



**Munene v Mentor Group Limited & another (Miscellaneous Civil Application E557 of 2022)
[2023] KEHC 1266 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1266 (KLR)

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

MISCELLANEOUS CIVIL APPLICATION E557 OF 2022

A MABEYA, J

FEBRUARY 24, 2023

IN THE MATTER OF ARBITRATION ACT OF 1995

AND

ARBITRATION RULES OF 1997

BETWEEN

BETWEEN

GEORGE NDUATI MUNENE APPLICANT

AND

MENTOR GROUP LIMITED 1ST RESPONDENT

MAISIBA SAMSON KIRIOBA 2ND RESPONDENT

RULING

1. Before court is an application dated 25/7/2022. It was brought pursuant to section 15 of *Arbitration Act*, Rule 3 of the Arbitration Rules, and sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application sought that the 2nd respondent's services be terminated and that he be replaced with another arbitrator.
3. The grounds for the application were set out on the face of it and in the undated supporting affidavit sworn by George Nduati Munene, the claimant in the arbitration proceedings. It was averred that since his appointment in 2013, the arbitration has never been concluded to date due to the 2nd respondent's non-commitment. That after the applicant appointed his advocates on record on 27/5/2021, the said advocates wrote a series of emails and letters requesting for a pre-hearing virtual meeting which were not responded to.



4. That the 2nd respondent only replied vide letter dated 4/11/2021 indicating his willingness to continue with the arbitration. That the applicant's advocate responded to that letter vide theirs dated 10/12/2021 and 27/1/2022 and notified that the claimant intended to proceed with the 2nd respondent's termination due to the inordinate delays and sought further directions, but none of those letters were responded to.
5. That the 1st respondent had also agreed with the applicant's request to progress the matter vide a pre-trial meeting as indicated in their email of 1/7/2021 and letter dated 30/6/2021. It was thus concurred that the non-responsiveness and non-commitment of the 2nd respondent and neglect of his duties as an arbitrator necessitated the instant application for termination of his services. That the matter had been ongoing for 9 years and was causing prejudice on the applicant's claim.
6. The applicant filed submissions dated 21/11/2022. This Court has considered those submissions and the entire record.
7. The simple task for this Court is to determine whether the 2nd respondent's services as an arbitrator ought to be terminated.
8. The mandate of an arbitrator can be terminated either on his removal after a successful challenge under section 14 of the Arbitration Act No 4 of 1995 or due to failure or impossibility to act as provided in section 15(1), (2) and (3) of the Arbitration Act.
9. Section 15(1)(a) of the Arbitration Act provides that:-
 - “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). he withdraws from his office; or
 - c). the parties agree in writing to the termination of the mandate.”
10. Though the applicant wrote to the 1st respondent vide a letter dated 18/8/2021 seeking consent to terminate the 2nd respondent's services, the same was not responded to. Thus the applicant proceeded correctly in seeking the termination of his mandate under as aforesaid under section 15(2) of the Arbitration Act that stipulates that: -
 - “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.”
11. This Court has seen the attachments to the application. The applicant's advocates desperately sought the 2nd respondent's audience and pre-trial meetings through numerous emails and letters dated 27/5/2021, 11/6/2021, 16/6/2021, 21/7/2021, 19/8/2021 and 4/10/2021. None of these received a response. The 1st respondent also wrote to the 2nd respondent vide email dated 1/7/2021 requesting for a meeting and directions and the same was still not responded to.
12. The applicant also filed a notice of termination by email dated 19/8/2021 and the same was still not responded to. Follow ups to that notice remained ignored until the 2nd respondent finally responded vide a letter dated 5/11/2021 indicating that it was the applicant who delayed the matter due to his constant change of advocates and indicated the willingness to proceed with the arbitration.
13. However, the 2nd respondent failed to respond to the follow up communication seeking directions.



14. The only conclusion that can be reached is that the 2nd respondent is unable to perform his functions and has not conducted the proceedings properly. The lack of communication on the 2nd respondent's part cannot be visited on the applicant's conduct of changing representation.
15. The upshot is that the application dated 25/7/2022 is allowed.
16. Section 16 (1) of the Arbitration Act that states that: -

“Where the mandate of an arbitrator is terminated under section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.”
17. It was not clear to this court how the 2nd respondent was appointed. As such, the only option is for the parties to proceed as provided for under section 12 of the Act that gives procedure for appointment of an arbitrator.
18. In the end, the application is allowed and following orders hereby issue: -
 - a. The mandate of the 2nd respondent in the dispute between the applicant and the 1st respondent herein be and is hereby terminated forthwith.
 - b. The applicant and the 1st respondent do appoint a new arbitrator as set out in section 12 of the Arbitration Act.
 - c. There shall be no order as to costs.

It is so ordered.

DATED AND DELIVERED THIS 24TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE

