

**HCCC MISC/548/2019**

**TEAM CONSTRUCTION LIMITED V CARNATION PROPERTIES LIMITED**

**Ruling date: 19th December 2019**

**SUMMARY OF FACTS**

The parties herein entered into a contract for construction. A sum of money was agreed upon as the consideration for the architectural services of the respondent. However, the applicant failed to pay the amount for the services rendered by the respondent. Following their failure, the respondent emailed the applicant asking for the fees of their services to be paid. The respondent subsequently sent a letter informing the applicant that the dispute would be referred to arbitration as per their agreement. A sole arbitrator presided over the matter, and he rendered an award in favor of the respondent. However, the applicant asserted that the arbitrator lacked the requisite jurisdiction because the dispute was decided outside the timelines stipulated under their arbitration agreement. In opposition, the respondent stated that the application could not be entertained by the court because it was filed under the wrong statutory provisions. They also stated that the applicant had filed it outside of the required timelines of the court which was 30 days. In light of these circumstances, the respondent urged the court to dismiss the application.

**ISSUES**

1. Whether the application was rightly put before the court in spite of filing it under the wrong section.
2. Whether the arbitral tribunal had the jurisdiction to decide the matter as per the terms of the arbitration agreement

**ANALYSIS AND DETERMINATION**

On the first issue, the court held that the application was rightly placed before it notwithstanding the objections raised by the respondent. First, the respondent claimed that the applicant filed the application as a chamber summons and not an originating summons as required by rule 3 (1) of the Arbitration Rules of 1997. However, the judge held that failure to follow the procedure required would not lead to disqualification of the entire application as the prayers were clear. This was in line with article 159 (2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. The court also found that the application was filed within the required timelines and there was no need to strike it out on the same.

With regards to the second issue, the court began by determining the date on which the dispute arose. This is because the arbitration agreement provided that a party could not raise a referral to arbitration 90 days after the occurrence of a dispute. After finding that the referral to arbitration was made after 86 days from the date of the occurrence of the dispute, the court found the notice to be raised in a timely manner. The court also had the opportunity to assess whether the notice for referral to arbitration given by the respondent conformed to the agreement of the parties. Such notice required that the parties request for a submission to arbitration or to concur with the appointment of an arbitrator within 30 days. Since the notice sent by the respondent contained

these two elements, the judge held that the respondent had given sufficient notice to the applicant. In sum, it was found that the arbitrator was acting well within their powers when deciding the matter.

### **HOLDING**

The court opined that the arbitrator had not superseded his jurisdiction because he acted within the terms of reference in the arbitration agreement of the parties. The arbitral award that was subsequently issued by the arbitrator was therefore valid.

### **RATIONALE**

The decision of the court was underpinned by the guiding principles for judicial authority. These principles include the mandate to administer justice without undue regard for procedural technicalities. The court also favored a pro-arbitration policy by seeking to uphold the terms of the arbitration agreement where the conduct of the parties was in conformity with the said agreement. This shows the respect for the finality of arbitral awards. It also demonstrates that arbitration is an end in itself, and not a means to a court hearing.

### **RELEVANCE**

Section 3 (1) of the Arbitration Rules of 1997 stipulates that applications made under 12, 15, 17, 18, 28 and 39 should be made via originating summons. However, this is a procedural requirement and failure to abide by it will not necessarily invalidate the application. This is owing to the court being guided by the principles under Article 159 which require them to administer justice without undue regard for procedural technicalities.

Section 10 of the Arbitration Act requires courts to refrain from interfering with arbitration unless provided for in the Act. Thus, where a court finds that an arbitration agreement was properly concluded, it will uphold the said agreement

## **TEAM CONSTRUCTION LIMITED V CARNATION PROPERTIES LIMITED**

- Applicant: Team Construction Limited
- Respondent: Carnation Properties Limited
- Case number: HCCC MISC/548/2019
- Court: High Court of Kenya at Nairobi
- Ruling date: 19<sup>th</sup> December 2019

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