Richlands Limited v Jinsing Enterprises Company Limited & another (Arbitration Cause E027 of 2021) [2022] KEHC 12967 (KLR) (Commercial and Tax) (26 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12967 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E027 OF 2021

A MABEYA, J

AUGUST 26, 2022

IN THE MATTER OF THE ARBITRATION ACT NO 4 OF 1995

BETWEEN

RICHLANDS LIMITED ..... APPLICANT

AND

JINSING ENTERPRISES COMPANY LIMITED ..... 1ST RESPONDENT

QS WALTER A ODUNDO ..... 2ND RESPONDENT

RULING

1. Before court is an originating summons dated September 6, 2021. It is brought pursuant to section 13, 14(3) (4) (5) and 17 of the *Arbitration Act*, and rule 3 (1) of the *Arbitration Rules*.

2. The summons sought the removal of the 2nd respondent as the sole arbitrator in the arbitral proceedings between the parties. It further sought a declaration that the arbitral proceedings were premature for non-compliance with clause 45.4 of the JBC agreement, an order directing the parties to exhaust other means of settling the dispute before proceeding to arbitration and finally and an order for a fresh appointment of an arbitrator.

3. The grounds for the summons were on the face of it and on the supporting affidavit sworn by Thomas Letangule on September 6, 2021. The dispute arose out of a contract dated December 13, 2016 between the applicant and 1st respondent for the construction of a residential house on LR No 2259/560, Karen C The parties mutually terminated the contract on January 18, 2018 and the 1st respondent raised a final certificate of Kshs 14,576,963.45 and further demanded Kshs 22,997,981.07.

4. The 1st respondent declared a dispute vide a letter dated July 3, 2019 and requested the president of the Architectural Association to appoint an arbitrator. pursuant thereto, the 2nd respondent was appointed as the sole arbitrator on October 22, 2019 which he duly accepted on September 28, 2020.

5. The applicant contended that the dispute was premature as the 1st respondent had not exhausted the alternatives provided in clause 45.4 of the JBC agreement which provided for amicable settlement of disputes before arbitration was attempted. That the applicant was not given sufficient notice to concur in the appointment of the arbitrator. That the applicant had engaged the Institute of Quality Surveyors of Kenya to resolve the dispute which placed a condition that for it to appoint an independent surveyor, both parties must comply. That the 1st respondent refused to have any independent re-valuation of works.

6. The applicant made a recusal application dated March 17, 2021 which the 2nd respondent dismissed on August 26, 2021. The applicant accused the 2nd respondent of bias. That the arbitral proceedings were set to kick off yet the parties were negotiating and had a draft consent. That the applicant had lost confidence in the 2nd respondent's ability to fairly determine the dispute and further that he lacked jurisdiction as the applicant was not afforded an opportunity to participate in his appointment.

7. The 1st respondent opposed the application vide the replying affidavit of Carolyne Muthue sworn on October 19, 2021. It admitted the subject contract which was mutually terminated. That the 1st respondent presented the applicant with the final certificate on December 26, 2019 but it failed to settle the same. This prompted the 1st respondent to make a demand on May 10, 2019. The applicant objected to the demand and indicated that it would be seeking re-measurement of the works by an independent surveyor.

8. The 1st respondent contended that the JBC agreement had no provision for re-measurement of works, but the applicant proceeded with the re-measure of works though it never communicated the results to the 1st respondent.

9. In view thereof, the 1st respondent invoked clause 45.1 of the JBC agreement and declared a dispute. On July 25, 2019, the 1st respondent forwarded a list of three arbitrators to the applicant for its concurrence within 30 days. The applicant was also invited to forward its own list of preferred arbitrators in case it did not concur with the ones provided.

10. When the applicant failed to respond, the 1st respondent wrote to the Architectural Association of Kenya (AAK) on October 7, 2019 requesting for the appointment of an arbitrator. That letter was copied and served upon the applicant. The AAK appointed the 2nd respondent as the arbitrator on October 22, 2019. It was contended that, prior to that, the parties had unsuccessfully attempted negotiation between October 2019 and September 2020. The evidence of the correspondence was at pages 67-70 of CM1. It was contended that until the applicant's letter dated October 9, 2020, the 1st respondent was not aware that the applicant had engaged IQSK for a second independent measurement.

