



REPUBLIC OF KENYA



**Clogeworks Infrastructure Limited v Mbugua (Miscellaneous Civil Application
E218 of 2021) [2022] KEHC 16928 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E218 OF 2021
HK CHEMITEI, J
DECEMBER 15, 2022**

BETWEEN

CLOGEWORKS INFRASTRUCTURE LIMITED APPLICANT

AND

RAHAB NUNGARI MBUGUA RESPONDENT

RULING

1. This is a ruling on a Notice of Motion dated November 16, 2021 seeking the following orders: -;
 - a. That this honourable court be pleased to appoint an arbitrator to hear and determine a dispute between the parties under the contract between Rahab Nungari Mbugua and Clogeworks Infrastructure Limited.
 - b. That in the alternative, the honourable Court does vest appointing authority on the Chairman of the Chartered Institute of Arbitrators, Kenya Branch.
 - c. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of the application as well as the affidavit dated November 16, 2021 sworn by Gerald Clement Ochwada a director of the applicant on even date. He deposed that the applicant entered into a contract with the respondent on November 19, 2020, the subject matter of the contract being erection and completion of the shell structure A-frame development on Plot No 15165/18 & 21 Nakuru County. That the applicant duly conducted itself pursuant to its obligations under the contract which included constructing the subject structure within the stipulated period and to the required standard. That unfortunately the respondent breached the terms of the contract by failing to make payments to the applicant for the works done as was required under the contract.



3. He deposed further that in response and pursuant to the terms of the contract, the applicant suspended the works it was undertaking and wrote to the respondent a letter dated April 20, 2021. That the respondent had challenged the applicant's grievances as regards the contract payments, as was witnessed from the correspondences between the respondent's advocates and the applicant's advocates. Further, that the subject contract under clause 31 required that any dispute arising out of the contract, which could not be amicably settled between the parties, should be referred to adjudication/ arbitration /mediation in accordance with the laws of Kenya.
4. Mr Ochwada went on to depose that the applicant's advocate on record had written to the Chartered Institute of Arbitrators, Kenyan branch, requesting them to appoint an arbitrator to arbitrate over the dispute as contemplated by the parties at the time of executing the contract. However, they had responded by advising the applicant's said advocates that since the dispute resolution clause did not specifically nominate it as the appointing authority, the applicant ought to seek assistance of the court to vest such authority on the Chairman of the Chartered Institute of Arbitrators.
5. That clearly the applicant, which was presently being denied access to its money given the successful completion of its contractual obligations and urgently desired to access justice through the appointment of an arbitrator to resolve the dispute, which concern could only be actualized through this court entertaining this application.
6. The respondent in response to the application filed a replying affidavit dated July 13, 2022. She opposed the application claiming the same was bad in law, incompetent, non-starter, frivolous, vexatious, malicious, full of half-truths and a gross abuse of the court process. She averred that the said application had been filed on November 16, 2021 and served upon her on June 27, 2022 that is 8 months later. That therefore the same was an afterthought and a waste of the court's time.
7. The respondent however conceded that indeed the parties herein had entered into a contract and executed it on November 19, 2020 the subject matter being erection and completion of a shell structure A-frame development on Plot No 151165/18 & 21 which belonged to her. She averred that the contract sum of the project was in accordance with the priced bill of quantities costs of Kenya Shillings Three Million, Twenty-Six Thousand Nine hundred and Forty shillings only (Kshs 3,026, 940/=).
8. The respondent disputed the copy of contract annexed in the applicant's director supporting affidavit. She averred that the same imposed exaggerated costs of the project and it did not reflect the agreed or the executed price of the contract. That the parties had agreed that the contract duration should not exceed 16 calendar weeks from the date of commencement unless the same was extended in written form and which up to date had not been extended. Further, that the applicant had grossly breached terms of the contract by failing to complete the structure despite receiving full amount thus approaching this court with unclean hands.
9. The respondent contends that the applicant had a motive to unscrupulously defraud her, as it had suspended works vide letter dated April 20, 2021 citing frustration of non-payment and threatening to stop completion of the project despite receiving Kenya shilling four million, two hundred and forty-five thousand, nine hundred and seventy-five (Kshs 4, 245, 975.00) which is more than the agreed price, a fact well known to it. The respondent averred that there was no dispute between the parties herein as the applicant alleged. That what it should be candid to tell this court is that it had breached the contract and had suspended further construction, and so it could not purport to sparingly invoke terms of the contract for selfish gain.
10. The respondent went on to aver that clause 31 of the contract could only be applied where there was a dispute between the parties and as such have failed to agree on their own but in this instance, the



applicant breached the contract by failing to meet its end of bargain yet she had settled the agreed amount. That she had been kind enough to call for a meeting with the applicant but her calls had been met with resistance by the applicant citing that it had to be paid in full in order to resume work.

11. The respondent denied the contents of paragraph 14 of the applicant's director supporting affidavit and stated that she had not detained any equipment at the construction site. While relying on the advice by her advocate, the respondent averred that she believed to be true that this was a simple issue that could be resolved by engaging a quantity surveyor to conduct a thorough valuation and file a report which should guide parties on who owes who without engaging an arbitrator or mediator.
12. That she was more than willing and open to sit down with the applicant and settle the stand off without involving court, arbitrator or mediator. Further, that she stood to suffer prejudice if the orders sought herein to appoint an arbitrator were granted as she would incur more expenses on top of what the applicant owed her. She prayed that the application be dismissed with costs as it lacked merit.
13. When the matter came up for hearing the court directed that the same be disposed by way of written submission which both parties have complied.

Applicant's Submissions

14. The applicant identified three issues for determination by this court namely; whether the arbitration/mediation clause was valid and enforceable. On this issue the applicant submitted there was an arbitration clause under clause 31 of the contract which stated that any dispute arising out of the said contract which could not be amicably settled by the parties would be referred to adjudication/arbitration/mediation in accordance with the laws of Kenya. That the said clause was valid and consequently enforceable and binding since the parties herein had entered into the contract willfully and without any coercion.
15. On the second issue whether there was a dispute to be referred to arbitration the applicant submitted that the parties herein seemed not to agree on the amount owing and due to the applicant and that the respondent had threatened to institute civil action against it for alleged breach of contract.
16. On the last issue, whether this court should refer this matter to arbitration by appointing an arbitrator, or in the alternative vest the appointing authority on the Chairman of Chartered Institute of Arbitrators it was submitted that Article 159 (2) (d) of the *Constitution* mandated courts and tribunals while excising their judicial authority to promote efficacious resolution of disputes through alternative dispute resolution mechanism *inter alia* arbitration and mediation. The applicant placed reliance on section 6 of the *Arbitration Act*, 1995, the cases of *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR and *MITIS Electrical Company Ltd v Mitsubishi Corporation* [2018] eKLR.
17. In conclusion, it was submitted on behalf of the that the present application was merited and the orders sought were pretty straightforward. This court was urged to grant the orders sought in the said application.

Respondent's Submissions

18. The respondent also identified three issues for determination namely; whether the instant application was merited. The respondent submitted that the instant application was not merited as it was premature, bad in law, frivolous, malicious, a waste of court's time with the sole intent to defraud her. That there was no evident dispute between the parties and that the applicant had neglected its contractual obligations. Further, that section 107 of the *Evidence Act* required that a person alleging a fact has to prove it and this being a civil case, the degree of proof was on a balance of probabilities.



19. The respondent placed reliance on the case of *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR and submitted that the applicant had not demonstrated the frustration it faced in execution of its contractual obligation nor had it proved any dispute between them and if so, the effort made to comply with clause 31 of the contract before approaching the court.
20. On the second issue of who was in breach of the contract, the respondent submitted that it was obvious that the applicant had breached the contract. That it did so by suspending the terms unilaterally without consulting her and had refused to abide by the very terms it voluntarily agreed to despite receiving up and above the agreed contractual sum.
21. The last issue was on who should pay costs of the suit. The respondent submitted that the award of costs was discretionary and ordinarily costs followed event under section 27 of the *Civil Procedure Act*. She prayed that she be awarded the same.
22. In conclusion, the respondent submitted that under section 12 of the *Arbitration Act*, the court did not have the jurisdiction to appoint an arbitrator but could only descend in the arena where the parties fail to agree on an arbitrator to be appointed. She urged the court to dismiss the instant application with costs in her favour.

Analysis and Determination

23. I have perused the application herein, the supporting affidavit, the response by the respondent and the annexures thereto and the submissions by both parties and the only issue for the determination is whether the application dated November 16, 2021 is merited.
24. In view of the above pleadings, it is clear that this is a straight forward matter which arose from a contract between the parties. The said parties in their contract agreed under clause 31 as follows;

“Any dispute arising out of the contract which cannot be amicably settled between the parties, shall be referred to adjudication /arbitration/mediation in accordance with the law.”
25. Arbitration is a consensual process which draws its mandate from the arbitration agreements of the parties which set out the manner in which the disputes should be resolved and the procedures to be followed. The arbitrator’s mandate and appointing authority are derived from the contract of the parties. In the instant suit the parties herein agreed in their arbitration clause to first try and resolve amicably any dispute arising from the contract before referring the matter for arbitration.
26. The applicant in his application and the annexures therein did not demonstrate any effort of both parties trying to resolve the matter amicably. The said annexures only demonstrated a back and forth correspondences between the parties advocates but the same was not aimed at resolving anything. Having also looked at the letter from the Chartered Institute of Arbitrators, I note that the parties herein were advised to review the clause in the contract and resolve in writing on the appointing authority. That in the event they failed to mutually agree then they may seek the court’s assistance to vest such authority on the Chairman of Chartered Institute of Arbitrators.
27. No evidence has been presented before this court showing that the parties have attempted to review the alternative resolution dispute clause in writing with regard to the appointing authority. Further, I note from the annexures in the replying affidavit of the respondent that she is willing to have a sit down with the applicant.
28. Needless to say, although this court finds the application premature due to the above reasons, clause 31 in the contract binds both parties. It is admitted that work had been done and some payments made by



the respondent. The court cannot rewrite the contract on behalf of the parties. Since they are unable to agree on the extent of the work done vis a -vis the payments made so far, let clause 31 of the agreement kick in.

29. The application is therefore allowed; the chairman Institute of Arbitrators Kenya branch do appoint an arbitrator to adjudicate over the dispute between the parties herein.
30. Costs shall await the outcome of the arbitration.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 15TH DAY OF DECEMBER 2022.

H. K. CHEMITEL.

JUDGE

