REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E1000 OF 2020

PILI MANAGEMENT CONSULTANTS LIMITED...APPLICANT

-VERSUS-

CHINA FUSHUN NO. 1 BUILDING ENGINEERING COMPANY LIMITED ....RESPONDENT

RULING

1. This ruling in respect to the application dated 18th August 2020 wherein the applicant seeks the following orders: -

> ***1. Spent.***
>
> ***2. Spent.***
>
> ***3. That this Honourable court be pleased to make an order removing the Honourable Mr. Justice Aaron Ringera as the Sole Arbitrator in the arbitral proceedings between the parties herein which proceedings are pending before Arbitrator.***
>
> ***4. That this Honourable court be pleased to make an order that the Arbitrator is only entitled to fees and/or costs for the work done by him in the arbitral proceedings up to the date of delivery of the ruling on the application by the applicant herein challenging the arbitral Tribunal's jurisdiction.***
>
> ***5. That such further or order be granted as this court may deem fit in the circumstances of this case.***
>
> ***6. That costs of this application be provided for.***

2. The application is supported by the affidavit of the applicant's director **Mr. Hezron Awiti Bollo** and is premised on the grounds that: -

> ***i. The Arbitrator is biased against the applicant but he has dismissed the applicant's application for his recusal from the arbitral proceedings and he now intends to commence the main hearing of the claim anytime from 21st August, 2020.***
>
> ***ii. The Arbitrator has deliberately abdicated his duty to treat the parties before him equally contrary to the law and the rules of natural justice.***
>
> ***iii. That Arbitrator has denied the applicant an opportunity to present its defence/response to the claim before the arbitral Tribunal.***
>
> ***iv. The applicant has lost confidence in Arbitrator's ability to fairly hear and determine the dispute before arbitral Tribunal.***
>
> ***v. The Arbitrator, in any event, has no jurisdiction in the matter for the reason that the applicant was never afforded the opportunity to participate in his appointment.***
>
> ***vi. The Arbitrator also dismissed the applicant's challenge on his jurisdiction when it is clear that he lacks jurisdiction owing to the unprocedural manner in which he was appointed as the Sole Arbitrator.***
>
> ***vii. The Arbitrator is only entitled to reasonable fees/costs for the work done by him upto the time he made a decision regarding the challenge on his jurisdiction.***

viii. The fees/costs already charged by the arbitrator is too high in the circumstances and he ought to be ordered to refund substantial part of the fees/costs.

3. The applicant narrated the sequence of events that led to the filing of this application as follows: -

> ***i) That the applicant had challenged the manner in which the Honourable Mr. Justice Aaron Ringera (hereinafter "the arbitrator") was appointed as the Sole Arbitrator and contended that the Arbitrator had no jurisdiction because he had been irregularly and unprocedurally appointed without the input or knowledge of the applicant. The applicant's said challenge on the arbitral Tribunal's jurisdiction was dismissed on 14th April, 2020.***
>
> ***ii) That the respondent was late in filing its response to the challenge on the Arbitrator's jurisdiction filed an application for extension of time, which application, although opposed, was allowed and the respondent was granted an extension of time to respond to the challenge on the jurisdiction.***
>
> ***iii) That the challenge on jurisdiction was heard by way of written submissions and a ruling dismissing it delivered on 14th April, 2020 when the Arbitrator directed the applicant to file its response to the claim within 30 days.***
>
> ***iv) That the applicant was late in filing its response to the claim and filed an applicant therefore applied for extension of time which application was however dismissed on 5th June 2020.***
>
> ***v) That from the reasoning in the decisions on the above two applications, it became clear to the applicant that the Arbitrator was biased and was also treating the parties unequally contrary to the law. The applicant therefore filed an application before the Arbitrator seeking his recusal from the arbitral proceedings. The application was heard and dismissed on 12th August, 2020.***

4. The respondent opposed the application through the replying affidavit of its Director Mr. Bao Ping who avers that the application is based on falsehoods and is intended to delay the matter as the arbitrator has been impartial and beyond reproach the Applicant has previously brought numerous frivolous Applications which all have the same substance as the current Application and they were all found to be without merit by the Learned Arbitrator, Justice Ringera and adds that this Application is the proverbial last kicks of a dying horse with regards to the Applicant's attempt to scuttle these Arbitral proceedings.

5. He faults the applicant for filing an omnibus Application in which it challenges the Arbitrator's jurisdiction, seeks orders on fees to be charged by the Arbitrator and leave to file a Defence out of time when the only issue contemplated under section 14(3), under which the Application has been brought, only relates to removal of an Arbitrator where there are justifiable doubts as to his impartiality and independence.

6. He further states that the matters raised in the instant application have already been litigated and adjudicated upon, directions issued and that the arbitral proceedings have progressed on the basis of said directions. He maintains that if the Applicant was aggrieved by the Arbitrator's rulings, it should have followed the laid down procedure for a review of the same and not seek recusal of the Arbitrator on the basis of an unfavourable ruling.

7. Parties canvassed the application by way of written submissions which I have considered.

Analysis and determination.

8. The main issue for determination is whether the applicant has made out a case for the removal of the sole arbitrator.

9. Section 14(2) and (3) of the Arbitration Act stipulates as follows: -

> ***"14(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."***

10. 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"***.

11. 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 content of paragraph 15 of the ruling is not a determination at all of the issue at hand. It was merely a necessary writing flowing from the issues and arguments presented by parties and they do not make the arbitrator incapable of acting impartially in the future in the subject of arbitration, which is payments due on the certificates No. 12 and 13. The arbitrator is still capable of determining the real issues in controversy on, and he is possessed of necessary competence to appreciate the evidence which will be produced by the parties. There was nothing conclusive of the rights of the parties in the ruling which would amount to misconduct on the part of the Arbitrator in the sense of Mustil J's formulation. 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 suggest 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".

12. In the present case, the applicant faults the sole arbitrator for bias on the basis of the arbitrator's rulings and observation that the applicant had adopted a pattern of delaying the matter. According to the applicant, the arbitrator did not treat the parties equally when he declined to allow the applicant's application for extension of time within which to file its response to the claim yet a similar application by the respondent for extension of time within which to file a response to the applicant's challenge on the arbitrator's jurisdiction was allowed.

13. The applicant is further aggrieved that its application for the recusal of the arbitrator was similarly disallowed thus precipitating the filing of the instant application.

14. The applicant outlined the reasons for believing that the arbitrator is biased as follows: -

a) When the respondent applied for extension of time to respond to the applicant's challenge on jurisdiction, the application was filed nearly three (3) months late but the Arbitrator had no difficulty allowing the application.

b) On the other hand, the applicant's application for extension of time was filed only 12 days late and yet the application was dismissed, without being heard orally, and the Arbitrator also remarked in his ruling that the applicant was engaged in "delaying game" despite the valid reasons for delay which has been presented to the Arbitrator.

c) After dismissing the applicant's application for extension of time, the Arbitrator directed that the arbitral proceedings would now proceed under Section 26(b) of the Arbitration Act, 1995. The Arbitrator further directed the applicant to pay his further fees in the sum of Kshs 491,595/= over and above the initial payment of Kshs 348,000/-, yet the same Arbitrator has shut out the applicant from presenting its case.

d) Although the Arbitrator had earlier ruled that he was not satisfied with the alleged service of the claim documents upon the applicant and directed the respondent to serve the applicant physically, the same Arbitrator dismissed the applicant's application which challenged his jurisdiction on the same ground of lack of service. This finding is contrary to the holding by the Arbitrator that the applicant was engaged in "delaying game ".

15. It was applicant's case that the totality of the arbitrator's decision to disallow the filing of its response to the claim would be to exclude him from participating in the arbitral proceedings.

16. The applicant further contended that the bias on the part of the arbitrator amounts to prejudging the dispute before him thus denying it the right to fair hearing.

17. I have carefully perused the arbitrator's ruling dated 5th June 2020 in respect to the applicant's application for extension of time within which to file a response to the claim and I note that the arbitrator rendered himself, in part, as follows: -

"6. The procedural history of this arbitration bears out the claimant's contention that the respondent is guilty of employing delaying tactics against the prosecution of the Claimant's Claim as illustrated by the following: -

a) Procedure Order for Directions No. 1 of 2019 was made on 24th July, 2019. It required the respondent to file its response on or before 27th September, 2019. The Order was duly served on the respondent who was then unrepresented.

b) On 1st November 2019, being unsatisfied with the service of the Claimant's Statement of Claim against the respondent, I issued Order No. 2 for Directions whereby I directed physical service of the Statement of Claim filed on 29th August 2019 and further directed that the respondent do file its response thereto within 30 days of its being served with the Statement of Claim. I also directed that there be a Compliance of Meeting on 14th January, 2020 to assess the parties' compliance with Order No. 2 for Directions.

c) On 5th December 2019, I received a letter dated 4th December 2019 from Paul Amuga of Amuga & Company Advocates stating that they had been instructed to act for the respondent and that they were preparing their client's response to the claim which would be filed in due course.

d) Without filing any Statement of Response as directed or at all, the respondent filed a motion challenging the

jurisdiction of the Tribunal on 19th December 2019.

e) The jurisdiction motion was dismissed as devoid of merit on 15th April, 2020 and I directed that the response be filed on or before 15th May, 2020.

f) The respondent's counsel intimation of necessity for extension of time was communicated in an e-mail to counsel for the claimant on 22nd May 2020 both dates were past the May 15th Deadline for filing the response.

7.It is manifest from the above narration of procedural history that the respondent has had more than ample time since 2019 to file its Statement of Response. Infact since December 2019, the respondent has had benefit of counsel and from counsel's own letter of 5th December 2019 to the Tribunal, counsel has been preparing the respondent's response. Indeed the letter of 5th December, 2019 belies counsel's deposition in the supporting affidavit that he had only limited instructions.

8. In the premise, the reason advanced for seeking the extension of time to file the response is a hollow sham. The Covid- 19 pandemic has nothing to do with the respondent 's failure to file its response in this arbitration. It had all the time to do so before Covid- 19.

9.The delay in filing the application is also not lost on the Tribunal. The application was only made after the expiration of the deadline for filing the response. No reason was advanced for such delay.

10.All in all, I am not satisfied that there is sufficient reason to extend time as prayed. This is a perfect case of the maxim that equity does not aid the indolent. The respondent's delaying game must be and is hereby stopped."

18. From the above extract of the arbitrator's ruling, it is clear to me that his finding that the applicant was guilty of employing delaying tactics in the matter did not arise out of the blue but was based on the history of the arbitral proceedings which the arbitrator outlined in detail before finding that the applicant was all along not keen in filing its response despite being directed to do so on several occasions.

19. In the circumstances of this case, I am unable to find that there was any bias in the part of the arbitrator in rejecting the applicant's application for extension of time within which to file a response to the claim.

20. I find that the arbitrator properly exercised his discretion in rejecting the applicant's application dated 27th May 2020 and by extension, the arbitrator's rejection of the subsequent application for his recusal was well grounded.

21. This court has not lost sight of the fact that speedy disposal of disputes is the primary intention of parties when agreeing to subject their dispute to arbitration. In this regard, it would negate/defeat the intention of the Arbitration Act if parties were allowed to delay arbitral proceedings, without any justification, as was the case in this matter as narrated by the arbitrator in the ruling delivered on 5th June 2020.

22. I have considered all the rulings made by the arbitrator in this matter and as I have already stated in this ruling, I do not find that there was any element of bias on the part of the arbitrator. I further find that the arbitrator properly interpreted and understood the matters/issues before him. I am therefore not persuaded that the applicant has established grounds for the removal of the arbitrator.

23. Consequently, I dismiss the application dated 18th August 2020 with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 22nd day of April 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:

Mr. Amuga for Applicant.

Mr. Kirika for Kindathi for Respondent.

Court Assistant: Sylvia.