Riverside Square Offices Limited v Crje (East Africa) Limited (Originating Summons E261 of 2023) [2024] KEHC 4526 (KLR) (Commercial and Tax) (26 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4526 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ORIGINATING SUMMONS E261 OF 2023

A MABEYA, J

MARCH 26, 2024

IN THE MATTER CHALLENGING THE APPOINTMENT OF AN ARBITRAL TRIBUNAL BY THE INTERNATIONAL CHAMBER OF COMMERCE

BETWEEN

RIVERSIDE SQUARE OFFICES LIMITED ..... APPLICANT

AND

CRJE (EAST AFRICA) LIMITED ..... RESPONDENT

JUDGMENT

1. The applicant instituted this suit vide an Originating Summons dated 6/6/2023. The same was brought pursuant to Article 159(1) and (2) of the *Constitution* of Kenya 2010, Section 12 of the *Arbitration Act* CAP 49 Laws of Kenya (as amended), Rule 3 of the Arbitration Rules 1997, sections 1A, 1B and 3A of the *Civil Procedure Act*.

2. The Summons sought orders that a declaration be issued to the effect that the appointment of the arbitral tribunal by the International Chamber of Commerce was null and void. That a declaration do issue that the *Arbitration Act* gave the Kenyan Chapter of the Chartered Institute Of Arbitrators powers to conduct the arbitral process and that the appointment of Dr. Jamsheed Peero as Arbitrator in the subject dispute be declared null and void.

3. The Summons was supported by the grounds on the face of it and the affidavit of Tali Israel Tali sworn on 6/6/2023. The applicant contended that, on 1/11/2019, the applicant and the respondent entered into a contract for the construction of commercial development and other related works on a property known as LR 209/22216 (Plot A) Riverside Drive at a contractual cost of Kshs 1,046,978,608/-.

4. That it was a term of the contract that any dispute that would arise from the agreement would be resolved by arbitration carried out by the Kenyan Chapter of the Chartered Institute of Arbitrators.

Further, that the parties agreed that the substantial law to be applied would be the Kenyan Law. That the dispute was to be resolved in accordance with the Rules of the International Chamber of Commerce.

5. That due to the hybrid nature of the agreement, the Kenyan Chapter of the Chartered Institute of Arbitrators would be required to apply the rules of the International Chamber of Commerce in conducting the arbitral process. That the appointment of the arbitral tribunal formed part of the agreement. That the Kenyan Chapter of the Chartered Institute of Arbitrators and the International Chamber of Commerce had two different and distinct procedural rules.

6. That on 3/3/2023, the respondent submitted its request for arbitration to the International Chamber of Commerce who appointed an arbitral tribunal in accordance with the International Chamber of Commerce (ICC) Arbitration rules. The applicant termed the appointment as being against the intention of the parties which was to have the procedural rules of the International Chamber of Commerce applied by the Kenyan Chapter of the Chartered Institute of Arbitrators.

7. The respondent opposed the suit vide a replying affidavit sworn by its director Song Guanglong on 24/7/2023. He confirmed the parties having entered into the referred to commercial contract as pleaded by the applicant. That a dispute had ensued and that pursuant to clause 20.6 of the agreement, the respondent had submitted the dispute to the Secretariat of the International Court of Arbitration and Dr. Jamsheed Peeroo appointed as the sole arbitrator for the dispute.

8. The respondent contended that the applicant had participated in the proceedings before the tribunal and it would be prejudicial to it as costs for the arbitrator had been incurred. He averred that in accordance with Article 6 of the 2021 ICC Arbitration Rules, a party that has agreed to submit to arbitration under the rules is deemed to have submitted ispo facto to the rules at the date of commencement. That questions pertaining the existence, validity or scope of arbitration agreement should be determined by the arbitral tribunal. It was the respondent's position that the ICC and CIArb were two different bodies which apply different rules.

9. The parties canvassed the suit by way of written submissions which I have considered. The applicant submitted that under sub-clause 20.6 of agreement, the parties elected the Kenyan Chapter of the Chartered Institute of Arbitrators ("the said Chapter") as the one to conduct the arbitral process which included the selection of the arbitral tribunal.

10. That the said Chapter was to conduct the arbitral process in accordance with the Rules of Arbitration of the International Chamber of Commerce. That it meant that arbitration was to be administered by one arbitral institution under the rules of another. It was submitted that the arbitral agreement was express that the arbitration was to be conducted by the said Chapter and not the International Chamber of Commerce ("the ICC").

11. On its part, the respondent submitted that in the ICC, the parties are given an opportunity to choose an arbitrator. That despite the applicant being given an opportunity to do so, it chose not to. That the challenge of the arbitrator should be done in accordance with the ICC rules.

12. It was further submitted that, based on the principle of Kompetenz- Kompetenz, the arbitrator has the authority to resolve any dispute with respect to the interpretation, applicability and enforceability or formation of the agreement. That the applicant's jurisdictional challenge was before the arbitral tribunal.

13. I have considered the pleadings and the submissions on record. The applicant challenged the appointment of the arbitral tribunal by the International Chamber of Commerce. It contended that the arbitral clause contained in the contract executed by the parties, gave the said Chapter the mandate

to conduct the arbitration but use the rules of arbitration of the ICC. The applicant termed it as a hybrid system which incorporated the two systems.

14. On its part, the respondent contended that the selection of the arbitrator was something the parties were free to do and according to the ICC rules in arbitration, a party that had agreed to submit to arbitration under the rules is deemed to have submitted ispo facto to the rules at the date of its commencement. The respondent accused the applicant of forum shopping and stated that the applicant had already participated in the arbitral process.

15. The Court's interference in arbitral process is limited under section 10 of the *Arbitration Act* save as is set out in that Act. This suit was brought pursuant to section 12 of the *Arbitration Act* on appointment of arbitrators. It provides, inter-alia, that: -

> "(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.
>
> (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—
>
> (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
>
> (b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and
>
> (c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.
>
> (3) ..."

16. In the present case, the agreement that is the subject of the suit provided for arbitration as a dispute resolution mechanism. Clause 20.6 provides that: -

> "Sub clause 20.6 shall be deleted and replaced with the following Any dispute which is not solved in the manner provided in sub clause 20.4 and sub-clause 20.5 shall be finally settled by arbitration in accordance with the rules of arbitration of the International Chamber of Commerce. The arbitral tribunal shall comprise of three arbitrators appointed in accordance with those rules. The seat of arbitration shall be in Nairobi Kenya and the arbitration process shall be carried out by the Kenya Chapter of the Chartered Institute of Arbitrators. The language of arbitration shall be English. The Parties agree to treat ...".

16. A close reading of the said arbitral clause provides three facets. Firstly, it provides that the applicable rules for arbitration shall be the Rules of the International Chamber of Commerce. Secondly, that the seat of arbitration is to be Nairobi, Kenya and fixes the number of arbitrators. Thirdly, that the process of arbitration is to be carried out by the Kenya Chapter of the Chartered Institute of Arbitrators.

17. The Count is therefore called upon to determine the issue of the application of the arbitral process in terms of the said arbitration agreement. In *Fili Shipping Co Ltd v Premium Nafta Products and others* [On appeal from *Fiona Trust and Holding Corporation and others v Primalov and others* [2007]

UKHL 40 [2007] cited with approval *Techno service Limited v Nokia Corporation & 3 others* [2021] eKLR, it was held that: -

> " In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

18. The Court appreciates the party autonomy in deciding how to resolve their disputes. In *Nyutu Agrovet Limited v Airtel Network Limited* (2015) eKLR, the court held that: -

> " The rationale behind the limited intervention of Court in Arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to chose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through Arbitration, intervention by the Courts in the dispute is the exception rather than the rule. In *Kenya Oil Co Ltd & another v Kenya Pipeline Co. Ltd.*, CA No 102 of 2012, this Court expressed itself as follows on the principle:
>
> > 'The *Arbitration Act*, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). In addition to improving, simplifying and harmonizing practices in international commercial Arbitration, the Act recognizes the principle of party autonomy and limits the role of the Courts in commercial Arbitration. The principle of party autonomy underpinning Arbitration is premised on the platform that provided it does not offend strictures imposed by law, parties in a relationship have the right to choose their known means of resolving disputes without recourse to the Courts or by limiting the circumstances under which recourse to the Courts may be had."

19. However, I will add here that that autonomy has to be in accordance with the agreement between the parties. In the present case, the arbitral clause provided that the arbitral process is to be carried out by the Kenyan Chapter of the Chartered Institute of Arbitrators. The process of arbitration begins once a dispute has been declared and one party gives such notice to the opposing party and evinces of its intention to commence the arbitral proceedings.

20. In the subject clause, the parties used the term 'shall' denoting the mandatory nature of the obligation to have the dispute resolved by the Kenyan Chapter of the Chartered Institute of Arbitrators. It is that Chapter that was to be the appointing authority. That was the agreement of the parties, period. It cannot fall in the mouth of the respondent to insist that since section 17 of the *Arbitration Act* provides for the principle of Kompenz Kompetenz, the Court should leave an Arbitrator who has been appointed by a body that was not contemplated by the parties to determine his jurisdiction, when the same is as clear as day light. It would be to subject the applicant to unnecessary expense.

21. From the record, it is clear that the aforesaid International Chamber of Commerce, on receipt of the notice from the respondent, notwithstanding the clear provisions of the agreement between the parties as to what was the appointing authority, it proceeded to appoint a Dr. Jamsheed Peero as the sole Arbitrator. That shows how wrong that body was. It never respected the parties intention. It was eager to assume jurisdiction it did not have. May be it is the thirst for work?

22. It should be noted that one of the grounds for setting aside any arbitral award is if the process of appointment is not according to the agreement between the parties. That is clear under section 35 (2) (a) (v) of the *Arbitration Act*. The question here is whether, in the circumstances of this case where the applicant has come to Court at the earliest to stop what it considers to be unlawful process, the Court should let the same go the whole length and await to set it aside at the point of setting aside.

23. I do not think so. A party cannot be forced to undergo what is clearly a blatantly irregular and unlawful process with a promise that the same would be set aside at the appropriate time. The Court must firmly tell the parties, the ICC and its appointed Arbitrator, that charting an unlawful course is a no-go zone. That they should not subject the applicant to an unwarranted and unnecessary expense. Article 159 (2) (b) decrees that justice should be dispensed without delay. Why keep the parties waiting until the arbitrator who has wrongly assumed jurisdiction exercise it while it is clearly void?

24. The fact that its rules were invoked, that did not give the ICC the jurisdiction to own the arbitral process. To say the least, it acted without jurisdiction and its actions are void ab initio. Whatever process that have been undertaken is but void and of no consequences and the ICC and its arbitrator must be told as much. There is no need to subject the parties to further expenses.

25. In this regard, I find merit in the plaintiff's suit and hold that the agreement provides that the process of arbitration should be conducted by the Kenyan Chapter of the Chartered Institute of Arbitrators. The selection of the arbitral tribunal by the International Chamber of Commerce goes against the intention of the parties in their agreement and is of no consequence.

26. Accordingly, I allow the suit and grant the declarations sought in prayer nos. 1, 2, 3, 4, 5, 6, 7 and 9 of the Originating Summons. The respondent shall bear the costs of the suit in any event.

    It is so decreed.

DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE