



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. E312 OF 2019

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 14(3) OF THE

ARBITRATION ACT- CAHALLENGE TO THE ARBITRATOR

BETWEEN

MENNONITE BOARD IN EAST AFRICA.....APPLICANT

VERSUS

SIMON SAILI MALONZA.....1ST RESPONDENT

THOMAS &PIRON GRANDS LACS.....2ND RESPONDENT

RULING

1. The applicant filed the Originating Motion dated 31st July 2019 seeking the following orders;

1. SPENT

2. SPENT

3. THAT until further orders, this honourable court be pleased to grant a stay of further proceedings pending before Mr. Simon Saili Malonza, the sole arbitrator in the arbitral proceedings pending before him in the matter of arbitration between Thomas & Piron Grand Lacks and Mennonite Board in Eastern Africa.

4. That pending the hearing and determination of this application this honourable court be pleased to grant a stay of further proceedings pending before Mr. Simon Saili Malonza, the sole arbitrator in the arbitral proceedings pending before him in the matter of arbitration between Thomas Piron Grand Lacs and Mennonite Board in Eastern Africa

5. THAT this honourable court be pleased to remove Mr. Simon Saili Malonza the sole arbitrator in the arbitral proceedings pending before him in the matter of arbitration between Thomas Piron Grand Lacs and the Mennonite Board of East Africa

6. THAT this honourable court be pleased to order that the arbitral proceedings between the applicant and the 2nd respondent do take place before another arbitrator appointed in accordance with clause 45 of the agreement and Conditions of contract for building works made by the parties in December 2014.

7. THAT cost of this application be provided for.

2. The application is brought under Sections 7 and 14(3) of the Arbitration Act (hereinafter “**the Act**”) and Rule 3 of the Arbitration Rules

1997.

3. The application is supported by the affidavit of the applicant's Project Manager **Mr. ROBERT DARBY** who states that a dispute arose between the applicant and the respondent with regard to the discharge of their contractual obligations under their agreement of December 2014. He states that the 1st respondent, who was appointed to arbitrate over the dispute, issued direction number 3 on 17th July 2019 two days after he received notice of the applicant's intention to apply for his removal. He contends that he was not consulted over the directions given by the 1st respondent and is therefore apprehensive that unless the arbitration proceedings are stayed, the applicant will be subjected to unfair proceedings that are aimed at delivering an award in favour of the 2nd respondent.

4. The 2nd respondent opposed the application through the replying affidavit of its Chief Executive Officer **Ms CORALIE PIRON** who states that the application is incompetent and incurably defective. She avers that pursuant to clause 45.1 of the contract, any dispute between the parties was to be referred to arbitration and that when they attended the arbitration chamber, the applicant sought for an adjournment on the grounds that its counsel was indisposed. She adds that the applicant's said application was however dismissed on the basis that the preliminary meeting was merely an introductory meeting after which the applicant indicated that it would challenge the arbitrator's jurisdiction which it did on 10th June 2019.

5. She further she states that through a ruling delivered on 10th July 2019 the arbitrator dismissed the application challenging its jurisdiction. She maintains that the applicant does not deserve of the reliefs sought herein as the application has been brought in bad faith in order to frustrate or defeat the arbitral process.

6. Parties canvassed the application by way of written submissions. The applicant submitted that the 1st respondent failed to give the applicant a fair and reasonable opportunity to present its case when he proceeded with the arbitration in the absence of the applicant's counsel. Counsel submitted that the arbitrator exceeded the jurisdiction of a person exercising judicial authority. For this argument, reference was made to the decision in **Lambert Houreau v R** [1957] EA 575.

7. The 2nd respondent submitted that under Sections 14(8) of the Act, the arbitral proceedings cannot be stayed. With regard to the removal of the arbitrator the respondent submitted that the allegations of bias are baseless, unsubstantiated and do not meet the threshold for removal of the arbitrator. Reliance was placed on the decision in **Philip Kipsang Kemboi v Speaker County Government of Kericho & 3 others** [2019] eKLR among other cases.

Issues

8. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

Analysis

Removal of the Arbitrator

9. Section 13 of the Act sets out the circumstances under which parties can challenge an appointed arbitrator or arbitration tribunal. The said section stipulates as follows: -

“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.”

Section 13(4) states

“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”

10. The instant application is premised on the allegation of bias on the part of the 1st respondent. The applicant is aggrieved that the arbitrator declined to grant its application for an adjournment made on the ground that its counsel was indisposed. The applicant further stated that the arbitrator had disclosed that the 2nd respondent was his teacher and that according to the applicant no reasonable person would conduct a fair trial under those circumstances. The applicant further faulted the arbitrator for demanding that it consents to the terms of arbitration in the absence of his counsel who was unwell.

11. He submitted that the actions of the 1st respondent amounted to a violation of the applicant's rights to a fair trial under article 50 of the Constitution and Section 19 of the Act. He maintained that the applicant had lost confidence in the arbitral process presided over by the 1st respondent/arbitrator.

12. In a rejoinder, counsel for the 2nd respondent submitted that the allegations are baseless and unsubstantiated. He argued that at the preliminary meeting, the arbitrator refused to grant an adjournment owing to the fact that the meeting was introductory. With regard to the claim that the arbitrator was the 2nd respondent's student, the 2nd respondent conceded that the arbitrator was indeed his former student but that he graduated in the year 1996.

13. In **Jan Bonde Nielson v Nguruman Ltd.** [2014] eKLR it was held that;

...the appropriate test to be applied in determining an application for disqualification was laid down by the Court of Appeal in *R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED)*, and reinforced in subsequent cases. See *R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported)* where the Court of Appeal stated that: -

“When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established”.

14. In *Justice Philip K. Tunoi and Another v Judicial Service Commission and Another NRB CA Civil Appeal No. 6 of 2016 [2016] eKLR*, the Court of Appeal adopted the decision in *Porter v Magill [2002] 1 All ER 465* where it was held that the test for apparent bias is “[W]hether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.” The same position was taken by the Supreme Court (per Ibrahim J.) in *Jasbir Rai and 3 Others v Tarlochan Singh Raid and 4 Others SCOK Petition No. 4 of 2012 [2013] eKLR* that, *“The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”*

15. In *Galaxy Paints Company Limited v Trust Falcon Guards Limited*, Civil Appeal No 219 of 1998 (unreported) Justices of Appeal Kwach, Tunoi & Lakha stated that: -

“The question then arises whether this allegation is sufficient to give rise to automatic disqualification of the judges from sitting on appeal? It is a cardinal principal of law that holders of judicial offices are subject to the common law rule of natural justice whether any pecuniary interest or real likelihood or actual bias disqualifies a judge from sitting. The principle also applies to non-pecuniary interest. There is no fine distinction. Also, a judge should not sit or preside over a case where he has a personal bias towards a party owing to a relationship and the like that he may be personally hostile to a party as a result of events happening either before or during trial. Mrs Dias’ complaint is that the four judges struck out two appeals on technicalities. Do these circumstances give rise to a conclusion by a fair minded informed member of the public, and an advocate of 22 years of experience like Mrs Dias that the judges were actually biased and will not be impartial in the appeal? Do these circumstances suggest that the judges favour the respondent unfairly at the expense of the appellant?”

16. Having regard to the principles that emerge from the above cited cases the question that arises is whether the applicant has made its case for the disqualification of the arbitrator from handing the dispute herein. It was not disputed that the arbitrator was a student of the 2nd respondent. I however note that the arbitrator made this disclosure at the onset of the proceedings. I also note that the applicant has not demonstrated how the former teacher/student relationship that ended more than 2 decades prior to the filing of this case could have impacted on the instant case. In my considered view, inviting this court to remove an arbitrator on the basis of a teacher/student relationship that ended more than 20 years prior to the filing of the case would be unfair to the just determination of the dispute considering that it has not been shown that the arbitrator and the 2nd respondent had any other relationship after the 2nd respondent graduated in 1996. My finding is that it has not been established that there will be any conflict of interest between the arbitrator and the 2nd respondent so as to justify the arbitrator’s removal.

17. With regard to the issue of failing to grant the applicant an adjournment because of his counsel’s illness, I appreciate that the right to legal representation is enshrined in Article 50 of the Constitution. However, a perusal of the minutes of the preliminary meeting’s attendance list marked as **exhibit CP-1** indicates that the applicant was represented at the session by **Mr. Karanja Munyori** advocate. The applicant contended that his Counsel **Dr. Kuria** was not in attendance due to illness. I have examined the medical report marked as annexure **RD 6** and noted that confirms that the applicant’s advocate was in hospital. I however note that the Advocate sent a legal counsel to hold his brief, in which case, the applicant cannot be said to have been unrepresented at the preliminary meeting.

18. This court has also noted that the proceedings before the arbitrator are still at the preliminary stage of directions which means that the arbitrator is yet to make any substantive findings on the dispute between the parties. My finding is that in the circumstances of this case, the claim that the arbitrator is biased is premature and unfounded.

19. I therefore find that the applicant has not demonstrated that the arbitrator was biased in his conduct of the arbitral proceedings so as to warrant his removal from the case. My further finding is that a reasonable person looking at this case objectively and in its entirety would not have the impression of the danger of bias. The upshot is that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the arbitral process.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Kale for Nyanga for 2nd respondent.

Mr. Ndungu for Dr. Kamau Kuria for applicants

Court Assistant: Silvia