



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI Civil Appeal 309 of 2002

UNIVERSITY OF NAIROBIAPPELLANT

AND

N.K. BROTHERS LIMITEDRESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Gacheche, C.A.) dated 23rd July, 2001

in

H.C.C.C. NO. 1534 OF 2000)

JUDGMENT OF THE COURT

The appellant in this appeal, **University of Nairobi** (hereinafter called the appellant) and the respondent **N.K. Brothers Limited** (hereinafter called the respondent) entered into three separate contracts, on 2nd January, 1990 in which the respondent, a building construction company undertook to construct for the appellant three separate entities all at Kikuyu Campus and the appellant agreed to meet the agreed cost of constructing the same. The first agreement was for the construction of Hostel Block, kitchen and dining hall, warden’s house, toilet block and vegetable store together with associated external works. The agreed cost of constructing this entire entity was Ksh.67,943,179/75 and the completion date was 4th September 1990. The second agreement was for the construction and completion of Library Block together with Associated External works at an agreed contract price of Ksh.13,002,304/50. This was to be completed on or before 19th June 1990. The last agreement was for the construction and completion of two lecture theatres, tuition block and covered walkways together with associated external works at the agreed cost of Ksh.27,899,942/75, with a completion date of 19th June 1990. The contracts were each reduced into writing and were signed by the parties. **Clause 36 (1) and (2)** of each of those contractual agreements was the same and stated as follows:-

“(1) Provided always that in case any dispute or difference shall arise between the employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising there under or in connection there with (including any matter or thing left by this contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 30 (5) (a) of these conditions/or the rights and liabilities of the parties under clause 25, 26, 33 or 34 of these conditions, then such dispute or difference shall be and is hereby referred to the arbitrator

and final decision by a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the chairman or vice-chairman for the time being of the East Africa Institute of Architects who will when appropriate delegate such appointment to be made by the chairman or vice chairman of the local (National) Society of Architects.

(2) Such reference, except on article 3 or article 4 of the Articles of agreement, or on the questions whether or not the issue of an instruction is empowered by these conditions, whether or not a certificate has been improperly withheld or is not in accordance with these conditions, or on any dispute or difference under clauses 33 and 34 of these conditions, shall not be opened until after Practical Completion or alleged completion of the works or termination or alleged termination by the contractor's employment under this contract, or abandonment of the works, unless with the written consent of the employer or the Architect on his behalf and the contractor."

As is usual with all such contracts, there was an Architect whose duty, it would appear, was to supervise the works, measure it and certify either in response to the contractors request or on his own, the work done as the works progressed for purposes of payment. He would also be responsible for issuance of final certificate in respect of each of the works. Under him and appointed by the appellant, was a Clerk of Works who was also to act as inspector on behalf of the appellant but under the direction of the Architect.

As the works progressed, it would appear that some disagreements arose as there were allegations of delays and allegations of failure to meet the payments as certified by the architects as well as denials of the authenticity of such payments. Because of what will be apparent in this judgment later, we refrain from going into details on those alleged disagreements. Suffice it to say that as a result of the alleged disagreements, the respondent moved to court and in a plaint dated 24th July 2000, and filed in the superior court on 18th September 2000, the respondent sought judgment against the appellant for:-

"(a) Kshs.192,279,048/=

(b) Interest at the rate of 32% per annum from 23rd November, 1998 being the date of the last certificate until payment in full.

(c) Costs of this suit together with interest thereon.

(d) Such other or further relief as this Honourable Court may deem fair to grant."

That claim was allegedly made in respect of monies owing and not paid by the appellant to the respondent as per certificates issued by the Architect. These were certificate numbers 11, 12, 13, and 14 in respect of the first contract; certificate numbers 18, 19, 20 and 21, in respect of the second contract, and lastly, certificate numbers 25, 28, 30, 31, 32 and 33 in respect of the third contract. Further, the respondent in that plaint stated that the debt he was demanding had been acknowledged by the appellant vide the appellant's letter dated 10th September, 1997 and other subsequent correspondence.

Immediately the appellant was served with summons to enter appearance and copy of the plaint, it filed memorandum of appearance on 26th October 2000 and thereafter proceeded to file and did file notice of motion under certificate of urgency dated 16th November 2000 and filed in the superior court on the same date. That notice of motion was filed under **section 6 (1)** of the Arbitration Act and **section 3A** of the Civil Procedure Act; **Order XLV (1)** of the Civil Procedure Rules and all enabling powers of the court. It sought three orders namely:-

"1. That this Honourable Court be pleased to order a stay of the proceedings in this suit.

2. That this Honourable Court be pleased to refer the parties herein to arbitration as provided in the contracts dated 2nd January, 1990.

3. That the Defendant/Applicant be awarded the costs of this application.”

That application was based on two grounds and these were:-

“1. That the contracts dated 2nd January, 1990 stipulate that any disputes or differences between the parties shall be referred to arbitration.

2. Further grounds stated in the annexed affidavit of GITONGA MWANIKI and such further or other grounds as shall be adduced at the hearing hereof.”

In the supporting affidavit of Gitonga Mwaniki who was the Clerk of Works alluded to above, the appellant admitted that it entered into the alleged three contracts with the respondent on 2nd January 1990, for the construction of three buildings at its Kikuyu Campus and annexed the copies of those contracts. It however stated that each contract document provided in **clause 36** thereof that any dispute arising or any matter arising of whatever nature from each of the contracts would be referred to arbitration. We make no apologies for reproducing herebelow paragraphs 5 and 6 of that affidavit since the appellant’s entire argument is hinged on it. In those paragraphs the appellant’s Clerk of Works stated.

“5. That the defendant has disputed the plaintiff’s claim on the basis inter alia that:-

(i) The plaintiff is seeking from the defendant amounts far in excess of the sums agreed in the contracts as follows:-

(a) Under contract I the agreed sum was Ksh.13,002,304/50. The plaintiff is claiming Ksh.20,218,176/40.

(b) Under contract II, the agreed sum was Ksh.27,899,942/75 - the plaintiff is claiming Ksh.61,478,105/20.

(c) Under contract III the agreed sum was Ksh.80,002,986/25 – the plaintiff is claiming Ksh.183,421,062/10.

(ii) All interim Certificates issued by the Architect have been paid in full.

(iii) The Defendants challenged the final certificates issued by the architects on the grounds that:-

(a) some of the works included in the certificate were defective and condemned and the plaintiff did not rectify them.

(b) the final account submitted by the plaintiff did not include the works of the sub-contractors as required by the contract.

(c) the final account erroneously included items which should have been omitted from the works.

(d) the final account had arithmetical errors and included a computation of interest which was not provided for in the contracts or at all.”

6. That I therefore verily believe that there is a dispute between the parties which should be referred to arbitration as in the contracts provided.”

We note that in that affidavit, the appellant gives the amount agreed in respect of contract III as Ksh.80,002,988/25 whereas in the agreement documents in the record before us the amount is Ksh.67,943,179/75 which we have mentioned above. Be that as it may, the respondent opposed that application and in its affidavit (which we believe is replying affidavit) sworn by Premji Mavji Khoda, its Managing Director, the thrust of the respondents’ opposition to that application was contained in paragraph 3 in which he stated as follows:-

“3. I am advised by our advocate on record and verily believe that the present application is totally misconceived and untenable for the following reasons:-

(a) The Arbitration Clause, namely, clause number 36 of the agreement will only apply in the event of there being dispute and/or differences but in the instant case there are no disputes and/or differences as the claims in the plaint are filed on the basis of certificates issued by the nominated Architech (sic) of the Defendant who is the authorized agent in law and consequently the Defendant is estopped in law and in fact pleading that such certificates are invalid and/or the subject of any dispute and/or difference.

(b) With reference to paragraph 5 (iii) of the affidavit the challenge of the Defendant to the certificate issued by its authorized agent is not of any consequence in law and/or binding on the plaintiff at all and this has been explained and advised to us by our Advocate on record which we verily believe to be true.”

Several exhibits were annexed to that affidavit as evidence in support of the allegations therein. That application was placed before the superior court (Gacheche, C.A (as she then was?) who after full hearing, in a ruling dated and delivered on 23rd July 2001, dismissed it stating inter alia:-

“The agreement that the defendant relies on was entered into between plaintiff and defendant. In any event clause 36 aforementioned clearly caters for disputes arising between the “Employee and contractor,” these being the applicant and the respondent respectively, the role of the architect in that clause is as an agent by the employer but not otherwise. It cannot therefore be said that he was a party to that contract in his own right. The dispute that exists between the defendant and his agent, which is not one of the issues in this suit, would not compel me to stay this suit as the defendant urges this Court to do. Unfortunately, the cases that the defence counsel relied on would not be of any aid to him, given the above circumstances.

If the defendant feels aggrieved by his agent, he has other recourses that are open to him.

In the circumstances, the application is dismissed with costs.”

