



IN THE REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY AND TAX DIVISION

CIVIL CASE NUMBER 255 OF 2016

NATIONAL HOSPITAL INSURANCE FUND.....PLAINTIFF

VERSUS

ENG. PETER SCOTT (SOLE ARBITRATOR).....1ST DEFENDANT

MANGA & ASSOCIATES.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed an originating summons dated 27th June 2016, under the provisions of Section 17(6) of the Arbitration Act, Chapter 49 of the Laws of Kenya and Rule 3 (1) of the Arbitration Rules, 1997, seeking that the court determine the following issues and/or issue orders in relation to the same.

- a. Whether the 1st Defendant has jurisdiction to entertain the 2nd Defendant's alleged claim against the Plaintiff;
- b. Whether the dispute between the parties raises public policy and public interest questions requiring a trial by a court of law, as opposed to resolution by an Arbitral tribunal;
- c. That pursuant to (a) and (b) above, the Honourable court finds that, the 1st Defendant lacks the jurisdiction to entertain the claim by the 2nd Defendant and thereby set aside the 1st Defendant's ruling delivered on 9th June 2016.

2. The originating summons is supported by an Affidavit dated 27th June 2016, sworn by Geoffrey Gitau Mwangi, the Plaintiff's acting Chief Executive Officer. He averred that, the Plaintiff is a state corporation, established under the National Hospital Insurance Fund Act, No. 9 of 1998, of the Laws of Kenya and charged with the primary mandate of providing medical insurance cover to eligible Kenyans and their declared dependants, who are registered as members.

3. That, by a letter dated 18th December 2015, the Chairman of the Association of Consulting Engineers of Kenya, appointed Eng. Peter Scott, (herein the 1st Respondent), as the Sole Arbitrator, to arbitrate on the dispute between the parties herein. This was in response to a request by Nzioka & Company Advocates, acting for the 2nd Defendant (herein the 2nd Respondent).

4. Subsequently, following the preliminary meeting held on 22nd February 2016, before the Honorable Arbitrator, the 2nd Respondent's Advocates served the Applicant with a statement of claim on 29th February 2016. On the 11th of March 2016, the Applicant issued a notice of preliminary objection, to the effect that the Arbitrator lacked jurisdiction to entertain the claim, as there is no arbitral clause in the contract executed between the parties.

5. On 5th April 2016, the 2nd Respondent filed submissions opposing the preliminary objection, on the ground that the parties had executed the Conditions for, Engagement for Civil, Mechanical and Electrical Works for Structural Engineering Works, which provide for Arbitration as the dispute resolution mechanism.

6. On 8th April 2016, the Applicant's Advocates filed a Reply the submissions, reiterating the contents of the notice of preliminary objection and arguing that the dispute between the parties raises vitally important public policy and public interest questions relating to procurement and illegality of the contract, which would be suitably examined by a court of law.

7. On 6th May 2016, the Advocates for the parties appeared before the Honourable Arbitrator and directed to highlight submissions filed.

Similarly, the 2nd Respondent was directed to supply the documents that allegedly contained the Arbitration clause. The said documents were forwarded vide a letter dated 16th May 2016, whereupon the Applicant's Advocates submitted comments thereon on 25th May 2016, maintaining that, an Arbitration clause had not been established by the documents supplied by the 2nd Respondent.

8. On the 9th day of June 2016, the Arbitrator rendered a decision and dismissed the preliminary objection, effectively acknowledging that he had the jurisdiction to hear and conclude the claim by the 2nd Respondent. On 23rd June 2016, the Arbitrator summoned the parties to appear before him on 8th July 2016, to fix hearing dates, whereupon the Applicant moved to this Court.

9. It is argued that, an Arbitrator draws his mandate and jurisdiction from an Arbitration clause in a contract between the parties and that an Arbitration clause cannot be implied under the provisions of the Act, as ruled by the Arbitrator. Therefore the Arbitrator clearly and wholly misunderstood, misinterpreted, misapplied and failed to appreciate the provisions of Section 4 of the Arbitration Act, as jurisdiction cannot be conferred by default. The Tribunal must therefore down its pen.

10. It was further submitted that, even where for instance parties fail to raise the issues and proceed with the Arbitral process, such failure to challenge an Arbitral Tribunal's jurisdiction will not confer jurisdiction on the Tribunal, if in the first place the Tribunal did not have jurisdiction.

11. However the originating summons was opposed by the 2nd Defendant relying on an Affidavit dated 25th July 2016, sworn by Eng. S. R. Manga, one of the 2nd Respondent's directors. He deposed that the letter dated 19th August 2002, written by the Applicant's Chief Executive Officer to the 2nd Respondent states clearly at the second paragraph that the 2nd Respondent's appointment shall be in accordance with Association of Consulting Engineers of Kenya (ACEK) Conditions (herein "the conditions").

12. It was averred that the said conditions have two (2) agreements, the first is where an Architect is not appointed by the client and the second one is where the Architect is appointed by the client. Further, that clause 4 of both agreements makes provisions for settlement of disputes and lays down the steps to be followed in case of a dispute or a difference arises. That in particular, clause 4C, states that the dispute shall be referred to an Arbitrator.

13. It was argued that, since the appointment of the 2nd Respondent was in accordance with these conditions, the Arbitrator herein has the jurisdiction to entertain the dispute. That, a dispute should be dealt with in the first instant before the forum that has first jurisdiction, before it is put on a higher one. As such, this matter should be dealt with before the Arbitrator who has the first jurisdiction. Thus, the Application should not be allowed as it is baseless, frivolous and a waste of the court's time.

14. The parties agreed to dispose of the matter by filing written submissions. The Plaintiff filed its submissions on 25th May 2017, arguing that, the question of jurisdiction is paramount in any adjudication and whenever raised, the court or tribunal seized of the matter must, as a matter of prudence, inquire into it in *limine* and resolve it before doing anything concerning the matter in respect of which it is raised. Reference was made to the case of; *The Owners of The Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR* where Nyarangi J.(as he then was) stated:

"Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

15. The Judge further stated that;

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it."

16. That, in addition to being a fundamental issue, jurisdiction is the first test in the legal authority of a court or tribunal. Reference was made to the case of; *Floriculture International Limited vs Central Bank Ltd & 3 others (1995) eKLR*.

17. The Plaintiff admitted that, there is no question that, the relevant arbitration agreement is contained in clause 4 of the Association of Consulting Engineers of Kenya (ACEK) Conditions of Engagement and Scale of (Offices) Fees and there is no doubt that, the letter dated 19th August 2002, written by the Plaintiff's Chief Executive Officer, subjected the appointment to the conditions of engagement. Therefore, these conditions form the entire agreement between the parties in terms of; Section 97(1) of the Evidence Act, Cap 80, Laws of Kenya, which excludes any parole evidence in proof of the terms of a contract, which has been reduced to writing.

18. That, where a contract has been reduced to writing, no party can rely on extrinsic evidence of terms not contained in the document. Reference was made to the case of; *Universal Education Trust Fund vs Monica Chopeta (2012) eKLR*. It was argued that, besides, there is no exchange of documents, in which the parties expressed their intention to enter into an Arbitration agreement.

19. The Applicant submitted that, consequently, the only question relevant for decision in this controversy is: whether where arbitration agreement not signed by both parties, it complies with Section 4(3) (a) of the Arbitration Act. It was argued that, for the conditions of engagement to have taken effect, the Memorandum of Agreement should have been executed by both parties and attested by at least two witnesses.

20. That the memorandum attached to the conditions anticipates agreement on all matters relating to; the employment, including the rate of payment, intervals of payment, additional services and dispute resolution and in particular, clause 2 provides that, the memorandum of

agreement and the conditions of engagement together, constitute the agreement between the Client and the Consulting Engineer.

21. Further, the Memorandum of Agreement has an execution and attestation clause, requiring signatures in the presence of at least two witnesses. This position is in consonance with the signing and attestation requirements in Section 3 of the Law of Contract Act, Cap 23 Laws of Kenya.

22. It was further submitted that, it is a basic statement of contract that non-parties to an agreement or contract cannot be subject to its terms and/or acquire rights or be subject to liabilities under that contract, one must be a party to it. Therefore non-parties to an Arbitration Agreement cannot be bound by its terms unless they have agreed to have its terms apply to them. The case of; Consolidated Bank of Kenya Limited vs Arch Kamau Njendu t/a Gitutho Associates (2015) eKLR was cited, where it was held that, a party cannot be forced into arbitration where there is no legal basis for such Arbitration.

23. Similarly, that since arbitration is a creature of consent, the case of; United Steelworkers vs Warrior & Gulf Navig. Co., 363 U.S. 574, 582 (1960) held that, “a party cannot be required to submit to Arbitration any dispute which he has not agreed so to submit”. Further reference was made to the case of; Pramod Chimanbai Patel vs Lalit Constructions & Another 2002 (6) BomCR 72, where it was held;

“the only question relevant for deciding the controversy in the present case is whether the arbitration agreement, if in writing, must be signed by both the parties. I am of the view that it must be signed by both the parties. The other categories of agreements in writing contemplated by sub-section (4) i.e. letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or a statement of claim and defence clearly contemplate that such documents would be arbitration agreements in writing only when they are exchanged between the parties. The purpose is clear enough. The exchange signifies an active assent by both parties and a demonstrable meeting of minds of both parties as to the arbitration agreement. Having regard to this context, I am of view that in Clause (a) when Parliament says “document signed by the parties” it intends a document signed by both the parties.”

24. The Plaintiff relied on the case of; Standard Bent Glass Corp vs Glassrobots OY, 333 F.3d 330, 449 (2003), where allegedly, a clause substantially similar to Section 4 of the Arbitration Act of Kenya, in plain language of the Section, provides that, an Arbitration clause is enforceable only if it was contained in a signed written document or an exchange of letters.

25. It was further submitted that, even if the Arbitration agreement is applicable, the conditions precedent to triggering it have not been met, as the dispute is not yet ripe or justifiable under clause 4 of the Agreement. There is no evidence that, the reference to arbitration was preceded by the issuing of a statement of difference detailing out the areas and extent of difference or afterward submitted to a Consulting Engineer of good standing elected by the Engineers Registration Board as a Conciliator. Thus, the two conditions precedent to the invocation of the arbitration have not yet been fulfilled or crystallized.

26. That under clause 4, the ripeness of the issues presented to the Arbitrator under sub-clause (c), is contingent on the exhaustion of the options in sub-clauses (a) and (b). The Defendant was duty bound to resort to the mechanisms in sub-clauses (a) and (b) before purporting to invoke the jurisdiction of the Arbitrator under sub-clause (c).

27. Reliance was placed on the case of; Jeniffer Shamalla vs Law Society of Kenya (Petition 85 of 2016) (2017) eKLR, to argue that, where a contract provides for a clear procedure or mechanism for the redress of a grievance, the same ought to be strictly followed. It was thus reiterated that, as a result, this dispute is not yet ripe or justifiable for Arbitration under the terms of clause 4.

28. It was submitted that, the doctrine of justiciability is aptly captured in the case of; Wanjiru Gikonyo vs National Assembly of Kenya (2016) eKLR at 27 as follows:

“Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determining.”

29. That, Arbitration being a constitutionally sanctioned dispute resolution mechanism, the Tribunal ought not to engage in the premature adjudication of matters which have not yet been agreed to be submitted to arbitration.

30. However, the Defendant in response, filed submissions dated 28th June 2017, and basically reiterated the averments in the Replying affidavit save to add that, the Civil Procedure Act, Chapter 21, Laws of Kenya, emphasizes the just and expeditious resolution of disputes, as elucidated in the case of; Midroc Water Drilling Co. Limited vs Cabinet Secretary, Ministry of Environment, Water and Natural Resources & 2 others (2013) eKLR, wherein the court stated that;

“.....this court takes the view that Clause 67 of the FIDIC Conditions of Contract is any other method of dispute resolution that is not excluded by Article 159(2) (c) of the Constitution of Kenya.”

31. It was further submitted that, the direction taken herein to resolve this dispute by engaging the 1st Respondent is justified. That the issue of justiciability was elucidated in the case of; Hinga & Another vs PCEA through Rev. Dr. Njoya (1986) KLR 317, wherein the Court held that;

“for an issue to be justiciable, it must constitute a cause of action in law and must be concerning a right to property, contract or any other legal right.”

32. The Defendant maintained that, there is a contractual relationship between it and the Plaintiff, giving the parties equal legal rights,

therefore the Plaintiff cannot term the dispute as unjustifiable and unripe for resolution. As such the submissions by the Plaintiff are baseless and unfounded.

33. I have considered the matters deposed to herein and/or the arguments advanced alongside the rival submissions by the respective parties. I find that there is no dispute that the Plaintiff and the 2nd Defendant entered into an arbitration agreement, as evidenced by clause 4 of the Association of Consulting Engineers of Kenya (ACEK) Conditions of Engagement and Scale of (Offices) Fees and/or by the letter dated 19th August 2002, written by the Plaintiff's Chief Executive Officer. The Plaintiff has conceded to the same.

34. However, the issue of dispute raised by the Plaintiff is whether the arbitration agreement the not having been signed by both parties, as required under clause 4 complies with Section 4(3)(a) of the Arbitration Act.

35. The above stated Section 4(3)(a) of the Arbitration Act, provides that:

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) document signed by the parties;

(b) an exchange of letters, telex, telegram 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.

36. The Plaintiff has submitted at length and cited several authorities on the need for the parties to have signed the agreement for it to be binding on them. It was argued that, in the parties herein having failed to sign the agreement, the agreement does not meet the requirement of Section 3 (a) that the "document be signed by the parties".

37. However, the 2nd Defendant submitted that, the letter of offer for the appointment of the 2nd Defendant clearly states that, the appointment is in accordance with ACEK conditions. The offer was accepted thus, creating a binding contract between the parties. Therefore failure to sign the ACEK conditions is immaterial as Section 3 (b) cited above recognises an exchange of letters, as constituting an agreement in writing.

38. In my considered opinion the issue herein is simply whether there is a valid arbitral agreement in writing as required under Section 4(3) of the Arbitration Act. As can be seen, each party is relying on different sub-sections of that section. It suffices to interrogate the facts herein to determine the issue in controversy.

39. In that regard, I have considered the subject agreement herein and I find that clause 4 thereof states follows:

“(4) Settlement of dispute

The following steps should be taken if any difference or dispute arises;

a. Any dispute or difference arising from this Agreement shall first be confirmed by the issuing of a statement of difference detailing out the areas and extent of difference. This statement shall be accepted by both parties. This stage should be completed within 21 days of notice of difference by either judgment;

b. The statement of difference should be submitted to a consulting Engineer of good standing elected by the Engineers Registration Board as a conciliator for conciliation. The parties will undertake to accept his judgment;

c. Any dispute or difference not settled by conciliation shall be referred to the Arbitration of a person to be agreed upon between the Client and the Consulting Engineer or failing agreement within 28 calendar days, or within such extended time as may be agreed between the two parties after either party has given the other a written request to concur in the appointment of an Arbitrator, to a person appointed by the Chairman for the time of the Association of Consulting Engineers of Kenya.

40. I further note that the said Conditions of Engagement make provisions for the signatures of the parties and the same is blank. However it also suffices to note that “both parties” were required to sign the agreement, the Plaintiff's signature being the first in place and which signature is missing. The Plaintiff who is questioning the 2nd defendant's lack of signature did not sign the document either.

41. Be that as it may, I have also considered the letter dated 19th August 2002, under which the 2nd Defendant was commissioned to carry out the works and find that, it states in part as follows:

“2: Your appointment shall be in accordance with Association of Consulting Engineers of Kenya (ACEK) conditions of engagement and scale of fees;

3: Please liaise with the Lead Consultant and Project Architect M/s Baseline for further briefing;

4: Please signify your acceptance of this commissioning by signing a duplicate copy of this letter and returning the same to us.”

42. As can be seen from that letter, the 2nd Defendant is not required to sign the said ACEK conditions, as part of the condition of its appointment. In fact it does refer the 2nd Defendant to M/S Baseline Architects (who was appointed by the Plaintiff on 22nd May 2002), for “further briefing”, and this is even before the 2nd Defendant had accepted the appointment. The said acceptance was not subject to any given period and indeed the letter is signed by no less officer of the Plaintiff, than the “Chief Executive Officer”.

43. In fact as per the letter dated 12th November 2012, (in the Plaintiff’s documents annexed to the affidavit filed alongside the originating summons), ten years after the appointment of the 2nd Respondent, the Plaintiff wrote to Costwise Associates in relation to the reconstructed team of consultants for the project and included the 2nd Defendant as the “Civil and Structural Engineers”. Yet all along the ACEK conditions had not been signed. What then was the basis upon which the 2nd Defendant recognises as such.

44. The next question that arises therefore is whether the letter dated 19th August 2002, meets the criteria of Section 4 (3) (b) of the Arbitration Act. I have gone through the arguments advanced before the sole Arbitrator on the issue. The decision of the Arbitrator is part of the record; therefore I shall not reproduce it herein. However the Plaintiff submitted that the letter does “not constitute a record of an arbitration agreement” whereas the 2nd Defendant submits the letter creates a binding contract between the parties.

45. The sole Arbitrator rendered his decision on the issue under paragraph 6.0 in a detailed manner referring to the document supplied by the 2nd Defendant and stated as follows;

“I have studied all of the documents appertaining to the preliminary objection and have concluded that jurisdiction rests on the validity or otherwise of the arbitration agreement purported to exist between the parties;

“It is my observation that a contract to provide consultancy services exists between the parties as demonstrated by the exchange of the following letters of offer and acceptance:-

i. The letter reference HF/C/960/19, dated 19th August 2002 from Mr. Ibrahim M. Hussein, the Chief Executive Officer of the National Hospital Insurance Fund, to Mr. S.R. Manga and Associates in respect of the Structural Engineering for the Resource and Recreation Centre on L.R. No. 224968/2 in Karen;

ii. The letter reference M & A/097/001/02, dated 16th September 2002, from the Hon. Eng. S.R. Manga of S.R. Manga and Associates to the Chief Executive Officer of the National Hospital Insurance Fund in respect of the Structural Engineering Consultants for the proposed Resource and Recreation Centre on Plot 2.24968/2 in Karen;”

46. I entirely agree with the finding by the sole Arbitrator which is sound in law. Indeed, Section 4 (4) of the Arbitration Act clearly states that:

“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” (emphasis mine).

47. In my considered opinion, there is no requirement that the said contract be “signed” by the parties. It simply has to be in writing. As conceded by the Plaintiff, the conditions of engagement formed the entire agreement. These conditions are in writing, save that the document containing the same is not signed.

48. It is also conceded that the Plaintiff wrote the letter of 19th August 2002, which makes reference to the said conditions of engagement, which provide for arbitration as the dispute resolution mechanism, in case a dispute arises between the parties in relation to their engagement. Therefore, the argument that the memorandum of understanding (at pages 68 to 80 of the Plaintiff’s bundle), required that both parties sign for it to take effect, does not hold water taking into account the letter of 19th August 2002. This letter and the said conditions fall under section 4(3)(b) of the Arbitration Act.

49. I have considered the authorities cited by the Plaintiff and I am in total agreement with the authorities on jurisdiction and burden of proof. However, the Plaintiff cannot refer to the document produced by the 2nd Defendant as parole evidence and/or not amounting to exchange of documents, when it sent a letter of offer to the 2nd Defendant requiring it to accept and later appointed it officially and subsequently engaged it as Civil and Structural Engineers. Similarly the Plaintiff cannot argue that, it is being forced to arbitrate when it is the one that made reference to the Conditions of Engagement that contains an arbitral clause.

50. The Applicant also argued that, the Claimant in the Arbitral proceedings did not comply with the preliminary steps outlined under clause 4 before invoking the Arbitration clause. The said preliminary steps are evident from the extract of that clause as herein reproduced. However, I note that this issue was not raised before the Arbitrator and does not form part of the impugned decision. Even if it did, it would not amount to lack of jurisdiction on the part of the Arbitrator. It will only mean that the arbitration process is premature but remain the agreed forum for the dispute resolution.

51. Finally, the Court having ruled that, the Arbitrator has the authority to hear and determine the dispute between the parties herein, the issue of whether the dispute raises matters of public policy and/or interest has been overtaken by events and even then the issue not actively

canvassed in this application and neither was it an issue for determination before the Arbitrator.

52. The upshot of all this is that, the originating summons has no merit and is dismissed in its entirety with costs to the 2nd Defendant.

53. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 13th day of December 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Omesa for Mr. Otachi for the Applicant

Ms. Nzioka for Mr. Nzioka for the 2nd Respondent/ Respondent

Dennis.....Court Assistant

Court: Delivered at 2.45pm. The parties were in court in the morning and the court directed that Judgment would be delivered at 2.00pm. The court has been waiting for the Applicant since then.

G.L. NZIOKA

JUDGE