



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MISC SUIT NO. 565 OF 2014**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPLICANT**

**VERSUS**

**MASOSA CONSTRUCTION LIMITED.....1<sup>ST</sup> RESPONDENT**

**QS NEWTON DISHON MAUNGU (SOLE ARBITRATOR).....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant, **KENYA NATIONAL HIGHWAYS AUTHORITY** has moved the court pursuant to section 17 (6) of the Arbitration Act and Rule 3 (1) of the Arbitration Rules, 1997.
2. The Applicant requests the Court to set aside the Preliminary Ruling which was delivered by the Arbitrator on 30<sup>th</sup> September 2014.
3. It was the Applicant's position that the Arbitrator lacked jurisdiction to hear and determine any alleged dispute between the Applicant and the Respondent, **MASOSA CONSTRUCTION LIMITED**.
4. The Ruling which the Applicant is seeking to have set aside, was made in relation to the Applicant's contention, that the Arbitrator lacked jurisdiction to hear and determine the dispute between the 2 parties herein, as there was no arbitration agreement between the parties.
5. The Arbitral Tribunal was said to be capable of deriving its jurisdiction from a contract between the parties. Therefore, where there was no agreement between the parties, the Applicant believed that the Arbitral Tribunal which assumed that it had jurisdiction, would have acted without authority.
6. The Applicant also faulted the Arbitral Tribunal for delving into issues which were not before it. Indeed, the Arbitral Tribunal is said to have made determinations of a final nature, on issues which could only be determined after the parties had presented their respective cases on the substantive issues.
7. The applicant wants me to determine if there was a contract between the parties herein.
8. Secondly, the applicant wants me to determine if there was a contract which contained an arbitration clause between the two parties.

9. By suggesting the second issue above, the applicant is understood to be acknowledging the point that the contract containing the arbitration clause need not be in the contract between the employer and the sub-contractor. I say so because if the arbitration clause could only be binding if it was within the contract between the employer and the sub-contractor, then the second issue would have been unnecessary.

10. The third issue proposed by the Applicant was that the court should determine whether or not **KeNHA** (the employer), being a Statutory Body, could execute contracts outside the provisions of the Kenya Roads Act No. 2 of 2007.

11. To my mind, the answer to that question would not get us any closer to determining whether or not the Arbitral Tribunal had jurisdiction.

12. If the law does not allow **KeNHA** to execute contracts outside the provisions of the Kenya Roads Act, that of itself, would not mean that in the event **KeNHA** did execute such a contract, the Arbitral Tribunal would not have jurisdiction.

13. Of course, at this stage, I am not suggesting that the employer (**KeNHA**) actually did execute a contract outside the provisions of the Kenya Roads Act. I am not yet even saying whether or not **KeNHA** signed any agreement.

14. The question of jurisdiction is one of law. But then again, the law is not applied in a vacuum.

15. Pursuant to section 3 of the Arbitration Act an arbitration agreement is defined as follows;

***“arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.***

16. Therefore, there does not have to exist a contract between the parties, for there to arise an arbitration agreement. Provided that there exists a defined legal relationship, from which it can be discerned that the parties had agreed to submit all or certain disputes, to arbitration, it would be deemed that there was an arbitration agreement.

17. For that reason, I believe that the Applicant was right to have set out the second proposed issue, which made reference *“to a contract containing an arbitration clause”*.

18. Pursuant to section 4 of the Arbitration Act;

**“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 statement 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”.**

19. In this case, there is no contract which has been signed by both the employer and the sub-contractor.
20. The contract was signed by **SBI INTERNATIONAL AG KENYA and MASOSA CONSTRUCITON LIMITED.**
21. **SBI INTERNATIONAL AG KENYA**, (*hereinafter “SBI”*) signed the contract on 8<sup>th</sup> February 2010, indicating that it was doing so on behalf of the Director General of **KeNHA**.
22. The fact that it was SBI who indicated that they were signing the contract on behalf of **KeNHA** cannot, of itself, give rise to an obligation on the part of **KeNHA**. To suggest that a third party can cause you to be bound to the term of a contract, by simply indicating that he had signed the contract on your behalf, is completely wrong. I say so because all manner of contracts could be signed on your behalf, even without your knowledge!
23. The employer submits that a third party cannot enforce a contract simply because he was mentioned in that contract.
24. That is absolutely correct.
25. But it is also correct that an arbitration agreement need not be synonymous with a contract. I say so because pursuant to Section 4 (4) of the Arbitration Act, it is recognized that the contract could make reference to another document which contained the arbitration clause.
26. In this case, the contract document dated 8<sup>th</sup> February 2010 made reference the following 5 other documents, which were deemed “*to form and shall be read and construed as part of this Agreement*”;
- “i) Form of Tender.*
  - ii) Conditions of Contract and Appendix to Conditions of Contract.*
  - iii) Specifications.*
  - iv) Drawings*
  - v) Priced Bills of Quantities”.*
27. By virtue of the express wording of the Agreement dated 8<sup>th</sup> February 2010, those 5 other documents became a part of the Agreement.
28. However, it must be appreciated that **KeNHA** was not a party to the Agreement dated 8<sup>th</sup> February 2010. How then could it be enjoined to an Agreement which it was not a party to?
29. As alluded to earlier, it would be improper for third parties to purport to impose obligations on a party, without the consent or authority of that party.
30. But then again, the circumstances of this case are such that the parties to the Agreement dated 8<sup>th</sup> February 2010, were not strangers to the employer. The sub-contract which **MASOSA CONSTRUCTION LIMITED** was tasked to perform was literally a sub-set of the work with **KeNHA** (as the employer), wished to have done.
31. Nonetheless, the question that still remains is whether or not the contractor and the sub-contractor could enter into an Agreement which would then become binding on the employer, if the employer did not authorize or accept such an arrangement. In principle, the answer is in the negative.

