Kenya Pipeline Company Limited v Victoria Furnitures Limited (Commercial Arbitration Cause E046 of 2022) [2023] KEHC 2441 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2441 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E046 OF 2022

DAS MAJANJA, J

MARCH 10, 2023

BETWEEN

KENYA PIPELINE COMPANY LIMITED ..... PLAINTIFF

AND

VICTORIA FURNITURES LIMITED ..... DEFENDANT

RULING

Introduction and Background

1. Before the court is the Applicant's Originating Summons dated 21st July 2022. It is made, inter alia, under section 17(6) of the *Arbitration Act*, 1995. The Applicant seeks to stay the arbitration proceedings so that the decision made by the arbitral tribunal asserting jurisdiction can be reviewed and set aside in view of the fact that the Arbitrator lacks jurisdiction to proceed with the reference.

2. The application is grounded on facts set out on its face together with the supporting affidavit and supplementary affidavit of the Applicant's Senior Legal Officer, Jael Ludeki, sworn on 20th July 2022 and 12th August 2022 respectively. The Respondent opposes the application through the replying affidavit sworn by its director, Pankaj Shah, on 16th August 2022 together with the Notice of Preliminary Objection dated 2nd August 2022. The parties have also filed their respective submissions in support of their arguments.

3. Before I deal with the main issue in contention, a brief background of the matter is necessary. Sometime in May 2006, the Applicant awarded the Respondent a tender for the Supply and Installation of fit-out at the Applicant's proposed headquarters building at Nairobi for the contract sum of Kshs. 114,857,481.20. The details of the award were to be contained in a sub-contract that was to be signed by the Respondent and Donwoods Limited ("the Main Contractor"), a contractor who had been awarded a contract dated 19th October 2000 for construction works of the said Applicant's

proposed headquarters building ("the Main Contract"). This sub-contract between the Respondent and Donwoods Limited was entered into on 14th June 2006 ("the Sub-Contract"). By a contract dated 4th July 2006, the Respondent then subcontracted Zadok Furniture Systems Limited to supply, install and commission office furniture and demountable partitions and builders works.

4. Disputes arose over the performance of the Sub-Contracts; which disputes were eventually referred to arbitration for determination. Festus M. Litiku was appointed arbitrator on 4th November 2009 ("the Arbitrator") and it was clarified on 11th November 2009 that the parties to the dispute he was to preside over related to the Respondent and the Main Contract.

5. Between December 2009 and April 2021, the parties were engaged in preliminary meetings with the Arbitrator with questions being raised as to whether the Applicant was a necessary participant in the arbitral proceedings. The Applicant entered appearance on 9th March 2021 and contemporaneously filed a Notice of Preliminary Objection on 29th April 2021 citing the grounds, inter alia, that the Statement of Claim and the proceedings were void ab initio according to section 4 of the *Arbitration Act* according to the general principles of arbitration and that there was no arbitration agreement between the Applicant and the Respondent upon which the proceedings could be predicted. That there was no contract between the Applicant and the Respondent upon which the claim could be founded and that in any case, and without prejudice to the foregoing, the doctrine of privity of contract did bar the Respondent from seeking to benefit or enforce a contract to which it was not a party.

6. The Applicant contended that the claim was patently defective and bad in law because it had failed to comply with a necessary pre-condition to filing those proceedings, the pre-condition being the production of a valid proof of consent by the Main Contractor authorising the commencement of those proceedings in its name. That there was no arbitrable dispute between the parties or between the Applicant and the Main Contractor capable of being submitted to arbitration and that because there was no arbitration agreement between the parties, the establishment of the arbitral tribunal and the appointment of the Arbitrator was irregular, erroneous and defective. The Applicant urged that the Arbitrator lacked jurisdiction over the dispute and that the establishment of the arbitral tribunal in this dispute and the appointment followed an irregular process that did not comply with any known agreement between the parties or any procedure known to the law.

7. The Applicant averred that the claim and the entire proceedings had been caught by the statute of limitation, and are, therefore, inherently defective and bad in law as the Respondent had unilaterally remained indolent for over 12 years only for it to file its Statement of Claim and to seek to prosecute its claim without regard to the principles of fairness that require just and timely determination of dispute without respect to Article 50 of the *Constitution*. That this made the entire proceedings to be an abuse of the law, and to be unfair to the Applicant. As such, the Applicant prayed that the Statement of Claim and the entire proceedings therein be dismissed with costs.

8. The Respondent opposed the Preliminary Objection on the grounds that it was bad in law and did not fit the definition of a Preliminary Objection as it raised matters which could only be determined by examination and interrogation of facts. That the Applicant's Preliminary Objection was filed in complete misapprehension of the stipulations of the Sub-Contract wherein the Respondent was a sub-contractor nominated by the Applicant. The Respondent contended that the Sub-Contract was supplemental to the Main Contract and that essentially, it is the Main Contractor who was suing on behalf of the sub-contractor. The Respondent stated that as sub-contractor it had fully complied with the Sub-Contract by providing the requisite indemnity to the Main Contract, upon which the Main Contractor allowed the Respondent to use its name in bringing up this action against the Applicant.

9. The Respondent further stated that the Preliminary Objection was time barred by effect of section 5 of the *Arbitration Act* and that the record in the arbitral proceedings showed that the same were stayed awaiting the outcome of a related arbitration that was only concluded before a different arbitrator and in the High Court in the year 2020. The Respondent thus asserted that it had not been indolent at all in pursuing its rights. It termed the Preliminary Objection as a dilatory tactic and which ought to be dismissed with costs.

10. Having considered and weighed all the written submissions and the oral highlights on the Preliminary Objection, and, on the balance of probability, the Arbitrator published his ruling on 27th June 2022 ("the Ruling"). It is this Ruling that has given rise to the Applicant's application

Analysis and Determination

11. After going through the parties' pleadings and submissions and before dealing with the merits of the application, I propose to deal with the preliminary issues raised by the Respondent in its Notice of Preliminary Objection which can be condensed to the issue whether this suit is time barred having failed to satisfy the conditions under section 17(6) of the *Arbitration Act*. The import of the said section 17(6) of the *Arbitration Act* is common to the parties and provides:

> 17(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter. [Emphasis mine]

12. In resolving the preliminary objection, the court has to answer when did the Applicant receive notice of the ruling? In this respect, the evidence of two letters sent to the parties by the Arbitrator are not in dispute. The first letter is dated 11th April 2022 in which the Arbitrator addressed the parties as follows:

> This is to advise the parties that I have completed writing my Ruling on the above. The Ruling is now ready for publication...

13. The Arbitrator then went on calculate his fees and stated that prior to the publication of the Ruling, the parties had to pay for the hours he had spent on the matter. In his letter dated 27th June 2022, the Arbitrator confirms that he had received the Respondent's payment cheque on Wednesday, 22nd June 2022 and that he had published the ruling on the same date. The Arbitrator also stated that "The Ruling is ready for collection by the parties".

14. Based on the correspondence from the Arbitrator, the Respondent contends that this suit is time barred as it has been brought more than 100 days after notification of the ruling as the parties received the notice on 11th April 2022. The Respondent submits that actual receipt of the signed copy of an arbitral award/ruling is not necessary in considering when time starts to run, and that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection as explained by the court in *University of Nairobi v Multiscope Consultancy Engineers Limited* [2020] eKLR that:

> For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award is not necessary. So when the arbitral tribunal notifies the parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.

15. The Applicant also cited other decisions to support the same position including *Lantech (Africa) Limited v Geothermal Development Company ML HC* [2020] eKLR, Transworld Safaris Limited v Eagle Aviations Limited and 3 Others, *Mercantile Life and General Assurance Company Limited and Another v Dilip M. Shah and 3 Others ML HC* [2020] eKLR, *Dinesh Construction Limited and Another v Aircon Electra Service (Nairobi) Limited* [2021] eKLR and *Samuel Kigera t/a Rufus Prime Builders and Fabricators v Kenton College Trust Limited* [2022] KEHC 301 (KLR).

16. The Applicant rejects the position that the letter of 11th April 2022 served as a notice that a ruling has been published but was a, "soft approach by the Arbitrator to have his fees settled before he could publish his decision". The Applicant states that the ruling itself is dated 27th July 2022 hence it could not have been published on 11th April 2022. Further that the Arbitrator did not indicate in the said letter that the ruling was ready for collection upon payment of his fees and that all he did was to alert the parties of his intention to deliver the ruling and that time would in fact start running when the ruling was ready for collection. The Applicant submits that a prudent arbitrator would have published the ruling, communicated the fact of publication and then advised the parties to settle his invoice before collecting the ruling.

17. The Applicant distinguishes the case of University of Nairobi v Multiscope Consultancy Engineers (Supra) on the ground that in that case the arbitral tribunal had in fact published its decision and notified the parties that it was ready for collection upon payment of fees. In this case, the Applicant argues that no such communication was made and the Arbitrator did not either in the letter dated 11th April 2022 or at any time before 27th June 2022, inform the parties that the ruling was ready for collection. It also cites *University of Nairobi v Nyoro Construction Company Limited and Another* [2021] KEHC 380 (KLR) where the court held that a right of appeal under section 17(6) of the *Arbitration Act* accrued upon an arbitrator issuing to the parties a notice that the ruling is ready.

18. From the parties' arguments and submissions and going by the court decisions cited above, I have no doubt that the letter of 11th April 2022 was the notification that the ruling was ready and that the same was always ready for collection by the parties upon payment of the Arbitrator's fees. The notification by the Arbitrator that the Ruling was ready for collection after the parties had paid his fees was in reference to its physical collection and cannot be interpreted to be the notification of when time started running in respect of section 17(6) of the *Arbitration Act*. Arguing otherwise would suggest that time begins to run when the parties pay the arbitrator's fees rather than when parties are notified of the ruling. Such an argument would defeat the object of arbitration which is to ensure a speedy and final resolution of disputes.

19. At this stage, I would add that the authorities cited by the parties deal principally with section 35(3) of the *Arbitration Act* which provides that an application to set aside the award may not be made after 3 months have elapsed from the date the party making the application had ''received'' the arbitral award. It is the meaning of ''received'' that the court has expounded on in the catena of decisions the parties have cited. Section 17(6) on the other hand is more explicit as it refers to ''receiving notice of the ruling'' as the start date for reckoning of time rather than the receiving the ruling itself. I therefore hold that accepting the Applicant's arguments would be contrary to statute.

20. I further find that time began running from the date when the parties were notified that the ruling was ready on 11th April 2022 and not when the parties paid the full Arbitrator's fees on 22nd June 2022. The Applicant's Originating Summons, having been filed on 21st July 2022 is clearly time barred as it ought to have been filed within 30 days from 11th April 2022, that is at least by 10th May 2022. In University of Nairobi v Nyoro Construction Company Limited & another (Supra) the court held that an application such as the present one must be made within 30 days of notice of the ruling and

that this court does not have the jurisdiction to entertain a late application or extend time for filing such an application. Section 17(6) does not provide for extension of time and the court does not have jurisdiction to extend statutory timelines therein meaning that a late application under this provision is fatal and the court's jurisdiction is ousted. The court can move no further, with the consequence that that the substance of the Applicant's Originating Summons cannot be determined.

Disposition

21. It must now be clear that the Applicant's Originating Summons dated 21st July 2022 is incompetent. It is struck out with costs to the Respondent assessed at Kshs. 100,000.00 only.

DATED AND **DELIVERED** AT **NAIROBI** THIS **10TH DAY OF MARCH 2023**

D. S. MAJANJA

JUDGE

Mr Gichangi instructed by G.M. Gamma Advocates LLP for the Plaintiff.

Dr Mutubwa instructed by Mutubwa and Company Advocates for the Defendant.