The Office Bearers of Mtongwe Beach Management Unit & 2 others v Kenya Ports Authority & 2 others (Judicial Review Miscellaneous Application E005 of 2021) [2022] KEHC 11600 (KLR) (Constitutional and Judicial Review) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11600 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E005 OF 2021

JM MATIVO, J

JULY 28, 2022

BETWEEN

THE OFFICE BEARERS OF MTONGWE BEACH MANAGEMENT UNIT ..... 1ST APPLICANT

THE OFFICE BEARERS OF LIKONI BEACH MANAGEMENT UNIT ..... 2ND APPLICANT

THE OFFICE BEARERS OF OLD TOWN BEACH MANAGEMENT UNIT ..... 3RD APPLICANT

AND

KENYA PORTS AUTHORITY ..... 1ST RESPONDENT

MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES .... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. Even though these proceedings as drawn show that they were instituted by three applicants, namely, the Office Bearers of Mtongwe Beach Management Unit (the 1st applicant), the Office Bearers of Likoni Beach Management Unit (the 2nd applicant) and the Office Bearers of Old Town Beach Management Unit (the 3rd applicant), the 1st applicant opposed the case preferring to designate itself as a Respondent. Accordingly, the expression the applicants in this ruling shall where the context so permits be construed to mean the 2nd and 3rd applicants.

2. The 2nd and 3rd Respondents did not file any pleadings nor did they participate in the proceedings.

3. The Originating Summons is expressed under the provisions of section 13(3) & 14 of the *Arbitration Act*[1] (the Act), rule 7 of the *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for members*, section 3A, 63 (3) of the *Civil Procedure Act*[2] and all other enabling provisions of law. Essentially, the applicants pray for the removal of Jacqueline Waihenya, Sole Arbitrator from the Arbitration between them and Kenya Ports Authority, Ministry of Agriculture, livestock and fisheries and Attorney General's chambers.

4. They also pray that this court orders the Arbitrator to furnish them with a copy of the Interim award determining who would represent Mtongwe Beach Management Unit. Also, they pray that this court sets aside the Interim award dated March 1, 2021and delivered on August 9, 2021and that the Arbitrator be replaced with another Arbitrator from Mombasa in conjunction with the Chartered Institute of Arbitrators. They also pray for any further order the court may deem just and fit to grant. Lastly, they pray for the costs of this application to be provided for.

5. The genesis of the dispute as pleaded by the applicants is that they filed a Petition which was referred to arbitration in 2018 before Jacqueline Waihenya, the Arbitrator but the matter did not proceed for trial partly due to wrangles and factions between the applicants and partly due to delays attributed to the Arbitrator. They state that the officials of Mtongwe Beach Management Unit are divided into 2 factions represented by Lawrence Obonyo Legal Advocates and Marende Necheza & Company Advocates. It's the applicant's case that the Arbitrator was to publish an Interim award determining who was to testify on behalf of the 3rd applicant which ought to have been published on 1st March 2021. They also state that the arbitrator had insisted on payment of her fees as a condition for publishing the Interim award and subsequently the applicants paid the outstanding Arbitral fees by April 30, 2021 and requested for copies of the Interim award vide various letters to no avail.

6. They state that vide letters dated July 21, 2021and August 3, 2021, they lodged a challenge seeking the Arbitrator's recusal but she has refused. Also, they state that on 9th August 2021 in their absence the arbitrator delivered the Interim award holding that the applicants' advocates have not been appointed by Mtongwe Beach Management Unit and that the firm of Marende Necheza & Company Advocates are properly on record. They fault the arbitrator for ignoring a letter by Mtongwe Beach Management Unit appointing them, and, despite the arbitrators finding that the membership of a one Fredrick Kioko in Mtongwe Beach Management Unit was in question. As a consequence, they state that they have lost confidence in the arbitrator's ability to determine the arbitration fairly. Also, they contend that her conduct shows she is motivated by self-interest. They accuse the arbitrator for unduly delaying the completion of the dispute by delaying delivery of the Interim award.

7. Also, the applicants state that the delivery of the Interim award on August 9, 2021in their absence and only after they lodged a written Challenge to the Arbitrator was made in bad faith, and it demonstrates elements of bias.

8. The Office Bearers of Mtongwe Beach Office Bearers (designated as the 1st applicant in this case) opposed the application vide grounds of opposition dated November 1, 2021. The substance of their opposition is:- that the application is misconceived, a waste of time and an abuse of court process; that this court lacks jurisdiction to entertain the application; that the application offends sections 13, 14 and 35 of the Act; and this courts intervention in arbitration proceedings is limited as per section 10 of the Act; and that the application is frivolous, vexatious and lacks merit and it is brought in bad faith to delay the proceedings.

1 Act No. 4 of 1995.

2 Cap 21, Laws of Kenya.

9. In addition to the above grounds, the Office Bearers of Mtongwe Beach Office Bearers filed the Relying affidavit of Fredrick Kioko Mwanthi dated January 24, 2021. The salient features of the affidavit are that:- that the application is meant to subvert the administration of justice; that it lacks merit and it contravenes sections 13, 14 and 35 of the Act; that the deponent to the supporting affidavit has not been authorized by the Office Bearers of Mtongwe Beach Office Bearers; that Office Bearers of Mtongwe Beach Office Bearers appointed the firm of Marende Necheza advocates to salvage its claim because they had been given a last chance to appoint an advocate; and that all the parties agreed that the interim award would only be delivered after payment of the fees.

10. In their submissions, the applicants cited sections 13 (3) and (4) and 14 of the Act and argued that an arbitrator can only be removed if circumstances exist that give rise to justifiable doubt as to his or her impartiality and independence. They argued that the arbitrator cannot act impartially. They argued that the arbitrator exhibited bias and acted contrary to the rules of natural justice and she is motivated by self-interest as opposed to a speedy conclusion to the matter. The applicants submitted that the arbitrator failed to publish the interim award for over 5 months even though all the arbitral fees had been paid. They submitted that she rejected the applicants' challenge lodged on July 21, 2021 and August 3, 2021and by mentioning the matter on August 9, 2021in the applicant's absence. Further, they argued that the arbitrator failed to follow the procedure agreed by the parties, so, the applicants have lost confidence in her ability to fairly determine the arbitration.

11. To buttress their arguments, the applicants relied on *Modern Engineering v Miskin*[3] cited in *Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited*[4] in support of the holding that the applicable test when considering removal of an arbitrator is whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his/her ability to come to a fair and just conclusion. They also cited *Turner (East Asia) v Builder Federal (Hong Kong) and Josef Gartner & Co.*[5] cited in Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited[6] in support of the proposition that an arbitrator must always act judicially with a detached mind and with patience. They argued that an Arbitrator is enjoined by section 19 of the Act to treat the parties "with equality" and to give each party a fair and reasonable opportunity to present its case. They submitted that section 19 is based on article 18 of the Model Law which lays down the fundamental requirements expected of an Arbitral Tribunal for the purposes of procedural justice to be; (i) treatment of the parties and; (ii) full opportunity of the parties to present their case.[7]

12. Additionally, they cited Kipkoech Kangongo & 62 others v Board of Governors Sacho High School & 5 others[8] which held that a fair trial has many faces and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge. They cited Section 29(1) of the Act which provides that an arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.

3 **15 BLR 82.**

4 [2016] e KLR.

5 [1988] 42 BLR.

6 [2016] e KLR.

7 Citing UNCITRAL 2012 Digest of Case Law at page 97, paragraph 4.

8 [2015] e KLR.

13. They placed further on Tanzania National Roads Agency v Kundan Singh Construction Limited[9] in which the Court of Appeal in declining to recognize and enforce an arbitral award relied on the fact that the arbitral tribunal had failed to adhere to the rules of law chosen by the parties. They argued that the parties had agreed to be bound by the 2012 Rules which the Arbitrator ignored manifesting bias. They cited Associated Engineering Co v Government of Anhra Pradesh and Anor[10] cited in Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited[11] which underscored the need for an arbitrator not to act arbitrarily, irrationally capriciously or independently of the contract.

14. The applicants also relied on Modern Engineering v Miskin[12] in support of the holding that an arbitrator could be removed "only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence. They relied on Zadock Furniture System Limited and Maridadi Building Contractors Limited v Central Bank of Kenya[13] which held that the test for bias or prejudice is real danger. They also relied on PT Central Investindo v Franciscus Wongso and others and another matter[14]in support of the holding that the inquiry is to whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it and cited Metropolitan Properties Co. Ltd v Lannon[15] in support of the holding that the court looks at the impression which would be given to other people.

15. Regarding stay of the proceedings, the applicants submitted that section 14 (8) uses the word "may" instead of "shall" and relied on Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another[16] which defined the of words shall as obligatory. They submitted that Section 7 of the Act empowers this court to make interim orders (Citing Chania Gardens Limited v Gilbi Construction Company Limited & another[17]). Counsel argued that its rights will be prejudiced if the trial proceeds.

16. They faulted the arbitrator for questioning the membership of Fredrick Kioko yet he found that the firm of Marende Necheza and Company advocates were properly on record for the 1st applicant. They argued that the authority to act for an advocate emanates from a client. He argued that the arbitrator made an erroneous finding regarding the firm representing the 1st applicant and cited Republic v Muyesu Ama Ex-Parte Edward Elly Munubi[18] in support of the holding that an advocate not duly authorized cannot act for a party.

17. They argued that the interim award was delivered in the absence of the applicants' advocates despite the arbitrator being aware of their protest. They cited the definition of an award at section 3 of the

9 [2014] e KLR.

10 [1992] AIR 232.

11 [2016] e KLR.

12 [1981] 1 Lloyd's Rep 515.

13 [2015] e KLR.

14 [2014] SGHC 190.

15 (1968) 3 All ER. 304.

16 [2018] e KLR.

17 [2015] e KLR.

18 [2021] e KLR.

Act and also cited section 35 (1) (2) of the Act which provides that an award can be set aside if it is in conflict with public policy of Kenya. To buttress their argument, they cited Mifra Construction Company Limited v Eldoret Municipal Council[19] which held that an arbitrator must always make his determination guided by proper principles. Lastly, they cited section 16 (1) of the Act and Mellech Engineering & Construction Limited v David M Galaty[20]in which an arbitrator was removed for not being appointed in accordance with the rules.

18. The Office Bearers of Mtongwe Beach Management Unit in opposition to the Originating Summons submitted that the delay in concluding the arbitration proceedings is attributed to the party's failure to settle arbitration fees. They argued that the applicant seeks to remove the arbitrator for failing to deliver the ruling which she has already delivered. Citing section 10 of the Act, it argued that this court has no jurisdiction to entertain this case and relied on Elige Communications Ltd v Safaricom PLC.[21]

19. It also cited Bremer v ETS Soules[22]which set out the principles for removing an arbitrator to include where the relationship between the arbitrator and the parties or between the arbitrator and the subject matter of the dispute is such as to create an evident risk that the arbitrator has been or will in the future be incapable of acting impartially which requires proof of actual bias, or where the conduct of the arbitrator is such as to show that through lack of talent, experience or diligence, he/she is incapable of conducting the reference in a manner which the parties are entitled to expect.

20. It submitted that the applicant has failed to demonstrate how the conduct of the arbitrator has impeded her independence and impartiality and argued that even though the proceedings have lasted 5 years, the parties only complied with the pre-trial directions in January 2020. It argued that the interim award the arbitrator is accused of delaying was ready for publication as early as on March 1, 2021and it was only publicized later after settlement of the arbitrator's invoices by all the parties. It argued that on August 3, 2021, the applicants refused to attend the chambers of the Arbitrator.

21. As for the stay sought, it submitted that section 10 of the Act restricts court intervention to matters provided under the Act and cited Brian Martin Francis & 5 others v Samuel Thenya Maina & Martin Munyu (Arbitraton)[23]and Nyutu Agrovet Limited v Airtel Networks Limited[24]which underscored the scope of court intervention in arbitration matters. It submitted that for the applicant to succeed in their allegations that the arbitrator is incapable of determining the matter fairly, they ought to show that there was misconduct on the part of the arbitrator or that the arbitrator acted or omitted or committed certain acts which are contrary to her functions and obligations.

22. They submitted that the applicants have not presented any material to warrant the stay and cited section 14 (8) of the act which provides that while an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided. To buttress their argument, it cited Chania Gardens Limited v Gilbi Construction Company Limited & another.[25]

19 [2000] e KLR.

20 [2016] e KLR.

21 [2021] e KLR.

22 [1985] 1 Lloyd's L.R. 160.

23 [2021] e KLR.

24 [2015] e KLR.

25 [2015] e KLR.

23. As for the prayer to set aside the award, it cited section 35 (1) (2) of the act and noted that the applicants seek to have the interim orders set aside on two grounds. One, that the arbitrator erred in finding that the Lawrence Obonyo Legal Advocate were not instructed to act on its behalf. Two, that the interim award was delivered after the applicants had applied for the arbitrator's recusal. It argued that the award was ready as early as on March 1, 2021yet the applicant's counsel applied for the arbitrator's recusal on July 21, 2021and that on the delivery date the applicants boycotted the arbitrator's chambers. It submitted that the grounds cited for setting aside the award do not meet the threshold set out in section 35 of the Act. It submitted that the applicants have failed to prove that the arbitrator is biased and cited Zadock Furniture Systems Limited and Maridadi Building Construction Limited v Chartered Bank of Kenya[26]which held that the test for bias or prejudice is that there is real danger that the arbitrator is biased. It submitted that the applicants have not demonstrated incompetence. Lastly, it argued that under section 7(2) of the Act, the finding is conclusive.

24. For starters, the general approach on the role and intervention of courts in arbitration is provided in section 10 of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. Section 10 in mandatory terms restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section epitomizes the recognition of the policy of party's autonomy which underlie the arbitration generally and in particular the Act. It articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[27] Indisputably, the principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.[28]

25. Section 10 permits court intervention where the act expressly provides for or permits it. However, the act cannot reasonably be construed as ousting the inherent power of the court to do justice especially through judicial review and constitutional remedies. But this latter instance can only be countenanced in exceptional instances.

26. Section 13(3) provides that: - (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. Subsection (4) provides a restriction on the application of the above provision in the following terms: - (4) a party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.

27. Parliament enacted express provisions stipulating the challenge procedure. Section 14 provides as follows: -

> 14. Challenge procedure
>
> (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

[26] [2015] e KLR.

[27] Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[28] Kariuki Muigua, Role of the Court Under *Arbitration Act* 1995: Court Intervention Before, Pending AND After Arbitration in Kenya, Paper presented at The Chartered Institute of Arbitrators course on Advocacy in Mediation and Arbitral Proceedings on 5th February 2009, (Revised on 1st March 2010)

(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(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.

(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

28. A faithful reading of section 14 shows that parties are free to agree on how to challenge the arbitral tribunal. However, where the parties fail so to agree, a party may within 15 days of becoming privy to the appointment of the tribunal or circumstances that merit its challenge write to it stipulating the reasons for the challenge. If the challenged tribunal does not withdraw from office or the other party agree to the challenge, the tribunal shall decide the matter. The applicants made no attempt at all to demonstrate when they became aware of the alleged reasons nor did they address the question whether they filed their challenge within the 15 days stipulated by the above provision. The parties did not accord this issue due attention in their submissions.

29. An arbitrator may be challenged on basis of various factors provided for under the Act. An arbitrator may be challenged if there is reason to justifiably doubt his/her impartiality and independence. However, a party who has appointed an arbitrator may only challenge him on basis of reasons that he becomes seized of after such appointment. The act restricts the grounds for challenging the appointment.

30. The scheme of section 14 must be read in the context of the substrata legislative policy of minimizing judicial intervention in arbitral proceedings. In terms of section 10 of the Act, no judicial authority would intervene in arbitral proceedings except where it is so provided. Thus, a party, who is unsuccessful in the challenge to an arbitrator before the arbitral tribunal, has recourse to courts. The legislative intent is clear that the arbitral proceedings are not to be impeded except as provided under the act.

31. The applicant's application is premised on their letters dated July 21, 2021in which they notified the arbitrator that they had lost confidence in him and called upon her to recuse herself. The arbitrator

replied to the said letter vide her letter dated July 24, 2021. Relevant to the issue at hand is the last paragraph of the letter in which she wrote: -

> " The undersigned has therefore rescheduled this matter for Mention on 29th July 2021 at 9am when the prties and or their advocates on record should attend in person or otherwise via Zoom Video Conference (as the case may be) without fail to address the issues raised in the above referenced letter."

32. In reply to the above communication, the applicants counsel wrote: - "the under signed and /or clients would be unable to attend the said Mention of July 29, 2021for reasons that the notice issued was too short and highly inconvenient, due to court matters scheduled on the said date." The applicants' advocate declined to attend the meeting to address the recusal citing the short notice and other engagements. However, much as we cannot doubt the veracity of the reasons offered, the applicants failed to appreciate two consequences of their refusal and failure to suggest a convenient date. One, the nomenclature of section 14 which requires the arbitrator to make a decision on the recusal application. In this regard, the applicants failed to accord the arbitrator the opportunity to pronounce herself on the recusal. Two, no decision had been made as at this point to trigger a challenge to this court as contemplated by section 14. Three, by refusing to attend the scheduled session in which the parties were to address the recusal, the applicant closed the door for the arbitrator to pronounce herself on the decision, there by cutting the ground upon which her challenge before the High Court would stand. Four, and very important, the absence of a recusal decision rendered the applicants' application premature and unripe for adjudication and therefor totally incompetent. Five, there is no decision before me to challenge and by any stretch of imagination, the applicants cannot decline to attend the meeting to address the issues they raised and turn around and purport to accuse the arbitrator of refusing to render a decision.

33. Six, under section 14, if the challenge whether in the manner agreed by the parties or after decision by the tribunal does not succeed, the challenging party may apply to the High Court, within 30 days of refusal of the challenge, to determine the matter. This means there is no challenge before me for determination. Seven, the High court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator. There is no rejection or decision before me for me to confirm or reject. The decision of the High Court where there is a rejection of the challenge or refusal shall be final and is not subject to appeal. Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

34. Flowing from the discussion in the preceding paragraphs, prayer (1) of the amended Originating Summons is totally unmerited and unavailable.

35. Prayer (1) having collapsed, prayer (2) equally collapses. In any event, even if there as a competent application before me, the said prayer as drafted flies on the face of section 14 (8) which provides that while an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful. Prayer (2) cannot surmount the barrier erected by the above provision. I see no reason to deploy more ink and paper addressing it.

36. I now turn to prayer to remove the arbitrator. The allegations against an arbitrator in support of the request for his disqualification must satisfy the stringent threshold set by the law. As was observed

inChania Gardens Limited v Gilbi Construction Company Limited & another[29] the rationale for this stringent threshold is because of very high possibility that removal of an arbitrator by the court may be abused by parties who intent to disrupt the arbitral process. Accordingly, the law has set out a stringent test for removal of an arbitrator which is similar to the standard set for disqualifying a judicial officer from presiding over a case. The grounds for removal of an arbitrator are set out in section 13(3) of the Act which provides that 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.

37. The grounds upon which an arbitrator may be challenged are stipulated in section 13 (3) of the act. These are 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.

38. No argument was raised to suggest that the arbitrator does not possess the required qualifications nor was it alleged or proved that he is physically or mentally incapable of conducting the proceedings. There was no attempt to demonstrate that there are justifiable doubts as to his capacity to undertake the arbitration. The only contention is that the arbitrator is biased. Two reasons were cited in support of this ground. One, it was argued that the arbitrator insisted on payment of his fees before releasing the award. Two, it was argued that he proceeded to render the award in the absence of one party. Three, that the arbitrator held that the 1st applicant's advocates were properly instructed and ignore the letter of appointment held by the 2nd and 3rd applicants' advocate.

39. As was observed in Chania Gardens Limited v Gilbi Construction Company Limited & another,[30] the words ''only if'' and ''justifiable doubts'' in section 13 (3) of the act suggest the applicable 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.

40. The applicants accuse the arbitrator of insisting on fees payment. They argue that she was driven by the financial gain. The above argument sounds appealing. However, it collapses on several fronts. One, it is not one of the grounds prescribed in section 13 of the act. Two, parties to an arbitration are jointly and severally liable to pay arbitration fees once an arbitration commences and an arbitrator can withhold an award if a party fails to pay their share of the arbitration fees. This position finds statutory underpinning under section 32B (3) of the Act which provides that the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received. These provisions render the applicants' argument that she is driven by financial gain legally frail and unsustainable in law.

41. Equally weak and trivial is the attempt to blame the arbitrator for delaying the proceedings. The parties' disagreements and failure to comply with directions contributed to the delay. No attempt of shifting blame can change this reality. The arbitrator is being accused of rendering the award the absence of the applicants. The applicants were aware of the date. They declined to attend. It has been said they remained outside the arbitrator's chambers. They cannot now turn around and allege bias.

29 {2015} e KLR.

30 {2015} e KLR.

42. The applicants argue that the arbitrator was biased because she rendered the award in their absence and held that the advocates for the 1st applicant were properly instructed and ignored their letter of appointment. This latter ground is an invitation to this court to delve into merits. Its not one of the grounds for removal of an arbitrator or setting aside.

43. As for the alleged bias, a fundamental feature to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

44. An Australian case defined bad faith as ''a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker."[31] Even though "Bad faith" has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness.Justice Southin articulation of bad faith in MacMillan Bloedel Ltd. v Galiano Island Trust Committee[32] is worth citing. He stated: -

> "...Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact." (Emphasis added)

45. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[33]There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.[34] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide

31 *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (NAFK v Minister of Immigration (2003) 130 F.C. 210, [24]).

32 {1995} B.C.J. 1763.

33 *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

34 Minister for Immigration and Multicultural Affairs Ex p Jia (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); Bell v CETA (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

context. In many cases, the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making.

46. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that "justice should not only be done, but be seen to be done."[35] Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.[36] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the public.

47. The High Court of Australia explained, "Bias, whether actual or apparent, connotes the absence of impartiality." Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[37] A claim of apprehended bias requires a finding that a fair-minded and reasonably well-informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed", "suspected" or "presumptive" bias. [38]

48. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the actual views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the possible views and behavior of the decision-maker.[39] Each form of bias also requires differing standards of evidence.[40] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement

35 R v Sussex Justices Ex p McCarthy [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": Shrager v Basil Dighton Ltd [1924] 1 KB 274 at 284.

36 *See*, eg, Ebner v Official Trustee [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL); Forge v Australian Securities Commission [2006] HCA 44; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). *See* also Belilos v Switzerland [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of "the confidence which must be inspired by the courts in a democratic society".

37 Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

38 Anderton v Auckland City Council [1978] 1 NZLR 657 at 680 (SC NZ); Australian National Industries Ltd v Spedley Securities Ltd (in Liq) (1992) 26 NSWLR 411 at 414 (NSW CA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

39 **Groves, M. *"The Rule Against Bias"* [2009] UMonashLRS 10**

40 Ibid

is difficult to satisfy.[41] A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer might conclude there was a real possibility that the decision-maker was not impartial.[42]

49. In Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Anther[43] the Supreme Court cited Professor Groves M. in "The Rule Against Bias"[44] that-"... claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand."

50. In formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[45]The Lords also made clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.[46] Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[47]

51. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,[48] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by

41 *See*, eg, Sun v Minister for Immigration and Ethnic Affairs [1997] FCA 1488; (1997) 151 ALR 505 at 551-552 (Fed Ct, Aust); *Gamaethige v Minister for Immigration and Multicultural Affairs* [2001] FCA 565; (2001) 109 FCR 424 at 443 (Fed Ct, Aust). *See also* Porter v Magill [2001] UKHL 67; [2002] 2 AC 357 at 489 where Lord Hope accepted that proof of actual bias was "likely to be very difficult".

42 This expression of the bias test was suggested by the English Court of Appeal in Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in Porter v Magill [2001] UKHL 67; [2002] 2 AC 357. The Australian test, which is explained below, also adopts an objective assessment and will be satisfied if there is a "possibility" that the decision-maker might not be impartial: Ebner v Official Trustee [2000] HCA 63; (2000) 205 CLR 337 at 345.

43 Supreme Court No. 11 of 2016.

44 {2009} U Monash LRS 10.

45 [1993] UKHL 1; [1993] AC 646 at 670.

46 Porter v Magil [2001] UKHL 67; [2002] 2 AC 357.

47 See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

48 On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[49]

52. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[50] This position was appreciated Chania Gardens Limited v Gilbi Construction Company Limited & another,[51] which stated that 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.

53. Applying the stringent tests discussed to the reasons mounted by the applicant in this case, it is my conclusion that the applicant's allegations of bias cannot pass the above tests. The material before me does not suggest bad faith, bias, or a reasonable possibility of ill motive. Bad faith and bias are serious allegations which attracts a heavy burden of proof.[52]

54. I now turn to the prayers (3) seeking to set aside the award. Notably, the applicant has not invoked section 35 of the Act which provides grounds for setting aside an arbitration award. Instead, the applicant invoked sections 3A and 63(3) of the *Civil Procedure Act*[53] which are totally in applicable. The *Arbitration Act* is a complete code with clear provisions governing applications under the Act.

55. Under Section 35(1) of the Actm, recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. None of the above grounds have been cited or shown to exist.

49 Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

50 *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

51 {2015} e KLR.

52 *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587).

53 Cap 21, Laws of Kenya.

56. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya. None of the above grounds have been shown to exist.

57. The main case regarding public policy in England is Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v Ras Al Khaimah Nat'l Oil Co. (Rakoil).[54] In this case, the court reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.[55] The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.

58. The party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

59. By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.[56] Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel. By agreeing to arbitration, the parties limit interference by courts to the ground set out in section 35 of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise.

60. Flowing from the discussions and conclusions arrived at herein above, it is my finding that the applicant's Originating Summons dated October 14, 2021 is totally unmerited. Accordingly, I dismiss the said Originating Summons with no orders as to costs.

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY, 2022.

JOHN M. MATIVO

JUDGE

**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY , 2022.

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JUDGE

54 Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.s. T.) v. Ras Al Khaimah Nat 'I Oil Co. (Rakoil). 2 Lloyd's Rep. 246, 254 (K.B.)(1987).

55 Ibid

56 They may even reduce the level of procedural fairness by, e g, agreeing that the arbitrator may decide the matter without hearing them.