



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL MISC APPL. NO. 652 OF 2019**

**PARAGON ELECTRONICS LIMITED.....APPLICANT**

**-VERSUS-**

**NJERI KARIUKI.....RESPONDENT**

**AND**

**YUSUF SHARAFALLY ESUFALI &**

**AMAMA YUSUF SHARAFALLY ESUFALI.....INTERESTED PARTIES**

**RULING**

1) This ruling is the outcome of two applications, one is dated 9<sup>th</sup> October 2019 and the other is dated 4<sup>th</sup> February 2020. In the motion dated 9<sup>th</sup> October 2019, Paragon Electronics Ltd, the applicant herein seeks for inter alia for:

*a) The sole the arbitrator, M/s Njeri Kariuki, to be disqualified and removed from continuing to preside over the arbitral proceedings in the matter of the arbitration between Yusuf Sharafally Esufali and Amana Yusuf Esufali and paragon Electronics Ltd.*

*b) The sole arbitrator, M/s Njeri Kariuki be ordered to refund all the monies he has been paid by the parties in respect of the arbitration as fees or advance on fees.*

*c) The costs of this application on full indemnity be borne by the arbitrator.*

2) The motion is supported by the supporting and further affidavit of Clemence Wakio. When served with the motion M/s Njeri Kariuki filed a replying affidavit to oppose the application.

3) In the motion dated 4<sup>th</sup> February 2020, the main order sought by the applicant is for leave to file a further affidavit to annex new material, information and documents obtained from **ELC Case no. 335 of 2015 Mary Wamaitha Kaitanny =vs= Njeri Kariuki**. The two applications were heard together and disposed of by written submissions.

4) I have considered the grounds stated on the face of the motions plus the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submission together with the authorities cited by both sides.

5) It's the submission of the applicant that the arbitrator has refused to provide them with copies of typed proceedings and records of the arbitration which would form part of the evidence before this court thus preventing it from adequately prosecuting the motion.

6) The applicant further stated that the arbitrator has by conduct and by spoken words demonstrated lack of impartiality in the arbitral proceedings.

7) It is also argued that the arbitrator lacks the professional capacity and knowledge to adequately conduct the proceedings.

8) In the motion dated 4/2/2020, the applicant averred that it has obtained new and critical information from **ELC No. 335 of 2016, Mary Kaitanny =vs= Njeri Kariuki** that further shows that the respondent is incompetent lacks integrity and incapable of conducting the arbitration. It is stated that in the aforesaid case the respondent was found guilty of contempt and sentenced to serve a custodial sentence.

- 9) According to the applicant the new evidence explains the refusal by the respondent to release the records she held in respect of the arbitral proceedings. The applicant further complained that it was denied a chance to be present during a site visit.
- 10) It is the submission of the respondent that the applications lack merit hence they should be dismissed. She pointed out that she has not shown any bias on her part throughout the arbitration process.
- 11) She also stated that she did not know any of the parties prior to taking up the appointment as an arbitrator. The respondent gave in detail the directions she gave while conducting the arbitral proceedings and that there was no lapse on her part nor favourism or incompetence.
- 12) The respondent further stated that the site visit took place in the presence of the applicant's representatives namely Kennedy Ayodi and Steve Kimathi. It is also pointed out that the applicant was even granted an opportunity to reschedule the second site visit.
- 13) The respondent submitted that the motion dated 04.02.2020 on new information has no bearing on the motion dated 9<sup>th</sup> October 2019 hence it should not be used to determine her character and ability as an arbitrator. It is stated that the ELC case differs in its nature, context and substance.
- 14) Having considered the material placed before this court together with the rival submissions, it is clear in my mind that the second application dated 4/2/2020 is meant to bring out some facts and evidence in support of the motion dated 9<sup>th</sup> October 2019.
- 15) The court will have a chance to determine the weight, the importance and relevance of such piece of information after permitting the applicant to introduce and rely on such evidence. Consequently, the motion dated 4<sup>th</sup> February 2020 is allowed thus permitting the applicant to introduce and rely on the ruling given in **ELC Case no. 335 of 2015 Mary Kaitany =vs= Njeri Kariuki**.
- 16) Having allowed the aforesaid motion, I now proceed to determine the motion dated 9<sup>th</sup> October 2019. I have already stated that the applicant is basically seeking for the removal of the sole arbitrator (respondent) for various reasons captured hereinabove.
- 17) In **Modern Engineering =vs= Miskin 15 BLR 82**, Lord Denning set the test for removal of an arbitrator by stating *inter alia* 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 this 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".***
- 18) There is also no doubt that this court has jurisdiction to order for the removal of an arbitrator under Section 13 of the Arbitration Act. The applicant has expressly stated that the respondent cannot act impartially in the arbitration process.
- 19) The applicant is bound to present cogent evidence to establish the allegation of misconduct on the part of the respondent but he failed to do so in this matter.
- 20) The applicant has not laid any grounds where a reasonable person would find that there is a likelihood that the arbitrator could be biased. An arbitrator can be removed only if circumstances exist that give rise to justifiable doubt as to his or her impartiality and independence.
- 21) The applicant has also failed to establish that the arbitrator is incompetent in the manner she handled the arbitration proceedings.
- 22) The other issue which arose is the reliance of the ruling in **ELC no. 335 of 2016**. This is the decision in which the applicant relied upon to show that the respondent lacks integrity.
- 23) There is no dispute that in ELC No. 336 of 2016 the respondent had been ordered by the court to release title documents she was in possession but she declined to do so. She was subsequently cited for contempt and eventually convicted and sentenced.
- 24) With respect, I agree with the arguments of the respondent that the aforesaid decision had nothing to do with the respondent's character and integrity in these proceedings. I find the ruling to be of no evidential value to establish proof of lack of integrity on the part of the arbitrator.
- 25) In the end, I find no merit in the motion dated 9<sup>th</sup> October 2019.

The same is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF MAY, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent