



Nairobi Properties Limited v Africa Medicity Limited & another (Miscellaneous Application E030 of 2022) [2023] KEHC 2741 (KLR) (Commercial and Tax) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 2741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E030 OF 2022**

**DAS MAJANJA, J
JANUARY 27, 2023**

BETWEEN

NAIROBI PROPERTIES LIMITED APPLICANT

AND

AFRICA MEDICITY LIMITED 1ST RESPONDENT

JAMES MURUTHI KIHARA 2ND RESPONDENT

RULING

1. The applicant and the 1st respondent are currently involved in arbitration proceedings presided over by the 2nd respondent (“the Arbitrator”) in respect of a dispute arising out of the applicant’s and 1st respondent’s engagement on an intended project for the construction and operation of a multi-specialty hospital in Nairobi.
2. The applicant has filed the notice of motion dated January 14, 2022 seeking to terminate the mandate of the Arbitrator under section 15(1)(a) of the *Arbitration Act* on the ground that he is unable to perform the functions of his office and that he failed to conduct the proceeding properly and with reasonable dispatch. It also invoked section 14(3) of the *Arbitration Act* to challenge the Arbitrator’s impartiality and independence under section 13(3) of the *Arbitration Act*. It also urges the court to direct the Applicant and the 1st Respondent to agree on the choice of a new arbitrator in place of the Arbitrator within 14 days or such other period as the Court shall specify, failing which the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) should appoint an arbitrator in accordance with clause 17 of the ‘Non-Binding Memorandum of Understanding’ dated September 24, 2018 as between the Applicant and the 1st Respondent.
3. The application is supported by the grounds on its face together with the affidavits by Rohin Shah, one of the directors of the Applicant, sworn on January 14, 2022 and February 17, 2022 respectively.



The application is opposed by the 1st Respondent through the replying affidavit of its director, Allan Wamanga sworn on February 4, 2022. In addition to their pleadings, the Applicant and the 1st Respondent have also supported and supplemented their arguments by filing written submissions. The Arbitrator did not file any response.

The Application

4. The Applicant avers that the Arbitrator, by his words and conduct, has demonstrated manifest bias in the conduct of the arbitral proceedings which has given rise to justifiable doubts as to his impartiality. That he has already pre-judged, in writing, the outcome of the core dispute in the arbitration without a hearing and has additionally failed to ‘...conduct proceedings properly and with reasonable dispatch’ as required by section 15(1)(a) of the *Arbitration Act*.
5. The Applicant contends that circumstances exist that ‘give rise to justifiable doubts as to the impartiality’ of the Arbitrator based on his own conclusions and written comments as contained in his decision on the Applicant’s interlocutory Request for Discovery. More particularly, the Applicant states that its doubts and apprehensions arise from both the manner in which the arbitral proceedings have been conducted and the conclusion made summarily to the effect that the Applicant has purportedly admitted that it had ratified the costs of the 1st Respondent, which the Applicant argues, is a clearly contested issue forming the substratum of the dispute and which can only be considered on merit at the hearing stage.
6. That while the Applicant specifically pointed out the offending excerpts in its Statement of Reasons for Challenge of the Arbitral Tribunal filed pursuant to section 14(2) of the *Arbitration Act*, the Arbitrator evinced a partisan predisposition by avoiding those specified issues and instead misrepresented the Applicant’s position. The Applicant posits that there is a real apprehension that the Arbitrator is incapable or unwilling to conduct the arbitral proceedings before him impartially and in compliance with Article 50(1) of the *Constitution* which demands a fair hearing before an impartial tribunal. That the Arbitrator’s actions have deprived the Applicant of its fundamental right to a fair hearing and the protection of the law guaranteed under Articles 22(1), 27(1) and (2) and 50(1) of the *Constitution*.
7. The Applicant states that it is ready and willing to progress arbitration proceedings before any such other arbitrator in accordance with its plea in the application. It also avers that the Respondent will not suffer any prejudice if the application is allowed.

The 1st Respondent’s Reply

8. The 1st Respondent prays that the application be dismissed and faults the Applicant for frustrating the arbitral proceedings by presenting a myriad of applications and occasioning delay. The 1st Respondent states that the ruling on discovery that was delivered on October 14, 2021, having not been in the Applicant’s favor, the Applicant chose to challenge the Arbitrator’s jurisdiction and that this challenge and the current one is merely an attack on the ruling and had nothing to do with the Arbitrator’s impartiality. The Respondent points out that from the Applicant’s deposition, it is dissatisfied that the Arbitrator’s decision was not in its favour.
9. The 1st Respondent avers that the Applicant has not proved that there are justifiable doubts or that there is an eminent danger leading to impartiality on the part of the Arbitrator. It states that the Applicant’s scheme is to delay the expeditious resolution of the dispute by filing applications which consume time and finances and that this can be seen by the Applicant’s conduct of making oral applications, taking directions, withdrawing then later filing the same applications. Further, that there was in fact no delay by the Arbitrator in delivering rulings.



10. The 1st Respondent submits that it will be prejudiced as the appointment of another arbitrator would result in further delay in resolving the dispute in addition to forcing it to incur additional expenses. The 1st Respondent believes that this application is meant to circumvent and deny it the right of access to justice and is brought with the intention to stifle its right to a fair hearing enshrined in Article 50 of the Constitution.

Analysis and Determination

11. From the parties' pleadings and submissions, what the court is to determine is whether the Arbitrator's mandate should be terminated on account of bias and impartiality.
12. In making this determination, it is not lost that the court's intervention in arbitration proceedings is limited as section 10 of the Arbitration Act provides that 'Except as provided in this Act, no court shall intervene in matters governed by this Act'. The Applicant submits that the court's intervention is merited pursuant to sections 13(3), 14(3) and 15(2) of the Arbitration Act which provide as follows:

"13. Grounds for challenge

- (1)
- (2)
- (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.
- (4)

14. Challenge procedure

- (1)
- (2)
- (3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.
.....

15. Failure or impossibility to act

- (1) The mandate of an arbitrator shall terminate if—
 - (a) he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch;
or
 - (b)



- (2) If there is any dispute concerning any of the grounds referred to in subsection (1)(a), a party may apply to the High Court to decide on the termination of the mandate.

....."

13. I agree with the Applicant that the mandate of an arbitrator can indeed be terminated either on his removal after a successful challenge under section 14 of the Arbitration Act or due to failure or impossibility to act as provided in section 15 of the Arbitration Act. However, any party that seeks to challenge an arbitrator under section 13(3), that is, owing to circumstances that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so, can only lodge that challenge first, before the Arbitrator, before approaching the court. This is provided for by section 14(3) of the Arbitration Act which provides that 'If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.'
14. The Applicant lodged its challenge against the Arbitrator under section 14(2) of the Arbitration Act through its 'Written Statement of Reasons for Challenge of the Arbitral Tribunal' dated October 28, 2021 on the grounds that the Arbitrator failed to issue formal orders for directions in relation to more than 5 appearances and numerous procedural steps in arbitration, inordinate delays in preparation and issuance of directions and decisions by the Arbitrator, failure to issue timely communication to the parties/counsel on diverse instances, including where delays are expected, lapses in the management of administrative aspects of the proceedings, non-adherence to timelines set for various steps and events, patently disregarding material presented by the Applicant and thereby depriving it of a reasonable opportunity to present its case and failure to provide any reasoned analysis or justifications for decisions issued by the Arbitrator even when such decisions portend far-reaching ramifications on the parties.
15. The 1st Respondent responded to the challenge by urging the Arbitrator to dismiss it as the reasons advanced by the Applicant were not grounds provided for under section 13 of the Arbitration Act. After considering the challenge, the Arbitrator published an award on December 15, 2021. It has now moved this court and this Award forms part of the substratum of its application.
16. It is important to recall that this is not an appeal against the Award but an independent consideration by the court of whether the Applicant has satisfied the court that grounds for challenge of the arbitrator based on the grounds set out in section 13 of the Arbitration Act or grounds for termination of an arbitrator's mandate under section 15(1)(a) of the Arbitration Act have been met. In both instances, under section 14(4) and 15(2), the jurisdiction of the High Court is to determine the matter.
17. In deciding whether an arbitrator is impartial, this court is guided by several pronouncements of our superior court which both parties have cited in detail. In Philip K Tunoi & another v Judicial Service Commission & another NRB Civil Application No 6 of 2016 [2016] eKLR, the Court of Appeal cited with approval the House of Lords' decision in R v Gough [1993] AC 646 which held that that the test to be applied in all cases of apparent bias was the same, namely, whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand. It thus that:

- "41. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced



approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.

42. In *Taylor v Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:

“... we believe the modest adjustment in *R V Gough* is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland.”

“The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”

18. Under section 15(1)(a) of the *Arbitration Act*, an arbitrator may be removed if he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch. I have gone through the grounds raised by the Applicant before the Arbitrator vis-à-vis the history of the arbitration proceedings. It is common ground that the Arbitrator was appointed on April 16, 2020. A preliminary meeting was held over month later on May 19, 2020 where the Applicant evinced its intention to challenge the Arbitrator's jurisdiction and seek security for costs. The Arbitrator issued directions the next day directing the Applicant to file a formal application with regards to the jurisdictional challenge. On June 9, 2020 the Applicant, through a letter of the said date, expressed its willingness withdraw the jurisdictional challenge and in an email dated June 22, 2020, the Applicant confirmed the withdrawal. The 1st Respondent then filed and served its claim by September 9, 2020 and the Applicant filed its response a month later on October 9, 2020. The Applicant then filed an application dated October 12, 2020 seeking security for costs from the 1st Respondent which the Arbitrator stated was filed on April 12, 2021 and the Arbitrator directed the parties to file submissions and authorities on the same. The Arbitrator published the Award on Security for Costs on May 19, 2021. A pre-trial took place on June 14, 2021 and further directions were issued on filing of further pleadings, which the Applicant did on June 28, 2021 which pleadings included a Request for discovery/document production.
19. A hearing date was set for August 30, 2021 but the 1st Respondent's advocate was not available hence the hearing was rescheduled to September 9, 2021. However, on September 8, 2021, the advocates representing the 1st Respondent ceased acting and thus the hearing could not proceed. The 1st Respondent was then directed to appoint counsel within two days so that the parties could proceed with pre-trial and the Arbitrator stated that this position was agreeable to both parties. The 1st Respondent appointed counsel on September 14, 2021 and a meeting was held on September 17, 2021 where the Applicant was directed to submit to the 1st Respondent soft copies of all pleadings it had filed. The Arbitrator also stated that he would publish the award on the request for discovery/documents once the 1st Respondent's counsel had received the full set of documents. On September 22, 2021, counsel for the 1st Respondent stated that it had not received all the documents which apparently were in the Applicant's custody and it attached an application for production of documents. On October 14, 2021, the Arbitrator published the award dated October 12, 2021 on the Applicant's request for discovery where the same was largely disallowed save for one substantive request. On October 28, 2021 the Applicant challenged the Arbitrator pursuant to section 14(2) of the *Arbitration*



Act and the Arbitrator dismissed the challenge through the award of December 15, 2021 which now led the Applicant to file the present application.

20. From the chronology of events above, I do not find any basis to support removal of the Arbitrator on grounds of inability to perform the functions of office. The conduct of the proceedings was reasonable and taking all circumstances and evidence as a whole I do not find any reason to conclude that the Arbitrator failed to act with reasonable dispatch. I have also read the directions and orders issued by the Arbitrator and I hold that they were not 'out of the ordinary' and were more times than not accepted by the parties. The delays in proceeding for the hearing or delivery of the rulings were also not inordinate and were sometimes caused by unavoidable circumstances by all the parties including the Applicant, to which directions for further dates were thereafter always being given within days. I therefore cannot find that the Arbitrator has failed to conduct the proceedings properly and with reasonable dispatch as the record indicates otherwise. Taking the same facts into consideration I do not find anything cogent to lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the Arbitrator was biased against the Applicant or that he was not impartial in the manner he has been handling the proceedings.
21. As regards impartiality and bias, the Applicant's complaint is that the Arbitrator rejected the Applicant's request for discovery and made a definitive finding whose effect was to prejudice the Applicant's case. In the subject request for discovery, the Applicant sought all documents concerning costs incurred in the adaptation, if any, of the design at the Applicant's request or as approved or ratified by the Applicant. The request was based on the contention that the documents were relevant and would resolve the issue whether the claim for consultant's costs were on account of either the Applicant or 1st Respondent. In other words, the production of the documents would resolve whether the Applicant instructed the consultants to modify drawings or other documents.
22. The gravamen of the Applicant's complaint is that in the Award, the Applicant endorsed the position that it had ratified the costs and holding that the Applicant had expressed its willingness to pay costs incurred when the issue of costs incurred in the project was a live issue for determination. According to the Applicant, the Arbitrator's finding in the award on discovery reveal a partisan pre-disposition in favour of the 1st Respondent.
23. Bearing in mind that this is not an appeal from the Award on Discovery, I note that the remarks by the Arbitrator was in the context of an application for discovery. Such an application is interlocutory in nature and the findings therein provisional and not final as the matter is yet to be determined in full. It should not be lost that an arbitrator is entitled to make a decision on any issue raised by either party based on his appreciation of the facts and evidence before him and the fact that such determinations may be contrary to a party's position or expectation does not necessarily demonstrate a notion of bias or partiality. In my view, any reasonable observer bearing in mind the circumstances of the case would not come to the conclusion that the Arbitrator is impartial or biased.

Disposition

24. For the reasons I have outlined, I find that the Applicant's Notice of Motion dated January 14, 2022 lacks merit. It is dismissed. The Applicant shall pay the 1st Respondent costs assessed at Kshs 70,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2023.

D. S. MAJANJA

JUDGE



Court Assistant: Mr M. Onyango.

Ms Saina instructed by G & A Advocates LLP for the Applicant.

Ms Njagi instructed by Sang Chambers and Partners Advocates for the 1st Respondent.