The appellant felt aggrieved by that ruling and hence this appeal before us premised on six main grounds of appeal which are in brief that the learned Judge erred in failing to note that the question raised by the appellant that excess amounts were claimed by the respondent is a dispute contemplated by the arbitration clauses in the contract; that the question of interest claimed in the plaint was a dispute within the arbitration clause in all contracts; that the learned Judge erred in her failure to interpret properly the word “dispute” in the Building Contracts; that the superior court ignored the appellant’s complaints against the poor quality of works for which claims were made by the respondents; that the court pre-determined the issues without any recourse to the evidence before it; that the alleged admission by the appellant’s counsel to the effect that the dispute was between appellant and architect was taken out of context and should not have been relied upon to dismiss the appellant’s case as it related to admission that the appellant looked to the architect for certification and not as to the dispute that was in Court; that the superior court erred in holding as it did that issuance of final certificates by the architect precluded the appellant from challenging the works for which payments were demanded by the respondent; that the learned Judge erred in failing to note that the payment of the contract sum to the respondent was subject to approval of the interim and/or final certificates issued by the architect; that the court failed to consider that the appellant had discretion to question the final certificates before payment of the contract sum to the respondent; that the superior court, in its ruling failed to appreciate that the architect was a party to the contract and his role in the contract could not be severed and that being so, the court erred in holding that the architect was not a party to any dispute between the appellant and the architect; that the learned Judge erred in failing to appreciate and to uphold the spirit of the arbitration clause and the interpretation of the word “dispute” in the said arbitration clause, and finally that the learned Judge erred in law in concluding that the contractor was not a party to the dispute yet the amount it demanded was far in excess of the agreed amounts.

Mr. Kilonzo Jr., the learned counsel for the appellant urged the above grounds in his lengthy submissions, referring us to several authorities, all of which we have considered. Likewise, Mr. Hira, the learned counsel for the respondent maintained that there was no dispute as spelt out in the agreement and particularly in clause 36 that would warrant the matter being referred to arbitration. In his argument, the demands by the respondent were as certified by the architect who was appellant's agent and thus the appellant, being the principal was bound by the actions of its agent. If there was any dispute at all, it was between the appellant and its agent the architect, Mr. Hira maintained, and he referred us to part of the proceedings where Mr. Kilonzo Jr. was recorded as having accepted that proposition in his submissions. Mr. Hira also referred us to several authorities on the issue, which we have also considered.

This is a first appeal. In law, we are duty bound to revisit the application that was before the superior court afresh, analyse it, evaluate it and come to our own independent conclusion, putting in mind however, that the first court had the advantage of hearing the counsel for the parties in their original submissions and giving room for the same - see the case of **Selle and another vs. Associated Motor Boat Company Ltd and another** (1968 EA 123 where Sir Clement De Lestang, V.P. stated:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

In the appeal before us, the matters that were before the superior court were covered in affidavit evidence together with the exhibits and so no witnesses gave evidence in person. However, in principle the above authority is in law applicable as we are bound to look at what was before that court afresh, evaluate it and reach our own conclusions but bearing in mind as we have stated that the superior court heard the original submissions of the learned counsel and giving due regard to that.

The main issue as we understand the parties, and as appears from the record before us, the pleadings, the exhibits and the law is whether, the plaint filed by the respondents against the appellants in the superior court raised a dispute between parties that could be referred to arbitration in accordance with the arbitration clause which was part of all the three contractual agreements and which was **clause 36**. As we have stated above, the parties, i.e. both appellant and respondent readily agree that the three agreements they entered into on 2nd January 1990, each provided at **clause 36** that in case of any dispute on the contract, the same would be referred to arbitration. **Section 6 (1)** of the Arbitration Act, 1995, provides,

“6 (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds:-

- (a) that the arbitration agreement is null and void, inoperative or inapplicable or being performed: or***
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”***

The superior court was called upon by the respondent to act in accordance with the provisions of **section 6 (1) (b)** in that there was not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration in that the payment which was demanded by the respondent was a matter which was based on certificates issued by architect who was appellant's agent and thus as to the respondent the appellant was bound to meet the payment and any complaints it had over the payments were matters

between the appellant and the architect, his agent and not a dispute between appellant and respondent. The superior court accepted that argument and dismissed the application to refer the dispute to arbitration.

In our view, the question that needed to be answered was what constituted the dispute that needed to be referred to arbitration in each of the agreements that were signed by the parties on 2nd January, 1990? **Clause 36**, we note does not confine itself to the word “dispute” only. It also talks of “difference” and is coached in such away that it gives rise to wide interpretation. The operative words, in the clause, are in our view:-

“Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractoror as to any matter or thing of whatever nature arising thereunder or in connection therewithor the rights and liabilities of the parties under clause 25, 26, 33, or 34 of these conditions then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to” (underlining supplied).

It is clear from the above that the matters to be referred to arbitration under **clause 36** are not confined to disputes only. If difference arises between the employer and contractor or between contractor and architect on behalf of the employer, such a difference may also be referred to arbitration. Such difference can also arise as regards the rights and liabilities of any party as regards **clauses 25, 26, 33 and 34** which are not matters before us here. One question stands out, if as alleged by the appellant, the amount certified by the architect far exceeds the amount in the contractual agreement, as prima facie is the case in this matter, must the appellant pay that amount simply because the architect has certified it? Another question is, if it were to be proved that the respondent is seeking an amount that was not subject of the agreement and is clearly in excess of the agreed sum, would the respondent be right in receiving that amount notwithstanding that it was not its entitlement? Would the fact that the amount sought by the respondent is not the amount agreed in the contractual agreement not constitute a dispute notwithstanding that the architect had certified it? We pause these questions and offer no answers because the time to answer them is not due yet and the answers may go either way. That is the reason for litigation in a court of law. In our collective mind the architect’s certification may be binding on the employer in a building contract but only if that architect has not made certification of an amount in excess of the contractual amount. By contractual amount, we are mindful of the possibility that a contractual amount may be appraised from time to time and may thus be increased. However, in this appeal, the records before us and the counsel who addressed us, never drew our attention to any increase in the contractual amounts over and above the amounts in the record as witnessed by the three agreements annexed to both the main record and the supplementary record. In the third Edition Volume 3 of Halsbury’s Laws of England paragraph 892 (1), the reknown Law Lord set out requirements for the final certificates being conclusive and stated:-

“892. Requirements for being conclusive. The final certificate of an architect or Engineer will be conclusive and binding on both parties if the following conditions are complied with:-

(1) The subject-matter of the certificate, so far as the same is to be binding, must be within the powers of the certifier, and the terms of the contract must effectively make his determination binding on both parties.”

It also states at paragraph 892 (8) that the certificate must purport to be final. The example given by Lord Halsbury on the statement above is telling. He states in the notes:-

“.....Ashwell and Neshit, Lord vs. Allan & Co. (1912), 2 Hudson’s B.C. (4th Edition) 462 CA where it was held that no valid certificate could be given for work which on the instructions of the architect had been carried out in a manner at variance with the contract, the contract containing no power to vary the work to be done thereunder.”

Likewise in this case, we have not seen any clause allowing the architect to give certificate for an amount

in excess of the contractual amount. We have anxiously considered the decisions in the case of ***Golf Hotels (Kenya) Ltd vs. Lalji Bhimji Sanghani Builders and Contractors***, CA No.5 of 1997 and the case of ***Gupta vs. Contractual Builders Limited*** CA No. 33 of 1997. Those were both applications for summary judgment and were rightly decided on grounds that in both cases defences raised did not raise any triable issues as in the first case the architect was held to be employer's agent and the employer was bound by his actions. All that the defendant-employer stated in his defence in that case was that the architect acted *ultra vires* under the agreement by issuing what purported to be a final certificate when he should not have done so until he had complied with the formalities of **clause 15 (4)** of the contract which required the architect to issue in the first place a certificate making good the defects if any. It will be readily seen that in that case the contractor was not seeking to enrich himself vide such a certificate in that the certificate was not given for an amount in excess of the actual contract. The second case was also, as we have stated, an application for summary judgment. In this case, the application that was before the superior court was seeking that the arbitration clause be effected so that what the applicant contended was an illegality, may be probed by an arbitrator. The circumstances in other cases are clearly different from those obtaining in this case. In this case the applicant is claiming that the amount being sought by contractor pursuant to certificates is in excess of the agreed amounts. That in our view is a dispute between the contractor and employer as to what the contractor is entitled to under the contract.

Furthermore, there is the question of interest which the respondent claims in the plaint at 32% per annum from 23rd November, 1998 when the last certificate was issued till payment in full. We cannot see that aspect covered in the contractual agreement and Mr. Hira referred us to none. In our view, it constitutes a dispute and it will, if the respondent succeeds in getting it awarded, impact very heavily on the entire claim.

We need not consider other matters as this is not the time to consider the entire case. In our view, at this stage, proof of one dispute or difference under **clause 36** is enough to cause the suit to be referred to arbitration. We have however considered the provisions of **clause 30** and particularly **clause 30 (7)** and the fact that the allegations as appear in the record, were they to be proved could easily border on conspiracy to defraud and, in our view, this is a proper case to go for proper investigation by way of arbitration pursuant to **clause 36** of each agreement.

In our judgment view, had the learned Judge of the superior court considered all the aspects we have considered above in our capacity as a first appellate court, she could have come to a different conclusion.

In the result, this appeal succeeds. It is allowed, the order of the superior court made on 23rd July, 2001 is set aside. The High Court Civil Suit No. 1534 of 2000 is hereby referred to arbitration pursuant to **section 6** of the Arbitration Act. The appellant shall have the costs of the appeal and of the application dated 16th November, 2000 in the High Court. Orders accordingly.

Dated and delivered at Nairobi this 12th day of June, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR