



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NUMBER 520 OF 2012

HEALTH AND WATER FOUNDATIONAPPLICANT

Versus

CARE INTERNATIONAL IN KENYARESPONDENT

RULING

Reference of a dispute to arbitration

[1] I have before me an Originating Summons which is expressed to have been brought under section 11(2) and 12(2) of the Arbitration Act, and Rule 3(2) of the Arbitration Rules, 1992. It is seeking for ALLEN WAIYAKI GICHUHI ADVOCATE or some other fit and proper person to be appointed the arbitrator to determine disputes which have arisen between the parties herein. The Applicant is also asking for costs of the application and any other relief that the court may deem just. Parties filed their respective submissions as shown below.

Applicant's submissions

[2] In support of the application, the Applicant filed two affidavits and written submissions. The deponent averred that it entered into a contract which was to start on 1st October, 2009 to 31st March, 2011. The said contract contained an arbitration clause in the following terms:

The parties shall first try to resolve any disputes relating to this agreement by the mutual agreement of the parties or by Mediation. If the dispute is not resolved; it shall be referred to an Arbitrator who is acceptable to both parties and failing that, to a team of three Arbitrators consisting of one chosen by each party and the third chosen by the two Arbitrators. Arbitration shall take place in Nairobi. The decision of the Arbitrator(s) shall be final and binding. The language to be used in the arbitral proceedings shall be English.

[3] It is the Applicant's submission that, pursuant to the contract herein, a Final Audit Report was prepared on the Global Fund Programme Project No. C.K. KENGF7-PH1 HWF. But the Applicant did not agree with the said Report and that, according to the Applicant, constitutes a dispute for reference to arbitration as contemplated in the said contract. It is that dispute that the Applicant seeks an arbitrator to be appointed by the court to resolve. Evans Misati James, the Executive Director of the Applicant deposed that parties had made efforts to reach an amicable

settlement on the dispute but did not borne fruits. Subsequently, on 25th October, 2011, the Applicant gave a notice in writing under section 12(3), (4) and (5) of the Arbitration Act and suggested to the Respondent that Allan Waiyaki Gichuhi Advocate to be appointed as the sole arbitrator to preside over the said dispute but the Respondent refused, failed and or neglected to respond; it neither objected to nor confirmed the proposed arbitrator. In the circumstances, the court should make the appointment of the arbitrator.

[4] According to the Applicant, the Respondent has not indicated clearly why it is opposed to the application herein. The Applicant then referred the court to the Replying Affidavit by the Respondent to support its said claim, and asks the court to allow the motion.

The Respondent's submissions

[5] The Respondent opposed the application; filed a Replying affidavit and written submissions. The major objection by the Respondent to the application herein is on the basis that there is not dispute which is capable of reference to arbitration under the Arbitration Act. The dispute that existed was for a refund of a sum of Kshs. 1,711,428 on account of disallowed costs; these were expenditures by the Applicant which were inconsistent with the agreement and had been revealed by the Final Audit Report. The Report was served on the Applicant who was afforded an opportunity to raise any queries it may have had on the Report. And following a series of meetings between the parties, the issues around the Report which the Applicant was raising were resolved amicably as provided for in the arbitration clause, and the Applicant agreed to pay and paid a sum of Kshs. 1,711,428 on 1st March, 2011 via an inter-bank transfer, Customer Reference Number 11060FJXZ7 and Bank Reference Number 3106000947. The Respondent acknowledged receipt through Receipt Number 13417 dated 4th March, 2011, which receipt the Respondent has attached in its response. In the circumstances, the Respondent opines that there is no dispute which is capable of being referred to arbitration. Accordingly, the application should be rejected. The Respondent cited three cases in support of its case, namely; 1) **ADDOCK INGRAM EAST AFRICA LIMITED v SURGILINKS LIMITED [2012] eKLR**; and 2) **UAP PROVINCIAL INSURANCE COMPANY LTD v MICHAEL JOHN BECKETT [2013] eKLR**.

COURT'S RENDITION

Issue in the case

[6] After meticulous consideration of the pleadings and the submissions of the parties, I come to the conclusion that this application is asking the court to order a referral of the dispute herein to arbitration. Invariably, and this has been raised by the Respondent, the application will be resolved once I determine whether or not there exists a dispute in the sense of the Arbitration Act which is capable of referral to arbitration. That proposition constitutes the issue for determination by the court.

[7] ***“Before a court can order parties to go to arbitration it has to be satisfied that there is indeed a dispute over the claim in issue”***. Those are the words of Musinga J (as he then was) in the case of **ADDOCK INGRAM EAST AFRICA LIMITED v SURGILINKS LIMITED (supra)**. I find no reason to depart from them; I am accordingly guided. Is there a dispute in this case which can or should be referred to arbitration? An instant answer may administer a sudden shock on the unsuccessful party. Let me first considered what the parties have said on the issue. The Applicant says that it did not agree with the Final Audit Report prepared on the project herein. According to the Applicant several issues arose out of the contract which it was seeking settlement of, which signifies that there exists a dispute between them on the said Audit Report and it has annexed some correspondences to demonstrate the dispute. But what I find to be surprising is that the Applicant through the Executive Director, Evans Misati James chose not to provide details of dispute; instead annexed the correspondences. First of all, when a party declares a dispute and comes to court for a referral order to arbitration, it has to demonstrate there exists a dispute

between the parties with regard to the matters agreed to be referred to arbitration. The Applicant has not clearly stated the dispute in question; it has only made broad statements which are at very high level of generalization such as...***various issues arising out of the contract...the Applicant does not agree with the Final Report of the Global Fund Programme project No. C.K. KENGF7-PH1 HWF, as such a dispute has arisen as contemplated in the contract for reference to arbitration.***

[8] Apart from lack of any demonstration of the dispute, the Applicant seems to have left it to the court to discern the dispute herein. That is quite undesirable approach in any judicial proceeding and can only be exhibited by an indolent suitor. And, regrettably, the Applicant falls in that category. Even if the court was to peruse the correspondences annexed hereto, it can only say as much as the print says without any or further elaboration or interpretation, for instance, I can read that the letters related to disallowed costs which had been revealed by the Final Audit Report on the projects forming the subject of the contract herein and other attendant consequences, say, suspension of the contract until the disallowed costs had been settled. Additionally, I can ascertain that, except the letter dated 5th April, 2011, all the other correspondences came before the settlement of the disallowed costs by the Applicant on 1st of March, 2011.

[9] The Respondent, on the other hand, has placed enough evidence before the court which shows that there were negotiations between the parties where; the amount of the disallowed costs was agreed at Kshs. 1,711,428 and the Applicant paid those costs on 1st March, 2011. All these facts were not denied or confirmed by the Applicant, which then puts to doubt the veracity of the submission by the Applicant that the Respondent's ***Replying Affidavit does not state clearly and precisely why it is opposing the application.*** Nonetheless, the point is; in law, in the absence of express traverse, the facts and evidence adduced by the Respondent are deemed to be admitted. I so find and hold, and will proceed on that premises. If that be the case, which it is, and absent of details of the dispute in question, the only inference the court can make from the entire material before it, is that there is not in fact any dispute that could conceivably be referred to arbitration. I agree with the Respondent that the dispute that existed has been settled by mutual agreement of the parties in accordance with the first part of the arbitration clause which provides that:

The parties shall first try to resolve any disputes relating to this agreement by the mutual agreement of the parties or by Mediation.

No dispute

[10] Accordingly, I find and hold ***that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*** Therefore, the second limb of the arbitration clause that relates to arbitration and appointment of arbitrator(s) on which the application herein is premised cannot be utilized. To understand this proposition, see the style in the second part of the arbitration clause and more specifically the words I have underlined, that:

If the dispute is not resolved; it shall be referred to an Arbitrator who is acceptable to both parties and failing that, to a team of three Arbitrators consisting of one chosen by each party and the third chosen by the two Arbitrators. Arbitration shall take place in Nairobi. The decision of the Arbitrator(s) shall be final and binding. The language to be used in the arbitral proceedings shall be English.

Orders of court

[11] The upshot is that the Originating Summons dated 14th September, 2012 is dismissed with costs to the Respondent. Orders accordingly.

Dated, signed and delivered in court at Nairobi this 7th day of May, 2014

F. GIKONYO

JUDGE