32. However, there may arise facts which could lead the court to conclude that either the employer had authorized the contractor and the sub-contractor to enjoin it into their Agreement, or the employer may have chosen to accept the terms of the Agreement.
33. The suggestion in this case was that the employer, by its conduct, had ratified the Agreement between the contractor and the sub-contractor. The said conduct was said to have played out in the manner in which the employer directly involved itself with the sub-contractor.
34. The Arbitral Tribunal was faulted by the employer for delving into matters of evidence, which went beyond the scope of the issue which was for determination at that stage.
35. The Arbitral Tribunal relied on a sample Form of Agreement for sub-contracts and went on to hold that the employer nominated the sub-contractor in this case.
36. The Arbitral Tribunal also made a finding that the Performance Bond/Guarantee and Advance Payment Bank Guarantee which was provided by the sub-contractor, was in favour of the employer, instead of the contractor.
37. A further finding by the Arbitral Tribunal was that the sub-contract in this case was de-linked from the Main Contract. The only linkage between the two was that the main contract and the sub-contract were most likely funded under the same Budgetary provisions held in the Main Contract.
38. Nonetheless, the employer was said to have sought authority from the contractor, to enable the employer deal directly with the sub-contractor.
39. In the final analysis, the Arbitral Tribunal concluded that;
- “There existed a strong Contractual relationship between the Claimant and the Applicant/Respondent, a relationship of a Contractor, on one part, and an Employer, on the other part”.***
40. The point I am making is that the Arbitral Tribunal made several findings based on its analysis and assessment of factual evidence.
41. Some of those findings were of a final nature, such as the conclusion regarding the relationship between **KeNHA** and **MASOSA CONSTRUCTION LIMITED**.
42. When such findings are made by the Arbitral Tribunal even before the actual arbitration process had begun, there is a real danger that the process may not remain wholly objective.
43. To my mind, when the issue of jurisdiction is so inter-twined with the factual evidence that the substantive case cannot be kept off from the determination on the issue of jurisdiction, it would be prudent to direct that the determination on the question on jurisdiction be deferred, so that it remains alive until the Arbitral Tribunal gives its Final Award.
44. The Arbitral Tribunal has held that there exists a strong Contractual relationship between the employer and the sub-contractor. However, there has been no identification of the document or documents in which the existence of that relationship was established.
45. In a literal sense, the Agreement signed between the Main Contractor and the sub-contractor, did not include the employer. It made reference to the main contract, by making that Main contract a part of the Agreement.
46. However, there has been nothing to demonstrate that the employer either authorized that arrangement or otherwise ratified it.

47. If anything, if, as the Arbitral Tribunal said, there was a strong contractual relationship between the employer and the sub-contractor, why would the employer need to obtain from the Main Contractor a letter of Irrevocable Authority?

48. Is not that conduct indicative of the employer's acknowledgment that it did not have a privity of contract with the sub-contractor?

49. In the final analysis, I have come to the conclusion that the Arbitral Tribunal exceeded its role, by determining substantive issues which were not within the realm of the matter in issue. At that stage, the only question for determination was whether or not the Arbitral Tribunal had jurisdiction.

50. Having rendered itself as it did in the Preliminary Ruling, I hold that regardless of whether or not the Arbitral Tribunal had jurisdiction, it would be difficult, if not impossible, for the said Tribunal to proceed further with the arbitration process.

51. In the interests of justice to the parties, I order that the Preliminary Ruling be set aside. I so order, not because the Arbitral Tribunal has or does not have jurisdiction. The primary reason for my said determination is that the Arbitral Tribunal arrived at its decision after delving into substantive issues, which should only have been given consideration after the Tribunal's jurisdiction had been ascertained.

52. But did the Arbitral Tribunal have jurisdiction?

53. In my considered opinion, the Tribunal did not have jurisdiction. That decision is first premised on the lack of a contract between the employer and the sub-contractor.

54. Secondly, even though the Agreement mentioned the Main Contract, in which there was a clause for arbitration, the main contract did not mention the Agreement between the contractor and the sub-contractor.

55. The employer could not be forced into a contractual relationship through an agreement that it was not party to.

56. The manner in which the employer worked directly with the sub-contractor, could not, of itself, be deemed to have given rise to an arbitration agreement.

57. By dint of Section 4 (4) of the Arbitration Act, it was into the Agreement between the contractor and the sub-contractor that the arbitration clause was incorporated. In other words, if there was a dispute between the contractor and the sub-contractor, such dispute would be placed before an arbitrator for determination. That is because the arbitration clause in the Main contract was deemed to be contained in the Agreement, which had expressly made the conditions of the Main Contract a part of the Agreement.

58. In the final analysis, therefore, the Originating Summons is successful. It is declared that the Arbitral Tribunal lacked jurisdiction to hear and determine the disputes alleged to exist between the employer and the sub-contractor.

59. The costs of the Originating Summons are awarded to the Applicant.

**DATED, SIGNED and DELIVERED at NAIROBI this 9<sup>th</sup> day of June 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

No appearance for the Applicant

Miss kindunduhu for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

Collins Odhiambo – Court clerk.