



**County Government of Baringo v Rotunda Contractors Limited;
Ng'ang'a (Interested Party) (Miscellaneous Application E638 of 2021)
[2022] KEHC 12080 (KLR) (Commercial and Tax) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E638 OF 2021**

**A MABEYA, J
AUGUST 19, 2022**

BETWEEN

THE COUNTY GOVERNMENT OF BARINGO APPLICANT

AND

ROTUNDA CONTRACTORS LIMITED RESPONDENT

AND

JOSEPH NG'ANG'A, ARBITRATOR INTERESTED PARTY

RULING

1. Before court is an application dated 30/8/2021. It was brought under section 14(3) of the [Arbitration Act](#) and rule 11 of the [Arbitration Rules](#).
2. It sought the setting aside of the interim award issued by the arbitrator on 17/8/2021 with regards to his recusal. That the court upholds the challenge filed by the applicant before the arbitrator and terminate the mandate of Engineer Jospheh Njogu Ng'ang'a from continuing to preside over the arbitral dispute between the parties and that the proceedings do commence *de novo* under a new arbitrator other than Engineer Jospheh Njogu Ng'ang'a.
3. The application was supported by the affidavit of Julius Tarus sworn on 30/8/2021. The applicant's case was that the parties had a contractual dispute of Kshs 7,167,762.32/= and that their agreement provided that disputes were to be determined *vide* arbitration.
4. On 29/3/2021, the Chartered Institute of Arbitrators appointed Engineer Jospheh Njogu Ng'ang'a as the sole arbitrator to determine the dispute.



5. The applicant's concern was that the arbitrator asked for an initial deposit of Kshs 150,000/= and the respondent promptly executed the terms of appointment and paid the same. On 19/4/2021 the applicant requested for a reduction of the deposit to Kshs 70,000/= before execution but the arbitrator declined and gave the applicant a further 15 days to settle the deposit of Kshs 150,000/.The applicant executed the terms of appointment on 16/6/2021 with a promise that the deposit was being processed and the arbitral proceedings commenced without the payment.
6. A preliminary meeting was held on 27/4/2021 and parties filed their pleadings and a pre-hearing meeting was held on 1/7/2021. On 2/7/2021, the arbitrator issued his interim fee note of Kshs 1,270,166/= and the applicant was to pay Kshs 669,282/ as its share of costs by 30/7/2021.
7. However, the applicant challenged the fee note for being too high. On 24/7/2021, the arbitrator granted the respondent leave to apply for security for costs over concerns that the applicant might be unable to pay half of its costs. The respondent proceeded to file the application on 26/7/2021 seeking security for costs of Kshs 1,500,000/=.
8. The applicant protested the interim fee note *vide* various emails sent on 2nd, 29th and July 30, 2021 more so challenging the 67.96 hours allegedly spent in the arbitration. That the arbitrator allowed the respondent's application. It was contended that the arbitrator did not give a satisfactory explanation on the 67.96 hours and that he granted the respondent leave without considering the applicant's letters of protest on the high fees. On 3/8/2021, the arbitrator directed that the hearing will proceed virtually on 18th-August 20, 2021 instead of physically in Nakuru as earlier on agreed.
9. On 6/8/2021, the applicant filed an application before the tribunal praying that the arbitrator recuses himself from the proceedings on grounds that he had failed to demonstrate impartiality and independence. The respondent filed its response on 16/8/2021 and the interim award was delivered on 17/8/2021. It was the applicant's case that the arbitrator had premeditated his decision and that he had written his decision prior. The application was declined and the hearing was to proceed as scheduled on 18/8/2021 to 20/8/2021. The applicant complained that the parties were not consulted on whether the dates were still convenient.
10. It was thus the applicant's case that the arbitrator demonstrated incompetence and failed in his cardinal duty of ensuring fairness and equality as per section 19 of the *Arbitration Act*. That the arbitrator demonstrated bias in the manner he conducted the proceedings and failed to address the issue of the high fees to the satisfaction of the applicant. The applicant thus contended that it had lost faith and confidence in the impartiality and competence of the arbitrator.
11. The respondent opposed the application *vide* the replying affidavit of Dr Kiplagat Chelelgo sworn on 27/9/2021. It was the respondent's case that; the applicant had entered into an agreement with the respondent for the refurbishment of the office of the Governor on Baringo County.
12. A dispute arose and in May 2020, the Chartered Institute of Arbitrators appointed hon Sylvia Mueni Kasanga as the sole adjudicator to preside over the parts dispute. That despite having participated in the preliminary meetings and set up a time table of activities, just before the hearing scheduled on October 22, 2020 and after seeing several adjournments, the applicant applied for recusal of the said hon Sylvia Mueni Kasanga on grounds of conflict of interest.
13. That though the respondent opposed the application, the she recused herself in November 2020. That the respondent had paid for the arbitration costs up to recusal of Kshs 87,000/= but the applicant did not make a single payment.



14. That once again upon the appointment of the current arbitrator, the applicant again made a similar application for recusal days to the hearing despite having executed the appointment terms, attended the preliminary meeting, and agreed to the time-table of activities.
15. That the arbitrator had made several findings in favour of the applicant despite the respondent's opposition such as extension of time to file documents. On the issue of fees, it was contended that annexure "KC27" clearly indicated how the 67.9 hours were arrived at by the arbitrator. That as per attachment "KC32A and KC32B" the arbitrator had given a detailed explanation as to the charges and their basis.
16. The court has considered the pleadings, evidence and the parties' respective submissions. The main issue for determination is whether the applicant has made out a case for the removal of the sole arbitrator.
17. Section 14(2) and (3) of the Arbitration Act ("the act") provides that: -

"(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."
18. On the other hand, section 13(3) of the act provides: -

"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."
19. In Modern Engineering v Miskin 15 BLR 82, where Lord Denning put it as follows: -

"The proper test to apply when considering whether to order removal was to ask whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion ... The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if the arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying "I have not had any fair hearing".
20. In Chania Garden Ltd v Gilbi Construction Company Ltd & Another [2015] eKLR it was held: -

"Perception of bias, as it the case here, without proof will not amount to misconduct for purposes of removal of the arbitrator. The comments complained of were not made without basis. The parties made elaborate submissions and submitted documents on the issues which he addressed in the ruling including the matters on the Quantity Surveyor. ... The facts presented do not meet the ultimate test as per the literary work by Steve Gatembu at page 54 of Arbitration Law and Practice in Kenya that; "The test whether a person is in position to act judicially and without any bias has been suggested to be: - "do there exist grounds from which a reasonable person would think that there was a real likelihood that



the arbitrator could not or would not fairly determine.... (the dispute)on the basis of the evidence and arguments to be adduced before him”.

21. In the present case, the applicant faults the sole arbitrator for bias on the basis of the arbitrator’s costs, his decision to grant leave to the respondent to file an application for costs, allowing the application, and disallowing the applicant’s application seeking his recusal.
22. On the issue of costs, the arbitrator responded to the applicant’s inquiry on justification of his costs. What comes out clearly is that the applicant has previously applied the tactic of recusal to hide its unwillingness to pay arbitrator’s costs despite participating in the process.
23. The applicant did not respond to or deny the allegation that in 2020, it had made a similar application days to the hearing, and sought the recusal of the previous arbitrator, hon Sylvia Mueni Kasanga. The applicant did not also deny the allegation that by the time it was making the application, it had not paid a single cent towards that arbitrator’s costs despite having participated in the proceedings.
24. Fast forward, in 2021, the applicant has once again sought the recusal of the arbitrator. Even as at the time of making the present application, the applicant had not demonstrated that it had settled the deposit of Kshs 70,000/= that it had proposed.
25. The applicant read malice in the quick speed at which the arbitrator made the ruling. To this court’s mind, the expeditious determination of a matter cannot be said to be bias or predetermined disposition on the part of the tribunal. To the contrary, it should be encouraged.
26. In any case, the parties had already agreed on the hearing dates of 18th, 19th and August 20, 2021, hence it was only reasonable that the arbitrator gave his award before those dates. It does not escape this court’s attention that the dispute between the parties arose almost six years ago.
27. With utmost respect, it was unreasonable for the applicant to expect that the arbitrator would once again consult on the hearing dates after giving his award on recusal, yet the dates had been agreed upon by the parties themselves and a time table of activities had been drafted and agreed upon.
28. Bias on the arbitrator was not demonstrated. The applicant cannot purport to challenge the impartiality of the arbitrator on the sole reason that it feels that the fees is too high and denies the explanation rendered. Litigation is a costly affair and the applicant cannot avoid or escape the resolution of the dispute due to its unwillingness to settle arbitration costs. The accusation of bias is serious and must be supported by evidence and not mere comments and suspicion.
29. To the contrary, the arbitrator’s conduct points to his desire to expeditiously hear the dispute between the parties. This is in appreciation of the fact that the arbitrator still continued with the arbitral proceedings despite the none-payment of deposit or settlement of his interim fees. The arbitrator’s decision to allow the respondent’s application for security for costs was not unfounded considering the applicant’s previous conduct, and its continued refusal to pay any amount towards settlement of fees.
30. In *Zadock Furnitures Limited and Another v Central Bank of Kenya* HC Misc Application No 193 of 2014 [2015] eKLR, Gikonyo J. stated: -

“The grounds for removal of 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*. And the arbitrator recognized that fact. 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.”

31. Further, in *West Park Limited v Villa Care Limited & another* [2020] eKLR, Majanja J emphasized this point as follows: -

“The test adopted by the act is stringent. It is intended to weed out frivolous allegations not founded on facts. The application must be based on the circumstances that exist and those circumstances must be justifiable. This test is in consonance with the prevailing legal formulation for the test for recusal of judicial officers emerging from our superior court where the courts have held that the test is not subjective based on the feelings or belief of the parties aggrieved but of a reasonable person with knowledge of the facts in issue.”

32. The court reiterates the foregoing and holds that it is not satisfied that a case for the removal of the arbitrator has been made. The applicant may be a public body which will pay from public coffers but commerce must continue. It cannot be shielded from its obligations under the law. Let it comply and pay for the services rendered by the arbitrator. The prayer for removal and replacement of the arbitrator is denied.

33. As regards the setting aside of the interim award, I likewise find no grounds to do so.

34. Accordingly, the application is found to be without merit and is dismissed with costs. The orders staying the arbitral proceedings are hereby vacated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

