REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 548 OF 2016 (OS)

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF AN APPLICATION TO THE HIGH COURT

BETWEEN

KENYA AIRFREIGHT HANDLING LTD (KAHL)…….....APPLICANT

AND

MODEL BUILDERS & CIVIL ENGINEERS (K) LTD…....RESPONDENT

JUDGMENT

Introduction and background

1. This originating summons concerns the refusal by an arbitral forum to uphold an objection to its jurisdiction by the Applicant in respect of an arbitration which was commenced in July 2015. The Applicant pursuant to Section 17(6) of the Arbitration Act, No. 4 of 1995 has moved the court to determine whether or not the arbitral forum has jurisdiction to entertain and determine the dispute between the Claimant and the Respondent.

2. By way of introduction, and for present purposes, the events leading to the present proceedings may be stated briefly as follows.

3. Both the Applicant and the Respondents are limited liability companies incorporated in accordance with the laws of Kenya. In January 2012, the Applicant contracted the Respondent to undertake renovation and additional works to the Applicant's existing cargo storage warehouse in Nairobi as per the approved structural, electrical and mechanical drawings. The works were to be undertaken under the supervision of the Applicant's duly appointed architect and quantity surveyor. The contract sum was Kshs. 25,950,000/= (exclusive of VAT).

4. The Respondent commenced the works on 6 February 2012 and proceeded with earnest, with the project Quantity Surveyor and Architect respectively preparing and approving interim certificates for presentment by the Respondent to the Applicant for payment. There were delays in payment, the Respondent states. The Respondent however proceeded on and completed the works and also made good the defects. A final certificate was then issued on 12 July 2013. The Respondent contested the final

certificate. The final accounts had by then been prepared on 4 July 2013. When the parties could not agree, the Respondent notified the Applicant of the Respondent's intention to invoke the arbitration agreement in the contract. This was on 27 November 2013.

5. Nearly two years later the arbitral forum was constituted by the Architectural Association of Kenya. Walter Aggrey Odundo was appointed the sole arbitrator. The Applicant quickly raised objection to the arbitrators' jurisdiction but on 26 October 2016, having heard both parties, the arbitrator dismissed the objection prompting the Applicant to move this court for a determination of the same question.

Reliefs

6. For the sake of proper context, it is convenient to set out the main relief sought.

7. The Applicant seeks the following substantive relief:

> ***'That the Honourable court be pleased to set aside the Arbitral Tribunal's ruling dated 26 October 2016 and rule that the Arbitral Tribunal has no jurisdiction to adjudicate upon the Respondent's claim in the arbitration between the parties and the Honourable Court be pleased to stop and terminate the arbitration proceedings before the Honourable Arbitrator Walter Odundo"***

Common Cause Facts

8. The factual narrative above is largely not in dispute. I will probably add that both before me as well as before the arbitral tribunal there was common cause that the notice of dispute was given on 27 November 2013. There was also a common convergence that the dispute is over the amount payable to the Respondent who has completed the contracted works and undertaken or made good the defects. It is also not in dispute that the Respondent was aggrieved with the final accounts/certificate as issued by the project quantity surveyor and project architect.

9. What is in dispute is whether the Respondent notified the Applicant of the dispute within the prescribed time.

Applicants' case and argument

10. The Applicant's case is relatively straight forward. It is that the Respondent failed to comply with the mandatory preceding step of notifying the Applicant that a dispute subsisted and thus no arbitration could be commenced or prosecuted pursuant to Clause 45 of the contract. The Applicant hinged its case on Clause 45.3 which reads as follows:

> ***"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. "***

11. According to the Applicant, whilst the dispute arose in July 2013, the Respondent only gave a notice of the same in November 2013. This was well beyond the ninety day time limit and the relief in arbitration was barred.

12. Mr. Fidelis Limo urged the Applicant's case.

13. Mr. Limo submitted that the dispute arose on 18 July 2013 when the parties failed to agree on the final accounts. Counsel then added that despite knowledge of Clause 45.3 of the Contract, the Respondent did not comply and only gave a notification on 27 November 2013. Mr. Limo insisted that the non-compliance was not "a mere technicality" as it went to the root of the arbitration agreement and enforcement thereof. Where, therefore, a party failed to comply with the requirement as to notice or any other time provision, the arbitrator was divested by jurisdiction. Counsel urged that, I vacate the orders by

the arbitrator which upheld jurisdiction.

Respondent's case and submissions

14. The Respondent's case may be easily retrieved from the opposing affidavit of Dharan Singh Chaggar filed on 17 January 2017.

15. According to the Respondent, the dispute arose on 27 August 2013 and a Notice of the same was given on 27 November 2013. This, according to the Respondent, was within the time limit prescribed under Clause 45.3 of the contract. The occurrence or discovery of the issue giving rise to an arbitral dispute, according to the Respondent, had been discovered and the notice given within the ninety days.

16. The Respondent's case was urged by Mr. W. A Mutubwa assisted by Mr. Eugene Lubullelah.

17. Counsel insisted that the arbitral time-bar clauses had been complied with as the dispute which took Counsel to arbitration was the failure to issue a final certificate. According to Counsel, the cause of action arose on 27 August 2013 and a notification was duly issued on 27 November 2013 which was within the stipulated period. Counsel additionally submitted that the Applicant having participated in the arbitration process was also estopped from contesting the arbitrator's jurisdiction pursuant to the provisions of Section 5 of the Arbitration Act.

Discussion and Determination

18. From the above, it is clear that the main issue for determination in this cause is whether the Respondent correctly and properly referred the dispute to the arbitral forum. Put simply, is whether the arbitral forum is seized with the necessary jurisdiction.

19. S. 17 of the Arbitration Act No 4 of 1995 ("the Act") grants an arbitral tribunal the competence to rule on its own jurisdiction. A party raising objection to the arbitral tribunal's jurisdiction is to do so not later than the submission by such party of a statement of defence: see s.17(2) of the Act.

20. The objection to jurisdiction was filed and raised by the Applicant herein initially before the arbitrator. The objection was also raised before the applicant filed any response to the claim. There was no delay in raising the objection and neither can it be deemed that the applicant had waived the right to object to jurisdiction as the appropriate forum for raising the objection was before the arbitrator and at the time it was raised. I would consequently not accede to the Respondent's request that I find that the Applicant had waived the right to object and is thus caught up with the provisions of s. 5 of the Act.

21. Still under s. 17 of the Act, the court is also vested with powers to determine whether an arbitral tribunal has jurisdiction: see s. 17(6). The power may only be exercised once a party has raised objection before the arbitrator and the objection declined: see **Sebhan Enterprises Ltd *v* West Mount Power (Kenya) Ltd [2006] eKLR** . The court in such an instance exercises an original jurisdiction. As was stated in **West Mount Investments Ltd –v- Tridev Builders Company Ltd [2017] eKLR:**

> ***[23] As already pointed out, the application to the High Court under Section 17(6) the Act is not an appeal. The court must then in considering the matter exercise an original jurisdiction and is not beholden to any findings of fact by the arbitral tribunal. The court is to evaluate the evidence, assess it and make its own conclusion while relating the same to the arbitration agreement which the court is also to construe independently. Even if it was to be deemed that an application under Section 17(6) of the Act is an appeal, it would still be a first appeal and the High Court would still be under an obligation to re-evaluate and consider all the evidence and material laid before the arbitral tribunal and make its own conclusions: see*** **Selle v Associated Motor Boat Company [1968] EA 123 and Ramp Ratua & Company Ltd v Wood Products Kenya Ltd CACA No. 117 of 2001."**

22. In determining whether an arbitral tribunal has jurisdiction or not, the court interrogates four issues. Is

there a valid arbitration agreement? Is the arbitral tribunal properly constituted? Have the parties submitted themselves to arbitration in accordance with the arbitration agreement? Finally, are the matters submitted to arbitration arbitrable and within the scope of the arbitration agreement?

23. The question to be answered in the instant case is the third of the four questions. There does not appear to be any controversy that there was a valid arbitration agreement in place between the parties, it is only contested that it is now spent in view of the Respondent's non-compliance with a specific timeline. Secondly, the arbitration agreement, portions of which I have reproduced in succeeding paragraphs below, also provided for the arbitration to be conducted by a sole arbitrator appointed, in default of agreement, by the Chairman or Vice chairman of the Architectural Association of Kenya. The arbitrator herein was appointed by the chairperson of the Architecture Association of Kenya. The fourth question is also not in dispute. I need not determine whether the dispute between the parties is either arbitrable or was one contemplated by the arbitration agreement. The claim is for work done and services rendered. It is arbitrable. It falls within the arbitration agreement under the expansive Clause 45 of the Contract.

24. The contention however revolves around Clause 45.3. The Applicant contends that a dispute arose in July 2013 and the Respondent failed to notify the Applicant of the dispute until November 2013. The Respondent on the other hand contends that a dispute arose on 27 August 2013 and a notification was given on 27 November 2013 in pursuance of Clause 45.3 of the Contract.

25. It would be appropriate to first identify when the dispute arose as time, for purposes of Clause 45.3, begun to run when the dispute arose.

26. 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"***.

27. There ought to exist an underlying claim not admitted or which claim is conditionally admitted. Mere seeking of information by either party to a transaction and in the ordinary course of business does not of necessity raise any dispute or difference. I also hasten to add that the difference or dispute ought to be the sort contemplated by the arbitration agreement and, indeed, arbitrable for purposes of any arbitration process.

