



**Richlands Limited v Jinsing Enterprises Limited & another (Commercial Case E236 of 2023)  
[2023] KEHC 24067 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E236 OF 2023  
DAS MAJANJA, J  
OCTOBER 27, 2023**

**BETWEEN**

**RICHLANDS LIMITED ..... APPLICANT**

**AND**

**JINSING ENTERPRISES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**QS WALTER A. ODUNDO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant and the 1<sup>st</sup> respondent (“the respondent”) are embroiled in a dispute before the 2<sup>nd</sup> respondent (“the Arbitrator”). By an application dated September 26, 2022, the applicant applied for the Arbitrator to recuse himself from the arbitration proceedings on the ground that he had failed to act fairly, justly, impartially, independently and with equality towards the parties. After considering the application, the Arbitrator dismissed the application by ruling dated May 3, 2023 (“the Ruling”).
2. The applicant seeks to set aside the Ruling by the Originating Summons dated May 22, 2023 made pursuant to section 17(6), 32B(4), 6 of the *Arbitration Act*, 1996. The application is supported by the grounds set out on its face and the supporting affidavit of Thomas Letangule, a director of the applicant, sworn on May 22, 2023. It is opposed by the respondent through the replying affidavit of its Project Manager, Carolyne Muthue, sworn on July 25, 2023. The parties have also filed written submissions to supplement their arguments.
3. The applicant avers that the Arbitrator is biased against it. That clear malice and lack of independence is evidenced in the Ruling where the Arbitrator openly fails and/refuses to adjudicate on the issues raised by the applicant but adopts and fully adjudicates on the issues crafted by the respondent in their submissions, while noting that the respondent was not the mover of the application.



4. The applicant contends that the Arbitrator deliberately abdicated his duty to treat the parties before him equally contrary to the law and the rules of natural justice and the applicant has lost confidence in the Arbitrator's ability to fairly hear and determine the dispute before him. That the Arbitrator, in any event, lacked jurisdiction to hear the matter as the applicant was never afforded the opportunity to participate in his appointment. The applicant states that the Arbitrator also dismissed the applicant's challenge on his jurisdiction when it is clear that he lacks jurisdiction owing to the unprocedural manner in which he was appointed as the Sole Arbitrator.
5. For these reasons, the applicant urges the court to set aside the Ruling, remove the Arbitrator in the arbitral proceedings between the parties, make an order for the reappointment of an arbitrator in the matter and direct the parties to exhaustively implore to their best efforts other means of settling this dispute before proceeding to arbitration.
6. The respondent opposes the application. It states that following months of deliberation between the parties and after it became apparent that a dispute within the meaning of Clause 45.1 of the parties' contract had arisen, the respondent notified the applicant of the dispute on July 25, 2019 and forwarded a list of three arbitrators to the applicant for its concurrence within 30 days. It also invited the applicant to circulate its own list of preferred arbitrators in case it did not wish to concur with the ones provided. As the applicant did not respond to the request or give its concurrence to the appointment of an arbitrator before the lapse of the 30 days, it wrote to the Architectural Association of Kenya (AAK) on October 7, 2019 under Clause 45.1 requesting the appointment of an arbitrator. The letter was copied to and served upon applicant. On October 22, 2019, the AAK wrote back to the parties informing them that it had appointed the Arbitrator.
7. The respondent contends that since the appointment of the Arbitrator, the applicant has been employing Stalingrad tactics by filing one application after another before the AAK, Institute of Quantity Surveyors of Kenya (IQSK), the Arbitrator, this Court, and the Court of Appeal so as to overwhelm the respondent and delay the proceedings, That in particular, on November 6, 2019, the applicant without copying the respondents, wrote to the IQSK requiring the appointment of an independent quantity survey to review the contested valuations. IQSK declined to do so since the respondent's consent had not been sought. That on January 19, 2021, after the arbitration proceedings had begun, the applicant wrote to the AAK demanding the re-selection of an arbitrator. AAK equally declined and asked the applicant to raise all issues before the Tribunal. Further, that on March 17, 2021, the applicant filed a challenge against the arbitral tribunal before the Arbitrator which challenge was rejected for lack of cogent proof of bias/prejudice. On September 15, 2021, the applicant applied to the High Court to determine the challenge against the Arbitrator and the Court confirmed the rejection of the challenge. On September 26, 2022, the applicant filed a second challenge against the Arbitrator, which challenge was equally rejected. On October 4, 2022, despite the clear provisions of section 14(6) of the *Arbitration Act*, the applicant appealed the decision of the court to the Court of Appeal. That on May 30, 2023, the applicant filed the current application before this court seeking the removal of the Arbitrator for the umpteenth time and that in July 2023, the applicant, without disclosing the full facts in the matter wrote again to the AAK requiring the appointment of a second arbitrator in the matter. That this letter was not copied to the respondents however the response by AAK was served upon the respondents. The respondent contends that in light of the foregoing, it is abundantly clear that the applicant is hell-bent on frustrating the arbitration proceedings.
8. As regards the substance of the application for considerations, the respondent avers that the applicant has failed to enumerate the circumstances that give rise to justifiable doubts as to the Arbitrator's impartiality and independence that arose, post the decision of the court by Mabeya J. The respondent avers that the current Application is by and large a duplication of the previous applications by the



applicant both before the Arbitrator and this Court and no new issues or sets of circumstances have been raised in the present application that have not been raised before by the applicant. In effect the respondent urges that the applicant is inviting the Court to sit on appeal or review its previous decision yet the court lacks authority to do so under section 14 of the *Arbitration Act*.

9. The respondent submits that under section 13(3) of the *Arbitration Act*, 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. That the phrasing of section 13(3) is deliberate so as protect the legitimate interests of parties as opposed to individual desires and whims and that it is not enough for a party to say it has no confidence in the arbitrator's impartiality as such an applicant must produce cogent proof of actual bias or prejudice. That the applicant has neither adduced any concrete evidence of real bias or prejudice by the Arbitrator nor furnished proof of any circumstances set out in section 13(3). Thus, that in so far as the applicant has failed to meet the conditions stipulated under section 13, the application should be dismissed.

### **Analysis and Determination**

10. The court is being called upon to determine the Arbitrator's mandate after the applicant's unsuccessful challenge. Before doing so, I cannot ignore the fact that the court (Mabeya J.) made a determination on the Arbitrator's mandate by the ruling dated August 26, 2022 in *Richlands Limited v Jinsing Enterprises Company Limited & another* [2022] KEHC 12967 (KLR). The court found that there were no circumstances that raised justifiable doubts as to the impartiality and independence of the Arbitrator. The court also dismissed the applicant's contention that the appointment of the Arbitrator was premature or un-procedural and found that the applicant was notified of the Arbitrator's appointment on October 22, 2019. That in accordance with section 14 of the *Arbitration Act*, the applicant ought to have challenged the appointment within 15 days but instead, the applicant waited 1 year 5 months before filing the application for recusal of the Arbitrator on March 17, 2021 which the court adjudged to be an inordinate delay.
11. Since the court has already determined the propriety of the appointment of the Arbitrator, the applicant cannot raise the same challenge again as it is now res-judicata. This ground by the applicant is therefore dismissed.
12. On the contention that the Arbitrator is biased against the applicant, I note that the applicant raised the same issue with the Arbitrator just a month after the court's ruling on the ground that new issues had arisen necessitating the application. The Arbitrator determined whether, in fact, any new circumstances that raised doubts as to the impartiality, independence, fairness and equality of the Tribunal to warrant its recusal from the arbitration proceedings had arisen. The Arbitrator found that the only two issues that may be considered to be new issues in the applicant's application were the Arbitrator's order No.7 made on January 27, 2023 enlarging time for the respondent to file its response to the application and the issues that the respondent/applicant deponed under items 14-18 of its deposition.
13. On the first issue, the Arbitrator held that the Tribunal being the master of procedure found that the delay by the respondent to comply with the order was excusable and the applicant had not suffered any prejudice and the costs of the delay were to be paid by the respondent. The Arbitrator emphasized that an adverse ruling against a party does not amount to impartiality by the Tribunal. On the second issue, Arbitrator held that the items 14-18 of the deposition described the relationship between the



applicant and the respondent and did not touch on the impartiality, independence and fairness of the Tribunal. For these reasons, the Arbitrator found that the challenge against him had not been proved.

14. As observed by the Arbitrator and as I believe is common to the parties, under section 13(3) of the Arbitration Act, an arbitral tribunal may be challenged in respect of its mandate on the grounds that there exist justifiable doubts as to his impartiality and independence. An unsuccessful party to this challenge before the arbitral tribunal may apply to the court to decide on the arbitral tribunal's mandate under section 14(3) of the Arbitration Act. The said provisions 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. In Richlands Limited v Jinsing Enterprises Company Limited & another (*supra*), the court relied on the case of Chania Gardens Limited v Gilbi Construction Company Limited & another ML HC Misc. Cause No. 482 of 2014 [2015] eKLR where it was held as follows:

The grounds for removal of an arbitrator are set out in section 13(3) of the Arbitration Act, but the one which is relevant to this application is...only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence... The words "only if" and "justifiable doubts" are important in a decision under section 13(3) of the Arbitration Act. The words suggest the test is stringent and objective in two respects: a) the court must find that circumstances exist, and those circumstances are not merely believed to exist; and b) those circumstances are justifiable; this goes beyond saying that a party has lost confidence in the arbitrator's impartiality into more cogent proof of actual bias or prejudice. The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was real likelihood of bias. But, of course, justifiable doubts as to the impartiality and independence of the arbitrator do not include peripheral or imagined or fanciful issues or mere belief by the applicant.



16. Applying the aforementioned test to the Arbitrator's findings in the Ruling, I do not find any justifiable reasons and circumstances to conclude that the Arbitrator was biased against the applicant. If the apprehension of bias was because the Arbitrator enlarged time for the respondent to file a response to the applicant's application, I agree with the Arbitrator that he had the requisite discretion to make this decision and this discretion was properly exercised in the circumstances. There is nothing sinister about a tribunal granting a party more time to file a response if it considers the request reasonable and more so if any inconvenience can be assuaged by costs. Going through the applicant's deposition before the Arbitrator, I find that the same is repetitive as to what it informed the court earlier in *Richlands Limited v Jinsing Enterprises Company Limited & another* (*supra*), as it is just full of allegations of bias and partiality but without any cogent evidence or proof. In sum, no new issues arose between the time the court made the ruling on August 22, 2022 and September 26, 2022 when the applicant made a similar application challenging the Arbitrator's mandate.
17. For the above reasons, I do not find any basis to support the applicant's contention that the Arbitrator is biased or partial against it. The applicant has not provided any cogent evidence 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 him or that he is not impartial in the manner he has been handling the proceedings. In short, there are no valid reasons to set aside the Ruling made on May 3, 2023 or remove the Arbitrator from the arbitration proceedings between the parties.

### **Disposition**

18. The applicant's application dated May 22, 2023 fails and is dismissed with costs to the 1<sup>st</sup> respondent assessed at Kshs. 120,000.00.

**SIGNED AT DUBAI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2023**

**A. MABEYA**

**JUDGE**

