REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

HCC N O. 408 OF 2015

IN THE MATTER OF THE ARBITRATION ACT 49 OF THE LAWS OF KENYA

BETWEEN

NATIONAL HOSPITALINSURANCE FUND….....PLAINTIFF/APPLICANT

VERSUS

KAIRU BACHIA(SOLEARBITRATOR).....1ST DEFENDANT/RESPONDENT

UJENZI CONSULTANTS…….....2ND DEFENDANT/RESPONDENT

JUDGMENT

1. The Application before the Court is the Applicant's Originating Summons dated 5th December 2013 and filed on 6th December 2013. It is expressed to be brought under **Sections 17 (6) of** the Arbitration Act 1995 **(Act No. 4 of 1995) and Rules 3 (1)** of the Arbitration Rules**.** It sought for the determination of the following questions:-

a. ***Whether the 1st Defendant has jurisdiction to entertain the alleged claim by the 2nd Defendant against the Plaintiff.***
b. ***Pursuant to the determination of (a) above, this Honourable Court find that the 1st Defendant lacked the jurisdiction to entertain the claim by the 2nd Defendant and thereby set aside the preliminary ruling which was delivered by the 1st defendant (sole arbitrator) on 14th August 2015.***

2. Simultaneously with the Originating Summons, the Plaintiff/applicant also filed a chamber summons application on 25th August, 2015 seeking for a stay of the arbitral proceedings pending before the 1stDefendant between the plaintiff and the 2nd Defendant/Respondent. The same was supported by the affidavit and further affidavit of **Ruth Makallah Gakuo**, the Plaintiff' legal affairs manager, sworn on 25th August, 2015 and 15th September, 2015 respectively. These affidavits were also in support of the originating summons.
3. It was the Plaintiff's contention that it acquired property in Karen, Nairobi County in the year 2002 for the construction of a proposed Medical Resource Centre. The 2ndDefendant herein was appointed by the Plaintiff to provide quantity surveying services vide a letter of appointment dated

29th April, 2002. Under the contract, the claimant proceeded to provide quantity surveying services on diverse dates. However, a dispute arose between the Plaintiff and the 2nd Defendant.

4. On April, 15th 2015, the Plaintiff was served with a letter from F. Kairu Bachia (Sole Arbitrator) notifying the Plaintiff of an alleged dispute between it and Ujenzi Consultants which had been set down for a preliminary meeting before the sole arbitrator the next day, that is April 16th, 2015. That, despite the short notice, the Plaintiff was able to instruct its advocates to attend the stated preliminary meeting. The Plaintiff further stated that it was subsequently served with a statement of claim by the 2nd Defendant, whereby upon review, it became clear that the said claim was not a matter in which, the Arbitrator had jurisdiction. The Plaintiff drew this conclusion from the fact that the 2nd Defendant had invoked the provisions of A.7 of the fourth schedule to the Architects and Quantity Surveyors Act Cap 525 Laws of Kenya, to request the Chairman of the Architectural Association of Kenya in the appointment of the 1st Defendant.
5. The Plaintiff proceeded to depone that due to the apparent lack of jurisdiction, it filed a preliminary objection to jurisdiction of the Sole Arbitrator on 15th June, 2015. The same was heard and argued on 21st July, 2015. Through his ruling dated 14th August, 2015, the sole Arbitrator dismissed the preliminary objection. Aggrieved by this decision, the Plaintiff come to this court to challenge the finding on the said preliminary objection.
6. In the opinion of the Plaintiff 1st Defendant lacked jurisdiction as there was no arbitration clause which can be implied under the provisions of the Architects & Quantity Surveyors Act. That further, an arbitrator draws his mandate and jurisdiction from an arbitration in a contract. The Respondent was of the view that such a contract was not in existence in the instant case. It was also contended that the Arbitrator also failed to appreciate the distinctions between the provisions of the by-law 38 of the Architects & Quantity Surveyors Act as read together with the fourth schedule to the Act on one hand and the By –Law 39 as read together with the fifth schedule to the Act on the other part. That failure to consider this provision leads to a gross misinterpretation of the law.
7. Further, it was stated that section 39 of the By-laws provides that the conditions of Engagement and the Scale of Professional Charges for quantity surveyors shall be those contained in the Fifth Schedule to the By-Laws, while Section 38 of the By-Laws states that the Conditions of Engagement and the Scale of the Professional Charges for architects shall be those contained in the Fourth Schedule to the by –Laws. The Plaintiff hence contended that the attempt by the 2nd Defendant to invoke the provisions of the fourth schedule of the Act which related to Conditions of Engagement of Scale of Professional Charges for architects was misconceived and erroneous in law, as the applicable provisions with regard to quantity surveyors was the fifth schedule of the Act.
8. The Plaintiff further pointed out that the fifth schedule does not contain any arbitration provisions that would entitle the 2nd Defendant to purport to commence arbitration proceeding. The Plaintiff therefore faulted the appointment of the Arbitrator and therefore reiterated that he lacked the jurisdiction to adjudicate over the dispute between the parties.
9. In opposition to the application, the 2nd Defendant filed grounds of objection dated 1st October, 2015 together with the supporting affidavit and further affidavit of **Dan Ameyo**, advocate, sworn on 1st October, 2015 and 18th September, 2015 respectively. In the contention of the 2nd Respondent, the application before the court lacked merit. It was contended that there was a valid arbitration agreement between the Plaintiff and 2ndDefendant, and it was proper for the 1st Defendant to hold as such. That the law empowers an arbitrator to decide on the challenge of his jurisdiction, including the validity of an arbitration agreement. Accordingly, the 2nd Respondent averred that the 1st Defendant having ruled on the validity of the arbitration agreement between the Plaintiff and the 2nd Defendant and that he was properly seized of the matter, then it follows that the matter was properly before the 1st Defendant.
10. In the disposition of the Mr. Ameyo, learned counsel of the 2nd Defendant, the Arbitration Act cap 49 of the Laws of Kenya is fashioned along the lines of the UNCITRAL model Law. That the Act together with the UNICITRAL model law, limits court intervention in the arbitral process. That further, for arbitration to apply, there must be an agreement in which an arbitration clause is

incorporated. That in this instance the contract in question was a letter of appointment which contained a clause that the terms of the work commissioned shall comply with Cap 525 of the Laws of Kenya.

11. Accordingly, it was the averment of the 2nd Respondent that the provisions of Cap 525 Laws of Kenya were therefore incorporated in the agreement. In view of the foregoing, the 2nd Defendant contended that the provisions of Cap 525 of the Laws of Kenya contain an arbitration clause which is A.7 in the fourth schedule under that particular law. That further, in view of the separability and autonomy principle in section 17 (a) of the Arbitration Act, A. 7 in the fourth schedule is an arbitration agreement on its own and is independent of the document in which it is embedded. That in other words, the same is a stand alone agreement applicable to persons covered by Cap 525 laws of Kenya, namely architects and quantity surveyors.
12. The 2nd Defendant therefore sought to convince the court that Clause A.7 being an independent agreement covers both architects and quantity surveyors without the need of separating a similar Clause 1 of the 5th Schedule. That it is independent, separate and standalone agreement for the resolution of any disputes between the Client and either an architect or quantity surveyor. It was also contended that the Plaintiff has previously submitted to the jurisdiction of an arbitrator appointed pursuant to Clause A.7 of Cap 525 in respect of a dispute between the Plaintiff and the 2ndDefendant among other consultants. That in that arbitral process, the 2nd Plaintiff did not raise any jurisdictional objection to the appointment.
13. The 2nd Defendant further pointed out that the whereas the Plaintiff questions the application of the arbitration clause in Cap 525, the Plaintiff in its Statement of Defence filed with the Arbitrator , proposes use of conditions of engagement which has an arbitration agreement. Mr. Ameyo, further contended the Arbitral Tribunal the doctrine of kompetenz has the power to rule on any challenge of its own jurisdiction, including any objections as to the existence or validity of the arbitration agreement. That the 1stDefendant having ruled on this, it is not for this court again to challenge those findings and in proceeding to do so, the same would be in contravention of section 10 of the Arbitration Act.
14. In response to these averments, the Plaintiff in the further affidavit of **Ruth Makallah** Gakuo sworn on 15th September, 2015, reiterated that under Section 17(6) of the Arbitration Act, it had the right to approach this court to challenge a decision on an arbitral tribunal as regards jurisdiction. The Plaintiff further reiterated that no valid arbitration agreement existed between the parties. Further, the plaintiff reiterated that it was not an architect and therefore there was no basis for the 2nd Defendant to invoke the provisions of the Fourth Schedule of the By Laws of the Architects and Quantity Surveyor's Act.
15. The Plaintiff further contended that the principle of seperabilty /autonomy does not apply in this case, since there an arbitration clause was lacking in the agreement between the parties in the first place. That therefore the 1st Defendant cannot arrogate himself jurisdiction, when an Act of Parliament clearly states that no arbitration exists. With regard to the application for the stay of proceedings, the Plaintiff pointed out that the 2nd Defendant did not have an objection to the same. The Plaintiff further insisted that this is a new claim, and the disposition by the 2nd Defendant that the Plaintiff had previously acceded to the jurisdiction to arbitration in a similar matter was neither here nor there and such an assertion should be dismissed by the court.
16. The parties dispensed the application through written submissions orally highlighted in court. A large part of these submissions contained the averments in the affidavits before the court. I shall therefore touch on a few issues that were not highlighted in the evidence before the court.
17. Mr. Ogeto, who was the learned Counsel for the Plaintiff stated that in this case, it was vital for the Court to look at the relevant law that sets out the mandate of the Tribunal as held in the case of **Jessee Kamau Kinuthia –v- Teresia Wanjiku Kamande (2008) eKLR.** In view of the foregoing, the Plaintiff argued that Section 38 of the Architect and Quantity Surveyors By-Laws provides that the Conditions of engagement and Scale of Professional Charges of Architects shall be those contained in the Fourth Schedule of the By Laws as amended from time to time.
18. That conversely, Section 39 of the By –Laws provides for the Conditions of Engagement and Scale of Professional Charges for Quantity Surveyors shall be those contained in the Fifth Schedule of the By –Laws. That therefore, Clause A 6 and A.7 of the Fourth Schedule as the legal

basis of requesting for the appointment of the arbitrator is misconceived and wrong, as the same can only be applied in respect to Architects. Mr. Ogeto went on to add that the 2nd Defendant was retained as a Quantity Surveyor and not an architect, as such the Fourth Schedule was inapplicable. As such, it is the Plaintiff's assertion that the 1st Defendant did not have the jurisdiction to entertain the matter. Mr. Ongeto while citing the case of **Yusuf Gitau Abdallah –v- Building Centre (K) Ltd & 4 Others (2014) eKLR** reiterated that jurisdiction cannot be presumed by craft nor can it be conferred by way of a party's pestering. That further, the plaintiff had a case for the setting aside the decision of the arbitrator in which he dismissed the Plaintiff's objections. Mr. Ogeto therefore urged the court to allow the application and the orders sought therein.

19. In response to the above submissions, Mr. Ameyo learned counsel for the 2nd Defendant, submitted that the Plaintiff misapprehended the law and that its interpretation of Cap 525 was incorrect and does not represent the law as enacted. It was Mr. Ameyo's opinion that section 38 and 39 of the By-Law, make reference to the Conditions of Engagement of both the Architects and Quantity surveyors respectively are also subject to the provisions of the Act and the By –Laws. That in view of the foregoing, the conditions of Engagement of both the Architects and Quantity surveyors are also subject to provisions of both the Substantive Act and the subsidiary legislation.
20. Mr. Ameyo in his argument urged the court to look at the Act, as the same contains among other provisions, clause A.7 which provides dispute resolution mechanisms between both architects and quantity surveyors and their Employer. That in view of this, clause A.7 was not intended to apply only to the Conditions of Engagement of the Architects alone but the same also applies to Conditions of Engagement of Quantity surveyors. The 2nd Respondent relied on inter alia the case of **Kenya Airports Authority v Baseline Architects & 3 others [2015] eKLR** and **Kenya Tea Development Agency Limited & 7 Others –vs- Savings Tea Brokers Limited (2015) eKLR** in support of its submissions.
21. I have considered the application, the Grounds of Opposition as well as the written submissions by Counsel in support and in opposition to the application. Having done so, I take the following view of the matter. I shall first, deal with the issue raised by the 2nd Defendant on whether the court has the jurisdiction to determine this application. I find that the same is straight forward. I say so because what was effectively determined as a preliminary question by the arbitral tribunal on 14th August, 2014, was on the issue of the Arbitrator's jurisdiction. Under the Arbitration Act, this Court has the jurisdiction to determine the current application subject to Section 17 (6) and 17(7) of the Arbitration Act 1995 which provides thus:-

> ***"(6) 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.***
>
> ***(7) The decision of the High Court shall be final and shall not be subject to an appeal"***

22. I therefore agree with the sentiments of the plaintiff that this court is properly seized of the matter and shall therefore proceed to determine the issues raised therein.
23. I shall now determine merit or otherwise of the application. In my opinion, there are two issues for determination. The first is whether there was a valid arbitration agreement between the parties. For this question to be effectively answered, I am of the view that the court has to also determine the import of A. 7 of the Architect & Quantity Surveyors Act, Cap 525.
24. In determining whether there was an arbitration agreement, I find Section 3 and 4 of the Arbitration Act Cap 49 Laws of Kenya instructive. The same stipulates as follows with regard to an arbitration agreement;

> ***" 3 "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"***

25. From the above finding, a contract need not exist between the parties for an arbitration agreement

to arise. Provided that there exist legally defined relationship where it can be discerned that the parties agreed to submit all or ceratin issues to arbitration.

26.Further section 4 states as follows -;

> ***"4 (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."***

27.Bearing the above in mind, I find that the contract from which the dispute arises is a letter of appointment written to the 2nd Defendant by the Plaintiff dated 1st April, 2002. The relevant part of the letter states as follows;

> ***"We have the pleasure in confirming your appointment as Consulting Quantity Surveyors for the above project, which is to commence soon for National Hospital Insurance Fund.***
>
> ***The terms of this commission shall comply with Cap 525 of the Laws of Kenya.***
>
> ***Your Commission includes for all full Pre and Post contract services as covered by the relevant clauses under the Act. "***

28.From the above, it is given that there was an engagement between the parties. The same was hinged on the relevant provisions of Cap 525 of the Laws of Kenya.Therefore I am in agreement with Counsel for the 2nd Defendant that the contract incorporates the relevant provisions of Cap 525 laws of Kenya. However, the question that therefore falls for resolve, is whether the Arbitration requirement under A. 7 of the Fourth Schedule of Cap 525, can apply in this case in light of section 38 and 39 of the said Act.

29.Alive to the fact that this court is called upon to interpret the aforementioned provisions, it is important to state that the cardinal rule for construction of a statute, is that the same should be construed according to the intention expressed in the statute itself. In ***Halsbury's Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372***the learned authors stated thus :-

> ***"The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context…"***

30. The intention of a statute can be identified through a number of factors. In the case of **Cusack – vs- Harrow London Borough Council (2013) 4 ALL ER 97**, the Supreme Court observed:-

> ***"Interpretation of any document ultimately involves identifying the intention of***

Parliament, the drafter, or the parties. <u>That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors</u>." (emphasis mine)

31.Further, in Halsbury's Laws of England (supra):-

" It is one of the linguisitic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…"

32. Again in the case of **WARBURTON –VS- LOVELAND (1832)5 E.R.** Tindal C.J said:-

"Where language of an Act is clear and explicit, we must give effect to it whatsoever the consequences, for in that case, the words of the statute speak the intention."

33.Going back to the meaning and effect of A. 7 of the fourth schedule, one must note that the dispute at hand was one to do with monies owing to the 2nd Defendant by the Plaintiff. The 2nd Defendant herein was retained as a quantity surveyor.

34.In that regard and being a dispute involving the fees to a quantity surveyor, section 39, come into play. The same states that -;

"39. Subject to the provisions of the Act and of these By-laws, the Conditions of Engagement and the Scale of Professional Charges shall be those contained in the Fifth Schedule to these By-laws as from time to time amended or reproduced by the Board."

35.I have examined the said Fifth Schedule and note that nowhere does it state that a dispute with regards to the quantity surveyor's fees shall be subjected to arbitration. This is unlike section 38 of Cap 525 Laws of Kenya states that Subject to the provisions of the Act and of the By-laws, the Conditions of Engagement and the Scale of Professional Charges shall be those contained in the Fourth Schedule to the By-laws as from time to time amended or reproduced by the Board of Registration of Architects and Quantity Surveyors. The heading of the Fourth schedules shows that the same is with regard to Conditions of Engagement and the Scale of Professional Charges of architects. Meaning that the provisions therein only apply to architects. This includes A. 6 and A. 7 of the Fourth Schedule which states as follows ;

"A.6. Disputes

a. ***Any difference or dispute may be agreement between the parties be referred to the Board for an opinion, provided always that such an opinion is sought on a joint statement of undisputed facts, and the parties undertake to accept it as final.***

A.7. Arbitration

(a) Where any difference or dispute arising out of the Conditions of Engagement and Scale of Professional Fees and Charges cannot be determined in accordance with paragraph (a) of clause A.6, it shall be referred to arbitration by a person to be agreed between the parties, or failing agreement within fourteen days after either party has given the other a written request to concur in the appointment of

an arbitrator, to a person to be nominated at the request of either party by the President of the East Africa Institute of Architects."

36. Can the above provisions therefore be applied to the Fifth schedule in relation to quantity surveyors, which does not contain any provision on dispute resolution? Advocate to the 2nd Defendant Mr. Ameyo sought to convince this court that it was quite clear that Clause A.7 was not intended to apply only to conditions of Engagement of Architects alone. It was his submission that clause A.7 was intended to apply to Conditions of Engagement of professionals covered by the Act which includes Quantity surveyors. Mr. Ameyo thus concluded that clause A.6 and A.7 are general provisions applicable to both architects and quantity surveyors.
37. The Sole Arbitrator, agree with these arguments. In part in his Ruling from paragraph 4. 11 to 4.14, stated as follows;

"4.11 In a building contract, whenever there is a dispute on professional charges for the architect or quantity surveyor, the two professionals are interdependent like Siamese twins and one cannot survive without the other. The architect will depend on construction costs given by the quantity surveyor who in turn will have used the drawings4 prepared by the architect to compute the same.

4.12 I believe that it is not by default that Cap 525 is cited as the Architects and Quantity Surveyors Act. It was intended to regulate both professionals equitably. Section 5(f) of Cap 525 empowers the Board to make By-Laws 'for the scale of fees to be charged by architects and quantity surveyors for professional advice, services rendered and work done'

4.13 It is not conceivable, therefore, that the Board of Registration of Architects and Quantity surveyors which was established by section 4 of Cap 525, and which regulates the registration and conduct of both Architects and Quantity surveyors, could have provided a dispute resolution mechanism through arbitration for architects only to the exclusion of Quantity Surveyors.

4.14 The Respondent's Counsel argument that there is no arbitration clause in the fifth schedule that would entitle the Claimant (a quantity surveyor) to commence arbitration proceeds in the manner in which he did ignores the point that both section 38 and 39 and hence both the Fourth and Fifth Schedules are subject to provisions of the substantive Act and the subsidiary legislation. Consequently, the Respondent's argument cannot be upheld."

38. From the above I find the arbitrator greatly erred in the interpretation and import of A.7 of the Fourth schedule of Cap 525. The fact that the fourth and fifth schedules are subject to the provisions of the substantive Act and subsidiary legislation does not mean that they can be applied generally. They should be applied in respect of the particular professional they touch on. Indeed if this Court were to seek further assistance in trying to decipher the intention of Parliament, it may look at the marginal notes. A close look at the Section 38 of the Cap 525, it would reveal that the marginal notes reads "Fourth schedule to apply" while the marginal notes in section 39, further reads "Fifth schedule to apply". It is not I dispute in my view, that a court can use the marginal notes if necessary in construing a section of a statute.In the case of ***Ramadhani –vs- Republic (1969) EA 269, Platt J (as he then was) observed at page 271:-***

"But I think the marginal note may afford some guide. ……. I have on previous occasions considered the validity of using marginal notes in the interpretation of the meaning of the corresponding Section of the legislation concerned. Suffice it therefore to say that in my opinion the modern view is that marginal notes may be used in assisting the interpretation of the relevant provision of the law."

39. Having found so, I indeed agree with the sentiments of Mr. Ongeto that the Arbitrator's and 2nd

Defendant's reliance on Clause A.6 and A.7 of the fourth Schedule as the legal basis for the appointment of the Arbitrator is erroneous as the same applies only to the Conditions of Engagement & Scale of Professional Charges for architects, and is therefore not applicable to Quantity Surveyors. Had Parliament intended this to be the case, nothing would have simpler than stating so in both the substantive and subsidiary legislation. The 1st Defendant cannot purport to legislate on the issue as he attempted to do. Indeed in doing so, I find that he acted arbitrarily, irrationally and capriciously. As stated in the case of **Associated Engineering C –vs- Govt of Andhira Pradesh and Anor [1992] AIR 232**the Supreme Court of India held that :

> ***"The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given under the contract, if he has travelled outside the bounds of the contract, he has acted without jurisdiction."***

40. In the final analysis, therefore, the originating summons herein is successful. It is declared that the Arbitral Tribunal lacked the jurisdiction to hear and determine the dispute alleged to exist between the Plaintiff and the 2nd Defendant. I therefore hold that the preliminary ruling delivered by the 1st Defendant (sole arbitrator) on 14th August, 2015 is therefore set aside with costs to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 3rd Day of December, 2015.

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C. KARIUKI

JUDGE