28. In the instant case, it is not in controversy that the Respondent completed its part of the bargain (renovations and building). The Respondent was then issued with certificates dated 28 August 2012 and 15 July 2013 respectively reflecting completion of the works and the making good of defects. The Respondent then states that the Applicant had by a letter dated 12 July 2013 attempted through its consultants to prepare a final certificate but grossly understated the sums. The certificate fell short of establishing the correct sum due to the Respondent and no value for loss and expense was included. The Respondent protested. The Respondent was also then aware or contended that the Applicant had deliberately delayed release of the retention sums. The Respondent disputed the Applicant's final figures and apparently demanded more, but the Applicant did not budge.

29. Evidently, there was a dispute way back in July 2013. Immediately, the Respondent contested the Applicant's "final" sums or accounts, there arose a dispute. The circumstances, the facts, the conduct of the parties all pointed to a difference which had to be resolved either amicably or by arbitration. There

was therefore need to ignite the arbitration clause which had a condition precedent that prior to any commencement of arbitration the applying party (in this case the Respondent) had to first notify the other party of the fact that there existed a dispute which needed resolution, ultimately by arbitration. The party though could not invoke Clause 45.1 due to the prohibition obtaining under Clauses 45.4 and 45.5. These particular subclauses read as follows:

> ***45.1*** *In case any dispute or difference shall arise between the Employer or the on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the The Architectural Association of Kenya, on the request of the applying party.*
>
> ***45.4*** *Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.*
>
> ***45.5*** *In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.*

30. Both parties submitted before me that the notification anticipated under clause 45.3 was not issued until 27 November 2013. I did not have opportunity to sight this notification, as neither party produced it or availed a copy to the court. The non-production is however not prejudicial to either party as it is not the content that is critical but rather the date of notification, which the parties have agreed was 27 November 2013. I state so as the arbitration agreement does not provide any standard format of the notification contemplated under Clause 45.3 and thus the specific ingredients are also not prescriptive. However, the aim of the time bar clause under Clause 45.3 must be to draw the other party's attention to the existence of a dispute and assist the parties to swiftly deal with the dispute: see **West Mount Investments Ltd –v- Tridev Builders Company Ltd (Supra)** and also **The *Simonburn* [1972] 2 Lloyds R 355**.

31. I must point out that in the instant case the notice under Clause 45.3 is not intended to commence arbitration, rather a second notice is anticipated under Clause 45.1. The latter notice can only be given after the expiry of at least 90 days after service of the notice under Clause 45.1.

32. I must also point out that contractual time bar clauses equivalent to clause 45.3 may often appear bad bargains as they limit the parties right to move to the preferred mode of dispute resolution but their aim and purport is crucial in commercial transactions and relationships. Parties should never deal whilst unknown claims await them. Consequently, contractual time bar clauses will be enforced and also strictly applied. I have to strictly enforce the instant clause.

33. I have found that the dispute arose on 18 July 2013. I have also found, on admission by the parties that a notification was given pursuant to Clause 45.3 on 27 November 2013. This was beyond the prescribed time limit. Effectively, when the Respondent triggered the arbitration process and caused the appointment of the arbitrator, an important step in the process had not been undertaken within the prescribed time.

34. Even if the Respondents version that the dispute arose on 27 August 2013 was to be accepted, then still the notification of 27 November 2013 was outside the ninety day period by some odd day. It does not appear that the time limit was struck as an agreement between the parties. I have no powers to redraw the contract and extend that time-limit.

35. As matters stand, I have to uphold the contention that the notification was issued and served later than ninety days after the dispute arose. The notification was outside the prescribed time under Clause 45.3. The Respondent consequently lost any entitlement to claim in arbitration.

36. Based on the above principles I am also enjoined to hold that the arbitrator has no jurisdiction to entertain, hear and determine the dispute between the parties herein.

37. For the sake of clarity, the claim by the Respondent is not barred. What is barred is the arbitral process as a mode of determining the claim. Clause 45.3 is relatively clear and so is Clause 45 in its entirety. It does not state that where a dispute is not notified or lodged within 90 days the claim is barred, the clause only prohibits the commencement of arbitration and no more. The Respondent may thus very well lay his claim in court.

Disposal

38. For all the a foregoing reasons, the Applicant has succeeded in showing and convincing me that there is want of jurisdiction on the part of the arbitral forum which was constituted on 9 October 2015, when the sole arbitrator accepted his appointment. The forum is *non-conveniens*. I agree the application ought to succeed and it does.

39. In the result, I make the following orders;

a) The originating summons dated 23rd November 2016 succeeds and is allowed.

b) I hold that the arbitral tribunal constituted of Walter Aggrey Odundo has no jurisdiction to hear and determine the dispute between the parties namely Model Builders & Civil Engineers(K) Limited and Kenya Airfreight Handling Limited and referred to him by a letter dated 21 July 2015.

c) The arbitral tribunal's ruling dated 26 October 2016 is set aside and vacated.

d) The Respondent is to pay the costs of the originating summons to be taxed absent any agreement

40. Orders accordingly.

Dated, signed and delivered at Nairobi this 12th day of May, 2017.

J. L. ONGUTO

JUDGE