



REPUBLIC OF KENYA

Provincial Construction Company Ltd & another v Attorney General

High Court, at Nairobi
October 15, 1991

Mbito J

Civil Case No 165 of 1991

JUDGMENT

By this Originating Summons brought under Rule 3 of the Arbitration Rules and section 22(a) of the Arbitration Act the applicants would like this Court to determine if they can both commence arbitration based on a main contract made between the first named applicant and the respondent and or on a sub-contract made between the applicants alone at the instigation of the respondent. The applicants would also like to know the effect of clause 20(f) of the main contract the legal effect of the main contract on the sub-contract made between the applicants alone and whether or not the arbitrator can entertain the current dispute.

The facts leading to this reference are not in dispute. On 20th January, 1979, the 1st applicant namely, Provincial Construction Co Ltd hereinafter called the Contractor entered into a building contract (hereafter referred to as “the main contract”) with the respondent, namely the Government of Kenya, hereinafter, the employer, for construction of certain facilities at Nyeri Provincial Hospital. The said contract by and large incorporated standard conditions. By clause 32 of the main contract the parties to the main contract are entitled to refer all matters arising out of the contract to arbitration which matters are said to include “any matter or thing left by this contract to the discretion of the DR (Departmental Representative) or the withholding by the DR of any certificate to which the contractor may claim to be entitled”. At clause 7(g) the contractor is required to ensure that sub-contractors observe the terms of clause 7 of the main contract and by clause 19, the contractor is allowed to assign or sublet the contract with the approval of the employer. Further at clause 20(a) the DR is authorized to nominate sub-contractors who are deemed to be the sub-contractors of the contractor, also with the consent of the contractor and performance of such sub-contractor has to be the satisfaction of the DR as well as the contractor and has to be in accordance with a standard contract which by clause 33 thereof provides for own arbitration and by clause 15 thereof entitles the contractor to allow the sub-contractor to use his name or join the sub-contractor in invoking arbitration clause in respect of any certificate withheld by the DR.

Acting in pursuance to the provisions of clause 20(a) of the main contract the DR, without the objection of the contractor, on 18th February, 1980, appointed or nominated Instrumentation Ltd as a sub-contractor of the contractor and duly entered into a standard form of contract containing the aforesaid clauses. The sub-contractor was to execute certain works included in the contract.

A dispute has since arisen between the DR and the sub-contractor on accounts of the DR refusing to approve certain certificates raised by the sub-contractor. The contractor has therefore agreed to allow or

to join the sub-contractor in referring the dispute to arbitration in terms of clause 15 of the contract and clause 20 of the main contract and the two have in fact submitted the matter to arbitration. The employer is of the view that the contractor and his sub-contractor are not entitled to bring up the dispute to arbitration.

Mr Le Pelley, if I understood him well argued that as by clause 20(f) the employer is entitled to appoint a sub-contractor and obliges the contractor to accept such a sub-contractor, the employer should be responsible for any misdeeds of such a sub-contractor and should be subject to same remedies as those to which the contractor would have been subject to if the contractor had performed such work. In support of his aforesaid contention he relied on the English case of *Northern Region Health Authority v Derek Crouch Construction Co Ltd* (1984) QB A 644. In that case the employer had entered into a contract having similar provisions as the current ones with the contractor. The contractor was also deemed to have entered into a contract similar to the one entered herein with the sub-contractor and when the representative of the employer in that case refused to approve a certificate, the Court of Appeal decided that the subcontractor had a right to use the name of the main contractor in invoking the arbitration clause as the sub-contractor, called Crown would have suffered an injustice in the circumstances of the case.

Mrs Manyasi for the employer was of the contrary view. She argued that a third party cannot gain a right or benefit under a contract on the principles of privity of contract. She also urged that the case relied upon is merely persuasive and should not be relied upon.

In this Court's view, it cannot be disputed that the law applicable to the current matter is primarily the common law applicable to the current matter is primarily the common law applicable in this Country as modified by the contract law or the Arbitration Act. It is also a cardinal principle of the applicable common law that a third party cannot benefit from a contract unless such a contract is for his benefit or was made on his behalf by his agent. It is also a cardinal principal of construction that in construing a document, it should be interpreted in accordance with the clear expression of the documents in question.

In law, one is said to be an agent if he acts for another with the consent of that other. One can also be deemed to be an agent of the other by operation of law or by an agreement. In the present case, the contractor is entitled to appoint a sub-contractor, who would definitely be deemed to be his agent and if a dispute arose as between the employer and the sub-contractor the contractor would in my view be responsible for such actions or would be entitled to take a claim arising from services performed on his behalf by such a sub-contractor. The position would also be the same in my view where one is deemed to be an agent whether by agreement or by operation of law.

In the instant case, the contractor is entitled to appoint a sub-contractor for whose actions he would be responsible. He is also deemed to be the principal of a sub-contractor nominated by the employer. Consequently, should there be a dispute between the employer and such an agent of his, the contractor would be entitled to prosecute the dispute either alone or jointly with such an agent as he is deemed to be the principal. The contractor herein is therefore entitled to pursue the sub-contractors claim or to allow the sub-contractor as per their internal arrangement ie the standard sub-contractor, to pursue the dispute in his name, as laid down in the main contract.

In case my above conclusion is not right it is observed that under clause 32 of the main contract, the contractor is entitled to refer "the withholding by the DR of any certificate to which the contractor may claim to be entitled". The contractor therefore is entitled to refer to the DR's actions relating to the withholding of any certificates due whether from him or his agent if he claims to be entitled to such certificate as he is the principal of the agent. In fact he is bound to claim that he is entitled to such certificate as he is by clause 15 of the standard sub-contract obliged to allow the sub-contractor to use his name or to join the sub-contractor in making such claim. The sub-contractor's claim can therefore be referred to arbitration by the contractor alone or jointly with the sub-contractor as is usual under the law of agency to avoid the necessity of third party proceedings.

In view of the above conclusions, I would answer the issues posed as follows:

(1) Yes, because the issue relates to withholding or refusal to issue a certificate and also because the subcontractor is deemed to be the agent or employee of the contractor.

(2) Clause (f) merely clarifies that a sub-contractor is an employee or agent of the contractor and not the employer. Consequently the Government cannot be responsible for actions of such a nominated subcontractor and not that the Government cannot pay for services rendered through such a nominated subcontractor, if claimed through the contractor.

(3) This is a hypothetical issue and need not be answered for the purpose of the issues of law. If however it may help in expanding the current matter, I would merely advise that generally speaking, the main contract is the one which controls the rights of the contractor and the employer. Rights created by the sub-contract need not necessarily bind the employer unless the employer would have been bound if the acts had been done by the contractor himself or if the employer can be said to have impliedly authorized or approved the specific actions upon which the claim under the sub-contract is founded, more especially if the sub-contract was entered into at the instigation of the employer.

(4) Yes. Very much so as it relates to the withholding of certificates for the several stated works, which would arise as a result of its instigation of the employer. As the applicants have been entirely successful in this reference, I would award the costs thereof to them with interest from the usual dates at the usual rates.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of October, 1991.

J MBITO

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JUDGE