



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal (Appli) 143 of 2000

INTEX CONSTRUCTION LTD.....APPELLANT

AND

NATIONAL HOUSING CORPORATION.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi (Mbaluto, J) dated 4th November 1999

in

H.C.C. Misc. Application No. 131 of 1996)

RULING OF THE COURT

The dispute, the subject matter of this appeal, has remained largely unresolved since 1995. This is partly because the management and the conduct of cases in our courts has over the years been left entirely in the hands of litigants and their counsel, with the courts apparently playing only a marginal role. For example, this appeal which was lodged in the Court on 16th June, 2000 has taken over 8 years to hear and conclude it, mainly, due to many interlocutory applications filed by both parties; and when it came to hearing counsel for both parties relished in making lengthy and sometimes verbose submissions. In our view, most of the applications and greater part of the ensuing submissions in the appeal were frivolous, irrelevant, unnecessary and only meant to forestall or procrastinate disposal of the suit and the appeal. Moreover, the so-called authorities cited and relied upon by the parties express no new jurisprudence but merely repeat the already settled principles of law. It is indeed sad that the main actors in the scene are senior counsel.

The consequence of this is that the dispute, probably now stale, is still far from being concluded though it has been in the courts for about 15 years. This only reveals fundamental defect in our management of cases and it is our sincere hope that the new Rules of Procedure promulgated by the Rules Committee will see that the courts play an active role in the management of cases so that the parties themselves do not dictate the time period they want to address the court.

The record of the appeal shows that the dispute herein arose from a building contract between National Housing Corporation (NHC), the respondent herein, and Intex Construction Limited (Intex), the appellant herein, under the terms of which the appellant was awarded the contract by the respondent to construct for the respondent 1000 units of Highrise flats at Kibera, Nairobi, and to this effect the appellant and the respondent executed an Agreement and schedule of Conditions of Building Contract (with quantities) which is a standard construction contract issued by the Ministry of Public Works. The contract sum was Shs. 207, 298,895/- and the overall contract period was 96 weeks from 12th June, 1989.

It is common ground that in the course of implementing the project, the appellant ran into various problems resulting in its failure to meet deadlines, the consequence of which the relationship between the appellant and the respondent became strained and ultimately resulted in the termination of the building contract. This triggered the institution of a suit

HCCC No. 2136 of 1994 (O.S.) which was instituted by the appellant against the respondent. By a consent order made on 26th June 1998 it was agreed, inter alia, to refer several matters in dispute between them to arbitration by an arbitrator by the name of Mr. N. Mururu. By a joint letter dated 8th September, 1998, the parties drew up a list of three issues, which they agreed were to be determined by the arbitrator as preliminary points. The issues were:-

- 1. Whether there is a valid agreement arrived at in respect of the appellant's claim of loss and expense in the sum of Shs. 520,000 per week payable to the appellant.**
- 2. Whether there is a valid agreement between the parties arrived at on or about 6th December 1994 that the total time extension due to the appellant from 1st January 1993 to 2nd December 1994 was 72.5 weeks.**
- 3. Whether there is a further valid agreement arrived at between the parties as to the evaluation of the appellant's claim on loss and expense with effect from 1st January, 1993 onward.**

Presentations before the arbitrator were to be either by way of affidavits and/or oral submissions which would include admission of documentary evidence. The arbitrator found, inter alia, that the agreement to pay Shs. 520,000 per week was entered into by the parties to the contract to govern the mechanism of reimbursing the appellant for certain defined loss and was therefore a variation of the terms of the contract as far as Clause 24 of the contract is concerned. Further, having so found, the arbitrator also held that variation was not outside the contract in the sense that it was a totally different and independent contract with a life of its own. He found that the variation derived its life from the building contract and "must" be enforced under the building contract entered into in June 1989. The arbitrator also went on to find that he was seized of the dispute because under clause 36 of the building contract he had powers to deal with disputes or differences.

As to the second issue, the arbitrator held that the appellant had made several applications for extension within which to complete the works and that in each and every case, the requests for extension were agreed upon and granted. The arbitrator, therefore, found for the appellant in the second issue. Likewise, the arbitrator held that there was a further valid agreement arrived at between the parties as to the evaluation of the appellant's claim on loss and expense with effect from 1st January, 1993 onwards. This was the third issue given to the arbitrator for determination.

By an originating summons expressed to be brought under the Arbitration Act, 1995, the respondent sought the following orders:-

"That the interim award delivered on 22nd December, 1995 by Mr. N. Mururu in the arbitration proceedings between the parties hereto on issues 1 and 2 be set aside; and that the arbitration proceedings before Mr. N. Mururu be stayed pending determination of these proceedings."

Mbaluto J heard the case and in a reserved ruling held that the arbitrator having found that the agreement to pay shs. 520,000 per week in respect of loss and expense was not in accordance with clause 24 of the construction agreement, he should not have gone beyond that determination to look for evidence to justify the payment. The learned judge further held:

"Similarly with regard to extension of time, the arbitrator having found that the extensions were not in accordance with clause 23 of the construction contract, he should not have gone back to rely on the minutes of meetings between the parties as justification for the extension. He clearly dealt with a matter not contemplated by the reference.

Finally, even if I am wrong in my findings as aforesaid, I would still have arrived at the same overall conclusion because there is no doubt in my mind that the award is in conflict with the public policy of this country in that it seeks to validate what are clearly illegal payments of huge sums of public funds.

For the above reasons, the application is allowed and the interim award delivered on 22nd December, 1995 set aside. The respondent will bear the applicant's costs of this application."

The appellant contested this holding and appealed to this Court on 16th June 2000 on 23 grounds of appeal. Immediately there followed myriad applications of diverse nature, the most pertinent being the application to strike out the appeal, which we are hearing now; and another one to admit a supplementary record of appeal. The latter was allowed on 7th March, 2002.

Mr Ngatia for the respondent urges us to strike out the appeal on the grounds, first, that no appeal lies to this Court

from a decision of the superior court made under **Section 35** of the Arbitration Act 1995; and secondly, that the appeal was lodged out of time without the requisite leave.

We will seek to answer the second issue first. The ruling the subject matter of the appeal was delivered on 4th November 1999 and immediately thereafter the counsel for the appellant made an oral application for leave to appeal which application was granted. On 9th November 1999 the said counsel sent a letter bespeaking of the certified copies of proceedings and the ruling. The certificate of delay shows that these were collected by counsel on 4th May 2000 and this appeal was lodged on 16th June 2000. So far, these facts are not contested. The question then that arises is: Was the appeal lodged timely? By dint of the proviso to **rule 81** time required by the Registry for preparation and delivery of copies of proceedings as certified in the certificate of delay are excluded when computing the 60 day period for lodging an appeal. However, time needed for certifying copies of proceedings, judgments or rulings is not to be excluded in computing such time for the simple reason that the record of appeal does not need certified copies of proceedings, judgments or rulings. See **Republic v The Minister for Transport & Communications & Another: Civil Appeal No. 276 of 1996** (unreported). Thus in the appeal now before us, the appellant applied for wrong proceedings and ruling which were irrelevant documents to the appeal and the proviso to **rule 81** cannot come to its aid. Mr Nagpal learned counsel for the appellant in a spirited attempt to counter the submissions of Mr Ngatia relied on the certificate of delay which did not however assist him since it concerned documents not mandated by the Rules. As matters stand the appeal was lodged more than six months out of time and the certificate of delay herein is irrelevant. It must follow, therefore, that as the appeal was lodged out of time without the requisite leave which might have been obtained under **rule 4** of the Rules of the Court, this appeal cannot be sustained. On this ground alone, the appeal is fatally defective and is hereby ordered struck out.

The other issue whether an appeal lies to this Court from a decision of the superior court made under **section 35** of the Arbitration Act 1995 is merely of academic interest since we have struck out the appeal. Mr. Ngatia submitted that this Court lacks jurisdiction while Mr. Nagpal was of the opposite view. We were referred to the divergent views of the Court in **Kenya Shell Ltd v Kobil Petroleum Ltd Nai. Civil Application No. 57 of 2006** (unreported) by which Omolo and O’Kubasu, JJA held that **section 35** of the said Act does not take away the jurisdiction of either the High Court or the Court of Appeal to grant a party leave to appeal from a decision of the High Court made pursuant to that section, while Onyango Otieno JA disagreed with them.

In our view, having dismissed the appeal it would not be appropriate for us now to decide on the issue. This should be a matter to be debated on another day and in a different action.

In the result, we order that Civil Appeal No. 143 of 2000 be and is hereby ordered struck out with costs to the respondent (NHC).

Dated and delivered at Nairobi this 9th day October, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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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