11. It was also contended that section 14 of the *Arbitration Act* ("the Act") provided that an application challenging the appointment of an arbitrator ought to be brought within 15 days of becoming aware of the appointment, yet the instant application was brought years later without seeking extension of time. That under section 13(3) of the *Arbitration Act*, an arbitrator could only be challenged if the circumstances led to justifiable doubts as to his impartiality and independence, or did not possess qualifications agreed upon by the parties, or if he was physically or mentally incapable of conducting the proceedings.

12. This court has considered the parties pleadings, evidence and the written submissions on record. The main issue for determination is whether the applicant has laid a case for the termination of the arbitral proceedings, removal of the arbitrator and consequent whereof the appointment of a new arbitrator.

13. Section 14 of the Act provides: -

> " 1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
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> 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.
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> 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.
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> 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.
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> 5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator."

14. In the present case, the applicant challenges the arbitrator and the arbitral proceedings on two levels; that arbitration was premature as it was contrary to clause 45.4 of the contract between the parties and that it was not involved in the appointment of the arbitrator.

15. Clause 45.4 of the JBC agreement provided that: -

> " ... the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference with or without the assistance of third parties."

16. The 1st respondent relied in the case of *The County Government of Kirinyaga v African Banking Corporation* [2020] eKLR for the proposition that there was no jurisdiction to commence arbitral proceedings where a contract demanded alternative methods of dispute resolution as a pr-condition to arbitration.

17. Although the applicant contended that there had been no attempt to settle the matter amicably, the correspondence produced at pages 67-70 of CM1 proves otherwise. There were various attempts at negotiations as indicated by the letters dated September 22, 2020 and September 28, 2020.

18. Further, though the applicant attempted to have the dispute resolved by IQSK, there is no evidence to show that the applicant attempted to involve the 1st respondent in the same. This is so because the 1st respondent alleged that it was not aware of the applicant's decision to obtain a second re-measurement of the works. The communication to the 2nd respondent is not what the contract provided for. The communication should have been to the 1st respondent.

19. In any case, if the applicant is willing to settle the demand claimed by the 1st respondent, and if indeed the parties have a draft consent as claimed by the applicant, the existence of the arbitral proceedings or even this suit would not stop the parties from negotiating a consent between themselves.

20. On the appointment of the 2nd respondent without the involvement of the applicant, the record shows that the applicant was informed of the declaration of a dispute. It was given an opportunity to concur with the appointment of an arbitrator and instead informed the 1st respondent *vide* its letter dated October 9, 2020 that it would not participate in the arbitration.

21. The applicant was also served and copied in the letter addressed to AAK by the 1st respondent requesting for appointment of an arbitrator. When the 2nd respondent was appointed, the applicant was notified. The applicant cannot therefore claim that the appointment was either premature or un-procedural.

22. The applicant was notified of the 2nd respondent's appointment on October 22, 2019. In accordance with section 14 of the Act, the applicant ought to have challenged the appointment within 15 days. Instead, the applicant waited 1 year 5 months before it finally filed the application for recusal on March 17, 2021 before the arbitrator. There was inordinate delay in making the application.

23. Finally, there was an allegation that the 2nd respondent ought to be removed for being biased and for the applicant's loss of confidence in him. The applicant's contention was that the 2nd respondent was biased because he dismissed its application dated March 17, 2021 seeking his recusal. With greatest respect, an adverse ruling against one party is not an inference of bias. The applicant had a duty to proof actual bias and establish that the 2nd respondent was incapable of approaching issues with impartiality.

24. In *Chania Gardens Limited v Gilbi Construction Company Limited & another* [2015] eKLR, it was held: -

> " 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."

25. I will apply the stringent test above and ask whether there are grounds urged by the applicant whereby circumstances raise justifiable doubts as to the impartiality and independence of the 2nd respondent. It is this court's finding that the applicant did adduce any evidence of such circumstances. It was not enough for the applicant to simply state that it had lost confidence in the arbitrator and thus he ought to have been removed. More than that was required by way of cogent reasons.

26. The upshot is that the applicant's application dated September 6, 2021 is without merit and is dismissed with costs to the 1st respondent. The orders of October 13, 2021 staying the arbitral proceedings are hereby vacated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE