therefore alive to the legal restrictions of s. 10 that Where this court has not been conferred with jurisdiction by that Act it cannot purport to act. Hence s. 17(6) itself confers this court with the Jurisdiction to determine the issue as to whether the arbitrator has jurisdiction in the first place. Without jurisdiction the arbitrator's award would be null and void.

It is argued that the fact that time ran out on the applicant to file the application, this court cannot extend time. A plain reading of s. 17(6) clearly indicates that the time lines are not cast in stone. Even in normal proceedings there are adversities of life that would lead to delay in complying with the time lines set down by the law. A strict application that would amount to upholding an illegality would not be in the interests of justice, or the public interest. That Arbitration Act is implemented within the framework of living realities of the parties. And extension of time weighed against an award made without jurisdiction, extension of time would carry the day. I find company in this in decision of Kimondo J in Kamau **Njendu t/a Gitutho Associates vs Consolidated Bank of Kenya Ltd [2014] eKLR**. For the purpose of determining whether or not the arbitrator has jurisdiction, this court has the jurisdiction to extend time. Two weeks' delay is not inordinate delay.

Did he have jurisdiction? This would be answered through the following question.

c) Whether there is a contract for arbitration between the parties that clothed the arbitrator with the jurisdiction to entertain the dispute

In **KTDA Ltd and Others vs Savings Tea Brokers Ltd [2015] eKLR** cited in **KICC vs Green star Systems Ltd [2018]** it was stated that

... the jurisdiction of the Arbitrator is tethered in the arbitration agreement, reference and the law...

The respondent argued that there was a letter of offer and an acceptance on his part and that formed the contract. That in the offer documents there was a standard contract upon which he relied in pursuing arbitration services.

The sequence of events appears as follows. He was served with the notification letter dated 26th May 2014 reads: -

RE: PROPOSED DESIGNING AND DEVELOPMENT OF CULTURAL MUSEUM TENDER NUMBER NCG/CULTURE/1/2013-2014

This is to inform you that the tendering process of the above mentioned have been completed.

The tender committee on its twelfth committee meeting held on 23rd May 2014, awarded the said works to you Mesr. Gean Designers P.O. Box 56660-0100 Nairobi, at your quoted tender sum of Kshs.10,231,000.00 (Ten Million, Two hundred and thirty One thousand shillings only.)

You are therefore requested to accept the offer in writing and also provide performance security of 5% of the contract sum within seven days from the date of this letter.

I take this chance to congratulate you and look forward for timely execution of the project.

Samuel Wachira Gachigi

Ag Head, Supply Chain Management Services

It is the respondent's position that he filed the following letter as letter of acceptance dated 29th May 2014 .

The County Government of Nyeri,

P .O Box 1112-10100,

NYERI.

County Treasury

Your Ref: NCG/CON/TEND/1/135(b) 30

29th May, 2014

Dear Sir,

RE: PROPOSED DESIGNING AND DEVELOPMENT OF CULTURAL MUSEUM

TENDER NUMBER NCG/CULTURE/1/2013-2014.

We are in receipt of your letter dated 26th May 2014 informing us that we have been awarded the above mentioned tender. Copy of which is attached for ease of reference.

We are delighted and respectively accept your offer.

We enclose performance security Ref No.AM7/121/1/342683/2014/05 of Kshs. 511,550.00 (five hundred and eleven thousand five hundred and fifty shillings only) being 5% of the contract sum as requested.

Yours Faithfully,

Eustace Gitonga

Proprietor

9. He annexed to it a document entitled *Contractor's Performance Bond* from Amarco Insurance dated 28th May 2014 which made reference to 'an agreement in writing between County Government of Nyeri and Gean Designers "to carry out and complete the works therein stated in the manner and by the time therein specified that is by 27th May 2015 specified all in accordance with the provisions of the said contract named: **PROPOSED DESIGNING AND DEVELOPMENT OF CULTURAL MUSEUM TENDER NUMBER NCG/CULTURE/1/2013-2014**

10. That clause 7.2 of the Standard Model contract in the request for proposal contained the arbitration clause contained the clause stating:

a. Any dispute between the parties arising pursuant to this contract that cannot be amicably settled within 30 days after receipt by one party of the other party's request for such amicable settlement may be referred to arbitration by either party to arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an arbitrator, arbitrator shall be appointed by the chairman of the chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party.

11. The respondent deponed in his replying affidavit at paragraph 7 that in addition to sending that letter, he was also engaged by one Alice Wachira the then Acting County Secretary /head of public service who nominated a team of officers to evaluate the works undertaken by the respondent.

12. It is noteworthy that the letter dated 29th May 2014 does not bear any evidence of receipt by the applicant, neither does the attached Performance Bond. It is also noteworthy that the standard model contract alluded to by the respondent is not attached to these two documents. This would have clarified the issue that the applicant actually signed the model contract as alleged, and was bound by it. The applicant is a public entity whose every action in procurement is governed by law and it cannot be presumed that certain activities took place when no evidence is provided to that end.

13. There is also the alleged 'engagement' with the Acting County Secretary, and appointment of an evaluation team. Again no documentary evidence of this is attached.

14. These gaps were pointed out by the Director, Supply Chain Management vide his letter of 18th September 2017 to the County Legal Officer. The Request for proposal and notification of award to respondent were available. However, very crucial steps appear to have been skipped. No contract was signed between the parties regarding the subject tender, there was no site handing over report, there was no project manager nor was there a project management team, there was no inspection and acceptance report on the works.

It was evident that with the missing documentation, **"it was impossible to ascertain how the contractor went to site and who issued the site instruction"**. The respondent did not respond to these issues.

15. The Public Procurement and Disposal Act no. 3 of 2005 which was the subsisting law on procurement made provisions for the process. At Section 83. (1) it provided: ***"The procuring entity shall notify the person who submitted the successful proposal that his proposal was successful."*** Section 84. (1) and (2) of the Act provided: -***"The procuring entity may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 85 (2)***

(2) If the negotiations with the person who submitted the successful proposal do not result in a contract the procuring entity may negotiate with the person who submitted the proposal that would have been successful had the successful proposal not been submitted and subsection (1) and this subsection apply, with necessary modifications, with respect to those negotiations”

16. It appears to me from the plain reading of this provision that up to until the point where all the negotiations on the successful proposal have been had and done, there cannot be said to be a contract. The terms in the proposal could change, and that will only become clear when the contract is written as required by the provisions of s. 85

85. Contract requirements

(1) This section shall apply with respect to the contract resulting from a procurement by a request for proposals.

(2) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following—

(a) the contract may provide for a different price but only if there is a

proportional increase or reduction in what is to be provided under the

contract; and

(b) the variations must be such that if the proposal, with those variations, was evaluated again under section 83, the proposal would still be the successful proposal.

(3) The contract must be in writing.

(4) The contract must set out either—

(a) the maximum amount of money that can be paid under the contract; or

(b) the maximum amount of time that can be paid for under the contract.

17. No such contract was produced by the respondent. This is the contract that would have contained the arbitration clause. This is the arbitration clause that would have conferred jurisdiction upon the arbitrator. Without it the arbitrator had no jurisdiction over this matter.

18. It is necessary for contractors for public services to ensure that they comply with all the legal provisions and processes before going ahead to commit their funds. There is a whole world of difference between contracts for works between private enterprises and contracts for public works with public procuring entities. There must be strict adherence to the law.

19. That is why it is strange that the respondent on the strength of a notification of award would move to the applicant's site, without the applicant pointing it out and handing over, carry out the works without the applicant's involvement or supervision, decide on the completion and demand for payment, without the requisite inspection and acceptance of the works? These would have been in the contract if it had been signed, and the arbitration clause/agreement as envisaged by s. 4 of the Arbitration Act would have been there in any of the forms set out as follows: -

“(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract”

Conclusion

I find that under s. 17(6) of the Arbitration Act this court has jurisdiction to deal with the issue of the jurisdiction of the arbitrator. In the

event of filing the application challenging that jurisdiction out of time, the court has inherent jurisdiction to extend time so as to deal with that issue as without jurisdiction the arbitrators award would be a nullity.

I find that there was no contract between the parties herein, and consequently, no arbitration agreement or clause hence the arbitrator had no jurisdiction.

Hence the application is allowed and the following orders issue.

1. The preliminary award of Eng. Runji Ngware, the arbitrator, delivered on 2nd January, 2018 in a dispute between the applicant and the respondent is and is hereby set aside.
2. The costs of this application and the arbitral proceedings before the arbitrator be borne by the respondent.

Orders accordingly.

Dated, delivered and signed at Nyeri this 9th May 2019.

Mumbua T Matheka

Judge

In the Presence of:-

Court Assistant: Jerusha

Mr. Mugo for Mr. Macharia for applicant

Mr. Muthigani for respondent

Judge