



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 196 OF 2021

GEORGE ARUNGA SINO T/A MAYWOOD AUCTIONEERS.....APPLICANT

-VERSUS-

NCBA (FORMERLY NIC BANK LIMITED).....RESPONDENT

RULING

This Ruling is in relation to two matters; namely the Originating Motion dated 28th October 2019 which was filed by **GEORGE ARUNGA SINO T/A MAYWOOD AUCTIONEERS**, and the Notice of Motion dated 1st December 2020 which was filed by **NCBA BANK LTD**.

1. The Auctioneers will be cited as “*The Applicant*”, whilst the Bank will be cited as “*the Respondent*”, herein.

2. The Applicant sought 4 substantive reliefs, which were as follows;

“3. The sole arbitrator Andrew Waruhiu be ordered to produce a copy of his indemnity cover.

4. The sole arbitrator, Mr. Andrew Waruhiu be removed as an arbitrator from the arbitration between George Arunga T/A Maywood Auctioneers and NIC Bank Ltd.

5. The Honourable court be pleased to order and direct the arbitrator to refund the fees and expenses paid to him by the applicant herein, in the arbitration.

6. The cost of this application be provided for.”

3. On its part, the Respondent voiced its support for the removal of the arbitrator.

4. By its application dated 1st December 2020, the Respondent sought to have the arbitrator enjoined to the proceedings.

5. Secondly, the Respondent sought orders to compel the arbitrator to refund to it the sum of Kshs 290,000/= which the Respondent had paid to the arbitrator, in the arbitration proceedings.

6. On 22nd October 2020 the Court ordered that the arbitrator be enjoined to these proceedings.

7. On 11th March 2021 all the 3 parties consented to the joint hearing of the 2 applications herein. They also decided to canvass the application through written submissions.

8. On the issue concerning the removal of the arbitrator, there was consensus.

9. On his part, the arbitrator deponed thus;

“24. THAT, there having being (sic!) two challenges to the conduct of the Arbitrator by the parties, it is apparent that the parties have lost all faith in the process and pray that I be discharged from the matter forthwith and for the matter to be heard afresh.”

10. I understand that to mean that the arbitrator is not averse to being relieved of his role.
11. However, he insists that he had undertaken his responsibilities properly, until the matter was almost being concluded. Therefore, the arbitrator believes that it would be improper and unjust to order him to pay back to the Applicant and the Respondent, the funds which they had deposited with him.
12. This Court has to determine whether or not there were reasons to justify the removal of the arbitrator. I need to make that decision because it would enable the Court determine whether or not the arbitrator should repay the deposits to the Applicant and also to the Respondent.
13. The arbitrator was appointed by the Chairman of the **Chartered Institute of Arbitrators, Kenya**, on 17th January 2019.
14. Prior to the said appointment, the Chairman of the **Chartered Institute of Arbitrators** had written to the arbitrator on 29th November 2018, inquiring if the arbitrator would be ready and willing to take up the appointment.
15. When the arbitrator had confirmed his availability to take up the task, he was duly appointed.
16. One of the issues which the Applicant has raised herein is the need for the arbitrator to produce his Professional Indemnity Cover.
17. The arbitrator has not responded to the request for his professional indemnity cover.
18. In the circumstances, I presume that he did not take out a professional indemnity cover in relation to the arbitration herein.
19. Nonetheless, the absence of a professional indemnity cover could not and did not in any manner negate the qualification of the arbitrator to carry out the task that had been given to him.
20. In my understanding, a professional indemnity cover is a form of insurance provided in favour of the professional, so that in the event that a claim is brought against the said professional, arising out of his professional work, the indemnitor would reimburse or compensate the professional for the liability arising from his actions or omissions.
21. Human beings are not infallible. Therefore, even when they do their very best, there is a possibility that they can make mistakes.
22. When a mistake is made, and it causes loss, injury or damage to another person, the person who made the mistake may be sued. If the person who had been sued was held liable, he may not be able to pay the compensation awarded to the injured person. It is for that reason, that prudence dictates that professionals ought to take out professional indemnity cover.
23. I believe that that is the reason why the Chairman of the **Chartered Institute of Arbitrators (Kenya)** reminded the arbitrator of the need to ensure that he had taken out an;

“adequate professional indemnity cover, as the Kenya Branch does not take on any responsibility arising out of the nomination and performance of arbitrators.”

24. If the arbitrator did not have a professional indemnity cover, and if he were to be held liable arising out of his performance, he would have to take personal responsibility for reimbursing or compensating the party in whose favour a judgment had been made.

Removal of the Arbitrator

25. In a nutshell, the Applicant insists that the arbitrator was not impartial.
26. When the arbitral proceedings commenced, the Respondent failed to attend, although there was proof that the said Respondent had been duly served.
27. After the matter had gone ahead in the absence of the Respondent, the arbitrator indicated that he would deliver his ruling. That indication was provided on 20th August 2019.
28. However, the arbitrator later informed the Applicant that he would not be delivering the ruling within 30 days, as had been scheduled. Instead, the arbitrator directed that there would be a meeting on 27th September 2019, to deliberate on the Respondent's request for the ruling to be delayed.
29. After giving consideration to the Respondent's request, the arbitrator issued a peremptory order, through which the award was not just delayed; but the entire proceedings were re-opened.
30. The Applicant felt seriously prejudiced by the said peremptory order, considering that the Respondent had been given every opportunity to participate in the earlier proceedings, but had failed to make use of the said opportunities.
31. In the meantime, the Applicant, who was based at Kisumu, had incurred expenses when travelling to and from Nairobi, to attend the

proceedings.

32. In his considered opinion, the Applicant believes that the very least that the arbitrator should have done, was to direct that the Respondent should reimburse him for his expenses, if the proceedings were to resume afresh.

33. Meanwhile, the arbitrator sought and obtained Kshs 290,000/= from the Respondent, on account of the arbitrator's fees.

34. The said sum was in addition to the sum of Kshs 290,000/= which the Applicant had paid at the commencement of the arbitral proceedings. Therefore, the arbitrator has received a total of Kshs 580,000/= from the parties.

35. At paragraph 8 of his affidavit, the arbitrator confirms that the Arbitral Agreement dated 18th June 2019 contained a provision which required the parties to deposit the sum of Kshs 290,000/= on account of the Arbitrator's Fees.

36. It is expressly stipulated in the Arbitral Agreement that the deposit of Kshs 290,000/= was to be shared equally between the parties.

37. The arbitrator has now stated that there was mutual agreement that the Respondent should pay Kshs 250,000/=:, in addition to the deposit paid by the Applicant.

38. The parties have denied the alleged mutual agreement.

39. In the absence of consensus on this issue, and considering that the Arbitral Agreement is in writing, I find that there was no mutual agreement to vary the written Arbitral Agreement, as alleged by the arbitrator.

40. The arbitrator believes that the matter had become complex, hence the need for a further deposit.

41. I find that the arbitrator failed to satisfy this Court that any complexity had arisen, to warrant the demand for the doubling of the amount of money which the parties were to share, on account of the Arbitrator's Fees.

42. In my considered view, if the arbitrator had come to the conclusion that the Respondent was entitled to defend himself, the arbitrator ought to have penalized the Respondent by ordering it to pay for the work that had already been done. I so hold because the Respondent had had every opportunity to participate in the proceedings, but had failed to utilize the said opportunities.

43. Meanwhile, as the Applicant attended the proceedings, and incurred time and money when doing so, justice demands that if the matter was to be re-opened, the Applicant ought to have, first, been reimbursed for his expenses.

44. If things remain as they are now, so that the arbitration process starts *de novo*, the parties would have to incur expenses all over again. In my considered opinion, that would be an injustice.

45. It is no wonder that the parties have lost faith and confidence in the arbitrator.

46. I find that the parties have justifiable reasons for seeking the removal of the arbitrator.

47. The arbitrator was wrong to have sought and obtained double payments.

48. Nonetheless, the arbitrator had, prior to the time when the Respondent sought an opportunity to be heard; given a hearing to the Applicant. I find that the arbitrator is entitled to some payment for the job he had done, until the stage when he ordered that the process be re-opened.

49. The need to consider whether or not have the arbitral proceedings re-opened was triggered by the Respondent, who had hitherto failed to take part in the proceedings.

50. In my considered opinion the arbitrator is entitled to Kshs 150,000/= in total. Out of the said sum, the Applicant will pay Kshs 50,000/=:, whilst the Respondent will pay Kshs 100,000/=:. In effect, the arbitrator shall return to the Applicant the sum of Kshs 200,000/= less VAT on the sum of Kshs 50,000/=:. The arbitrator shall return to the Respondent the sum of Kshs 150,000/= less VAT on the sum of Kshs 100,000/=:.

51. The appointment of the arbitrator is hereby terminated forthwith.

52. Finally, the parties will each bear his or her own costs of the two applications.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF JANUARY, 2022

FRED A. OCHIENG

JUDGE