



**KTDA Power Company Limited v Jiangxi Water & Hydropower Construction
Company Ltd (Commercial Miscellaneous Application E615 of 2024)
[2025] KEHC 2255 (KLR) (Commercial and Tax) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E615 OF 2024
MN MWANGI, J
FEBRUARY 28, 2025**

BETWEEN

KTDA POWER COMPANY LIMITED APPLICANT

AND

**JIANGXI WATER & HYDROPOWER CONSTRUCTION COMPANY
LTD RESPONDENT**

RULING

1. Before me is a Notice of Motion application dated 31st July 2024 filed by the applicant pursuant to the provisions of Sections 3 & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking orders that this Court sets aside the appointment of Dr. Kenneth Wyne Mutuma as the sole member of the Dispute Adjudication Board and directs that the appointment of the said Board be conducted in accordance with sub-clause 20.2 of the Conditions of Contract.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Peter Wachira, the applicant's Managing Director. He averred that the parties herein entered into an EPC Contract for the South Mara Small Hydropower Project on 29th May 2014, valued at USD 8,434,166.44. That the said contract included various documents such as the General and Particular Conditions of Contract, the Work Programme, and the Schedule of Payment. He deposed that a dispute arose when the respondent unilaterally initiated the appointment of a Dispute Adjudication Board (DAB) in violation of sub-clause 20.2, which requires mutual Agreement on the appointment.
3. He asserted that the respondent prematurely requested the Chartered Institute of Arbitrators, Kenya Branch, to appoint an Adjudicator before the 28-day notice period expired, as a result of which



the Institute appointed Dr. Kenneth Wyne Mutuma as the sole Adjudicator without consulting the applicant. Mr. Wachira stated that the applicant challenged the appointment and jurisdiction of the DAB, on grounds that the process was irregular since the respondent did not follow contractual procedures. He stated that despite raising objections, the Preliminary Objection was dismissed on 14th June 2024. He further stated that given that the DAB's decision is binding under FIDIC conditions, the parties herein must mutually agree on its composition to ensure fairness and legitimacy.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 19th August 2024 by Mr. Duan Haohao, the respondent's General Manager. He contended that the applicant failed to settle multiple claims for additional payment arising from extension of time, despite repeated requests. That on 6th November 2023, the respondent notified the applicant of its intent to refer the dispute to the DAB and after further inaction, the respondent sought the Chartered Institute of Arbitrators Kenya's (CI Arb-K) intervention. He averred that the contract negotiations under Minute 40 anticipated CI Arb-K's role in appointing a DAB if parties failed to agree. He asserted that the applicant had ample opportunity to propose DAB members but failed to do so. Further, that the DAB was formed in accordance with the contract, thus any dissatisfaction should have been addressed through arbitration, not Court intervention.
5. In a rejoinder, the applicant filed a further affidavit sworn on 4th September 2024 by Mr. Peter Wachira, the applicant's Managing Director. He stated that in as much as the respondent issued a Notice of intent to refer the dispute between the parties herein to the DAB on 6th November 2023, it did not wait for the applicant's response within the contractually allowed period until 4th December 2023, before writing to CI Arb on 10th November 2023. He further stated that the letter dated 7th December 2023 referred to by the respondent was in respect to a different project, North Mathioya Hydro Project and not the South Mara Project. Mr. Wachira asserted that the contract between the parties herein did not automatically give CI Arb authority to appoint the DAB, and that CI Arb could only step in if both parties failed to agree on an appointment, which had not yet happened. He contended that since the respondent improperly initiated the DAB process, this Court has the jurisdiction to intervene and rectify the procedural irregularities.
6. In a rejoinder, the respondent filed a supplementary affidavit sworn on 19th September 2024 by Mr. Duan Haohao, the respondent's General Manager. He maintained that the appointment of the DAB was proper and that the applicant was misinterpreting the contract to delay settling outstanding claims. He asserted that the letter dated 7th December 2023 differentiated three projects undertaken by the parties and reaffirmed the need for a DAB Adjudicator for the South Mara Project. He averred that the contract required a list of potential Adjudicators at the time of signing to facilitate a quick resolution of disputes. He further averred that despite being notified of the respondent's intent to refer the dispute to a DAB, the applicant failed to respond and only acted after the CI Arb appointed a DAB member. The respondent stated that it invoked Clause 20.3 of the contract, which allowed for unilateral appointment of the DAB.
7. The instant application was canvassed by way of written submissions. The applicant's submissions were filed on 13th September 2024 by the law firm of Kipkenda & Company Advocates, while the respondent's submissions were filed on 22nd September 2024 by the law firm of Rom Law Advocates, LLP. The submissions were highlighted on 30th September 2024.
8. Mr. Odoyo, learned Counsel for the applicant submitted that the respondent did not propose a DAB member or allow the applicant to do so, leading to a hurried and unilateral appointment by the CI Arb without proper consultation. He relied on the case of *Vshydro Kenya Limited v Settet Power Generation Company Limited* (Commercial Case E054 of 2023 [2023] KEHC 24542 (KLR)), and



further submitted that appointment of the DAB must be mutual and consensual, as the DAB has binding authority over disputes.

9. Mr. Odoyo referred to the case of SBI International Holdings AG v [Kenya National Highways Authority \(Civil Case E968 of 2022\)](#) [2023] KEHC 20793 (KLR) and contended that Minute 40 of the minutes of the contract negotiation does not override the requirement for joint selection or consultation in appointing the DAB. He asserted that the appointment of Dr. Kenneth Wyne Mutuma violated sub-clauses 20.2 and 20.3 of the Agreement between the parties herein. He submitted that the decision made by the Adjudicator was not on a contractual dispute and could not be appealed from, before an Arbitral Tribunal as suggested by the respondent.
10. Ms Mudeizi, learned Counsel for the respondent submitted that the respondent acted in accordance with the Contract Agreement and due to the applicant's inaction when appointing the DAB. She further submitted that in as much as Clause 20.2 required mutual selection of a DAB member from a predefined list, no such list existed at the time of contract execution. She contended that this rendered Clause 20.4 inoperable, making Clause 20.3(a) applicable, which allows the appointment of a DAB member by the CI Arb. In addition, Counsel asserted that Minute 40 of the contract negotiation minutes confirmed that disputes would be referred to CI Arb for DAB appointment.
11. She relied on the decisions made in SBI International Holdings AG v Kenya National Highways Authority (supra) and Arnold v Britton [2015] UKSC 36, and submitted that Clause 2 of the Contract Agreement and Clause 1.5 of the Particular Conditions of Contract prioritize the minutes of negotiations over the Particular Conditions of Contract. She asserted that the DAB appointment followed the correct procedure in line with the minutes of negotiations and the overall Contract Agreement. Ms Mudeizi contended that since the applicant has no issue with Dr. Kenneth Wyne Mutuma, the instant application should be dismissed and the matter before the DAB as constituted should proceed to its logical conclusion.

Analysis And Determination

12. I have considered the instant application, and the affidavits filed in support thereof. I have also considered the replying and supplementary affidavits by the respondent, as well as the written submissions by Counsel for the parties. The issue that arises for determination is whether the Disputation Adjudication Board Member was appointed procedurally.
13. Before I delve into the merits or demerits of this application, I note that the respondent challenged the competency of the instant application and this Court's jurisdiction to hear and determine it on the ground that if at all the applicant was dissatisfied with the decision of the DAB member, it ought to have appealed by referring the same to an Arbitral Tribunal as provided for by the contract. On perusal of Clauses 20.4, 20.5 & 20.6 of the General Conditions of Contract, it is evident that it is only a determination of the dispute between the parties herein that can be appealed and/or referred to arbitration. I am of the considered view that the issues raised in the instant application are housekeeping issues and do not touch on the main dispute between the parties herein. As such, the instant application is properly before me and I have the requisite jurisdiction pursuant to the provisions of Sections 3 & 3A of the [Civil Procedure Act](#) to determine it.

Whether the Dispute Adjudication Board member was appointed procedurally.

14. It is not in contest that the parties herein entered into an EPC Contract for the South Mara Small Hydropower Project on 29th May 2014, which included various documents such as the General and Particular Conditions of Contract, the Work Programme, and the Schedule of Payment. It is also not



contested that a dispute between the parties herein arose and as a result thereof, the respondent invoked the provisions of Clause 20.4 of the General Conditions of Contract.

15. From the pleadings filed, it is evident that vide a letter dated 6th November 2023 the respondent expressed to the applicant its intention to refer the dispute between the parties herein to adjudication upon the elapse of 28 days. The respondent further indicated in the said letter that it would apply to the Chartered Institute of Arbitrators, Kenya for appointment of an Adjudicator to adjudicate the dispute. The respondent in a letter dated 10th November 2023 addressed to the Chief Executive Officer (CEO), Chartered Institute of Arbitrators, Kenya requested for the appointment of an Adjudicator. Notably, the letter was written before the elapse of the 28 days indicated in the earlier letter dated 6th November 2023.
16. In a letter dated 1st December 2023, the CEO, Chartered Institute of Arbitrators, Kenya informed the respondent to pay the requisite administration fees for purposes of appointing an Adjudicator. The respondent confirmed having made the payment vide a letter dated 7th December 2023 and on 13th December 2023, a sole Adjudicator was appointed.
17. The dispute resolution mechanism between the parties herein is provided for under Clause 20 of the General Conditions of Contract. Clause 20.1 provides for the contractor's claims and the mode of communication of the said claims to the employer and Clause 20.4 provides for reference of a dispute to the DAB. Clause 20.4 states that –

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Employer, then after a DAB has been appointed pursuant to Sub-Clauses 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board], either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other party. Such reference shall state that it is given under this Sub-Clause...

18. Appointment of the DAB is provided for under Clause 20.2 of the General Conditions of Contract. It states that -

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.

The DAB shall comprise, as stated in the Particular Conditions, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB...

19. From the foregoing clauses, it is clear that the party intending to refer a dispute to DAB ought to issue the other party with a 28 days' notice, after which the parties herein would jointly appoint a DAB to adjudicate the dispute. In compliance with Clauses 20.2 & 20.4 of the General Conditions of Contract,



the respondent vide a letter dated 6th November 2023 notified the applicant of its intention to refer the dispute between them to the Dispute Adjudication Board and asked the applicant to treat the said letter as a 28 days' Notice for referral of the dispute between the parties herein to adjudication. This Court notes that the said Notice was to elapse on 4th December 2023.

20. It is evident that before the elapse of the aforesaid 28 days' Notice, the respondent vide a letter dated 10th November 2023 wrote to the CEO, Chartered Institute of Arbitrators, Kenya requesting for the appointment of an Adjudicator. The said CEO in a letter dated 1st December 2023, informed the respondent to pay the requisite administration fees for purposes of appointing an Adjudicator. Confirmation of payment was done in a letter dated 7th December 2023, and on 13th December 2023, a sole Adjudicator was appointed.

21. I note that Clause 20.3 of the General Conditions of Contract provides for instances where it can be deemed that parties have been unable to agree on the DAB. It states the following-

If any of the following conditions apply, namely -

- a. the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,
- b. either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,
- c. the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- d. the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act- or is unable to act as a result of death, disability, resignation or termination of appointment, then the appointing entity or official named in the Particular Conditions shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

22. From the record, there is no evidence of negotiations between the parties herein on the appointment of a DAB. There is also no evidence that either party supplied and/or served the other party with a list of proposed members to be jointly appointed by the parties herein as the DAB. Additionally, the request to the CEO, Chartered Institute of Arbitrators, Kenya for appointment of an Adjudicator and the request for payment of administration fees for purposes of appointing an Adjudicator by the said CEO were both done before the elapse of the 28 days' notice provided for in the letter dated 6th November 2023 and Clause 20.2 of the General Conditions of Contract. In addition, contrary to the provisions of Clause 20.3 of the General Conditions of Contract, the appointment of the Adjudicator was done without consultation by both parties. This is evidenced by the fact that the letter for request for administration fees was not copied to the applicant.

23. I further note that in as much as the respondent relies on Minute 40 of the contract negotiations in emphasizing that the appointment of the sole Adjudicator was in line with the minutes of negotiations and the overall Contract Agreement, in the letter dated 6th November 2023 which preceded the request to the CEO, Chartered Institute of Arbitrators, Kenya for appointment of an Adjudicator, the respondent indicated that as a result of the dispute between the parties herein, it had invoked



the provisions of Clause 20.4 of the General Conditions of Contract. Further, the respondent in its replying affidavit averred that the inference under Minute 40 of the minutes of the contract negotiation was made with the intention of ensuring that sub-clause 20.2 of the particular conditions of contract was operable.

24. Considering all the above factors, it is my finding that the Agreement under Minute 40 of the minutes of the contract negotiation did not operate and/or were not to be read in isolation but were to be read with Clause 20.2 of the General Conditions of Contract.
25. It is trite law that parties are bound to the terms of their bargain and a Court of law cannot re-write a contract between parties unless coercion, fraud or undue influence are pleaded and proved. The said position was captured by the Court of Appeal in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, where it was held that -

A court of law cannot re-write a Contract between parties. The parties are bound by the terms of their Contract, unless coercion, fraud or undue influence are pleaded and proved.
26. It is my finding that the process of the appointment of Dr. Kenneth Wyne Mutuma as the sole member of the Dispute Adjudication Board was irregular as it did not follow the contractual procedures agreed on, by the parties herein.
27. I am persuaded that the instant application is merited. It is hereby allowed as prayed. Costs are awarded to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2025.

Ruling delivered through Microsoft Teams Online platform

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Odoyo for the applicant

Mr. Mudeizi for the respondent

Ms Lucy Njeru – Court Assistant.

NJOKI MWANGI. J

