



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E197 OF 2018

PESA PRINT LIMITED.....APPLICANT

VERSUS

ATTICON LIMITED.....1ST RESPONDENT

USHINDI CREDIT LIMITED.....2ND REPENDENT

BARONS ESTATES LIMITED..... INTENDED 3RD RESPONDENT

AND

SYMPHONY TECHNOLOGIES LIMITED.....1ST INTERESTED PARTY

FAMILY BANK LIMITED.....2ND INTERESTED PARTY

DR. EKURU AUKOT T/A EA LAW CONSULTING.....3RD INTERESTED PARTY

RULING (2)

NOTICE OF MOTION

1. The Applicant filed a Notice of Motion Application dated **4th May 2020** for orders that; -

- a. The Ruling and consequential orders issued on **20th December 2019** be reviewed and/or set aside pending the hearing and determination of this application.
- b. The Ruling and consequential orders issued on **20th December 2019** be reviewed and/or set aside pending the hearing and determination of this suit.
- c. Upon granting the above prayers, this Court recuses itself from this matter and direct that the suit be placed before the Presiding Judge of the division for re-assignment to a different judge within the division for further proceedings.

2. The Application is supported by the sworn Affidavit of **David Njane** dated **4th May 2020** on the grounds that; -

- a. There were five pending applications in this matter which included three applications of the 1st, 2nd and 3rd Interested Parties' Notice of Motion Applications dated 18th March 2019, 7th March 2019 and 28th March 2019 respectively. Notice of Motion Application dated 20th May 2019 by the intended 3rd Respondent and the main Notice of Motion Application dated 11th December 2018 by the Applicant.
- b. On **10th June 2019** the Court directed that the 1st, 2nd and 3rd Interested Parties be heard first and on **15th July 2019** parties proceeded with oral hearing of the said Interested Parties' applications.
- c. In the meantime, the pleadings for the Applicant's main Notice of Motion Application dated **11th December 2018** for setting

aside the Arbitral Award were yet to close and no single party had orally been heard in court.

d. Also pending was the intended 3rd Respondent's Notice of Motion Application.

e. After twice postponing the delivery of the ruling on the Interested Parties' Application, the Court on 20th December 2019 delivered a Ruling purporting to make a determination on the Applicant's main Notice of Motion Application. However, the ruling was only made available to the Applicant on **13th February 2020**.

f. It is therefore an error apparent on the face of the ruling. Whereas the court was expected to make a ruling on the Interested Parties' Application, it made a final Ruling on the Main Application that is yet to be canvassed.

g. Since the Court has already formed an opinion on the main application, it is only fair and in the interest of justice that another judge in the division take over the subsequent proceedings in this matter.

1ST & 2ND RESPONDENTS' GROUNDS OF OPPOSITION

3. The 1st and 2nd Respondents opposed the Applicant's Notice of Motion Application dated 4th May 2020 vide the Grounds of Opposition dated 30th September 2020 on the following grounds; -

a. The Court has no jurisdiction to entertain the Application.

b. The Applicant has not met the legal threshold for review under **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**. Specifically, the Applicant has not demonstrated a mistake or error apparent on the face of the record.

c. The Applicant has not met the requisite legal threshold for recusal.

d. The Application having been filed after an inordinate delay of 5 months and served on the Respondent 5 months after filing, is an afterthought.

e. The Application is scandalous, frivolous, vexatious and an abuse of the court process.

2ND INTERESTED PARTY'S GROUNDS OF OPPOSITION

4. The 2nd Interested Party opposed the Notice of Motion dated 4th May 2020 vide Grounds of Opposition dated 11th November 2020 on the grounds that; -

a. The Court has no jurisdiction to entertain the proceedings as the Arbitration Act which is the applicable law on Arbitrations does not contemplate an application to Review an order setting aside or refusing to set aside an Arbitration Award.

b. The court has no jurisdiction to hear and determine the Application for Review as the provisions of the Civil Procedure Rules are not applicable.

c. The Application is an abuse of the court process as the court is now "*functus officio*".

d. The Application has been filed after an inordinate delay of five months.

e. There are no sufficient grounds to warrant recusal.

APPLICANT'S SUBMISSIONS

5. The Applicant submitted on the issue of jurisdiction of this Court to determine the Application and whether the Civil Procedure Rules apply and states that the proceedings before this Court are not arbitration proceedings and the Civil Procedure Rules apply.

6. It was the Applicant's submission that it has moved the court to review its decision delivered on **20th December 2019** and not the Arbitrator's impugned award. In addition, the law on review is provided for under **Section 80** of the Civil Procedure Act and **Order 45 Rule 1** of the Civil Procedure Rules the court therefore has jurisdiction.

7. The Court of Appeal in the case of ***National Bank of Kenya Limited versus Ndung'u Njau [1997] eKLR*** established the guiding principles as follows; -

"A review maybe granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

8. On whether the Application herein was filed after inordinate delay, the Applicant submitted that the impugned Ruling was delivered on the 20th December 2019. However, the same was only made available to the Applicant on 13th February 2020 upon correction of typo errors

which the Court acknowledged at the time of delivering the Ruling.

9. Further, due to the Covid-19 Pandemic, even after filing the Application on 4th May 2020, there were so many challenges experienced at the registry and the Application was only regularized in August 2020 when the same was served upon the opposing parties.

10. The Applicant submitted that this Court has already formed an opinion on the yet to be canvassed Main Application and thus it is only fair and in the interest of justice that recusal follows.

1ST & 2ND RESPONDENT'S SUBMISSIONS

11. The Respondents submitted that this Court already held the view that it lacks jurisdiction to entertain the matter (Ruling dated 20th December 2019). The impugned Ruling was informed by the finding that the Court did not have jurisdiction and thus it was incumbent upon it to down its tools as it did.

12. It was their submission that the Ruling sought to be reviewed emanated from an Application filed under **Section 35 of the Arbitration Act and Rule 7 of the Arbitration Rules.**

13. The Arbitration Act does not provide for review of a decision made pursuant to **Section 35** and therefore under **Section 10 of the Act**, the court has no jurisdiction to intervene and confer upon itself the powers to review its decision.

14. In addition, the Respondents submitted that the legal threshold for recusal of a judge was summarized by the House of Lords in the case of **Porter versus Magill [2002] 1 All ER 465** where the House of Lords held that; -

“the question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

15. The Respondents submitted that the Applicant has not met the requisite legal threshold for recusal and has not provided any evidence to prove bias or impartiality. The Application should be dismissed.

DETERMINATION

The issues for determination are;

- a) Whether the Court should recuse itself from hearing and determination of the matter in this Court.
- b) Whether the Court should review its Ruling of 20th December 2019.

ANALYSIS

COURT PROCEEDINGS

On 27th February 2019 Mr. Makokha, Counsel for the Applicant informed the Court that it was challenging the whole Arbitral Award and alleged fraud by Interested Parties on whether the guarantee was called up or not.

Mr. Wena & Mr. Karanja sought that the Court first determines if the Interested Parties were party to the proceedings.

Mr. Makokha replied that there was no formal application and the Interested Parties ought to be included in these proceedings as the Court shall hear and determine the question of fraud.

On 28th March 2019, Mr. Makokha informed Court that the Applicant filed Supplementary Affidavit and Issues for Determination.

Mr. Wena, Mr. Munene & Mr. Karanja informed Court that there were Applications by Interested Parties filed on 19th March 2019 by 1st Interested Party and on 8th March 2019 by 2nd Interested Party; and sought their involvement in these proceedings be determined first before the hearing and determination of the substantive Application.

Mr. Makori for 3rd Interested Party, was to file an Application too as he was recently instructed in the matter.

The Court granted orders that the Interested Parties' Applications to be heard first before the substantive Application.

On 3rd June 2019, Mr. Karanja informed the Court that its jurisdiction was limited and a new Application was filed. The Court sought to read the Court Record.

On 10th June 2019, Interested Parties confirmed through their Counsel on record that the Applications were filed. The 2nd Respondent, Barn Estates Ltd were not in Court nor did they respond as the had a matter **HCCC E138 of 2018** in another Court on shareholding of the Plaintiff

Company Atticon whose Ruling was scheduled on 20th June 2019.

The Court gave directions that the Application filed on 21st May 2019 would remain pending awaiting the Ruling in **HCCC E138 of 2018** and the Intended 2nd Respondent's presence to determine the way forward.

Interested Parties' Applications were to be heard first together before the substantive Application and would proceed on 15th July 2019.

On 15th July 2019, the Court heard the parties/Counsel on the Interested Parties' participation in the proceedings against the allegation of fraud.

The Court granted parties that were not present or represented to apply through the Deputy Registrar and file written submissions before delivery of the Ruling.

On 2nd September 2019, the Deputy Registrar mentioned the matter, no party appeared or made any representation.

On 20th December 2019, the Court delivered the Ruling and thereafter proceeded on annual leave and the Courts shut down for vacation. The Court could not correct the typos then away from Court when it was closed. The Court resumed on 3rd February 2020 upon which the Ruling was corrected and released to the Registry. Therefore, receiving the Ruling on 13th February 2020 had nothing to do with the Court. The events that led to delay are recorded verbatim in the Court file. The import of the Ruling read to the Parties/Counsel on 20th December 2021 was in summary as follows;

- a) The Interested Parties could not legally be part of the proceedings to stay or set aside the Arbitral Award of 24th August 2018 as they were not parties to the Arbitration Agreement executed by parties and were not party to Arbitration proceedings.
- b) The issue of fraud was not specifically pleaded and proved to the required standards.
- c) Any claim under the Guarantee would be subject to the Applicant filing suit against the relevant party.
- d) The Court lacked jurisdiction to sit on appeal on the Arbitral Award except exercise its mandate under **Section 10, 35 of Arbitration Act.****

The Applicant has from the above sought a review and recusal by the Court.

The Law on Recusal is as follows;

The Court in **R vs David Makali & Others CA Criminal Application No 4 & 5 of 1995** went on and considered;

“I take the view that the Petitioner should establish such material facts as attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons.... The Applicant must therefore specifically set out facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of the judge.....it is absolutely necessary that the party applying should lay all relevant material before court. The best way of delivering that requirement is by adopting a method that inherently enables some form of deposition and production of evidence.”

In **Jackson Mwalulu & Others CA Civil Application 310 of 2004**, it was held;

“When Courts are faced with such proceedings for disqualification of a judge; it is necessary to consider whether there is 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 fairness of administration of justice. The test is objective and facts constituting bias must be specifically alleged and established.”

In **Mumias Sugar Co Ltd vs Director of Public Prosecutions & 2 Others (2012) eKLR**;

Bias was defined as: inclination; prejudice

Prejudice was defined as: preconceived judgment formed without factual basis; strong bias;

In the case **Serah Njeri Mwobi vs John Kimani Njoroge C.A. [2015] eKLR** the court referred to **Davidson vs Scottish Ministers (2004) UKHL 34** where Lord Bingham addressed the subject on impartiality of a Judge. He emphasized on the importance of the objective judgment and stated that;

“Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorized as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of

an objective judgment to bear, which could distort the judge's judgment.”

The Republic of South Africa vs South Africa Rugby Football Union (1999) 4 SA 147 at Pg 177 the court stated as follows; -

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

In Considering the Applications of Interested Parties first and determining whether they would be part of the proceedings or not inevitably, the claims against them were referenced from the main Application for setting aside which included other grounds that the Court did not address.

Specifically, **paragraph 5,6 & 8 of the Ruling**, made reference to allegations against the Interested Parties, whereupon the Court found they were not parties to Arbitration proceedings and could not be part of the proceedings to answer to these allegations.

The issues of public policy and alleged Arbitrator's conduct or misconduct were left unresolved and pending.

Clearly, it was difficult to divorce the allegations of fraud and unjust enrichment, bribery and corruption from the Interested Parties and from/by the Arbitrator as the claims were not specifically pleaded against a particular party but generally to interested parties and Arbitrator in furthering alleged unjust enrichment.

The Court's Ruling did not determine the issue of recognition and enforcement of the Arbitral Final Award as setting aside was only considered in relation to alleged fraud, unjust enrichment, bribery and corruption against the Interested Parties who could legally be joined to these proceedings.

Therefore, at Page 37 the Court outlined its mandate under **Section 35,36 &37 of Arbitration Act**.

The court cannot exercise jurisdiction to review under **Order 42 CPR 2010** and in the case of **National Bank of Kenya vs Ndungu Njau [1997] eKLR** which outlines the grounds for review and /or appeal; review is to correct an apparent error or omission on the part of the Court. This court finds no such error. The court dealt with the applications of interested parties as moved by parties/counsel.

The Applicant was of the view that whereas the Court was to rule on the Interested Parties' Applications it made Final Ruling on the Main Application. This Court reiterates that the Court dealt with the main Application on allegations preferred against Interested Parties, in order to arrive at the conclusion, they should be sued separately as they were not parties to the Arbitration. Secondly, the allegations against them were not specifically pleaded.

From the analysis, the court has not found tangible and cogent evidence to attribute bias or conflict of interest in the matter.

The Court finds that there is no legal basis for review as the allegations are intertwined for all Arbitrator, Interested Parties and possibly Counsel but the Court dwelt on the Interested Parties.

The Court lacks any jurisdiction to review the matter as the applicable law is the Arbitration Act.

The Applicant's recourse is to prefer an appeal and rest of the Main Application remains pending.

DISPOSITION

- 1. The Court dismisses the Applicant's Application for review and recusal of the Court.**
- 2. The Applicant is granted leave to appeal and the remainder of the Main Application is stayed pending the outcome of the appeal.**
- 3. Each Party to bear its own Costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KARANJA FOR 1ST & 2ND RESPONDENT

MR. WENA FOR 2ND INTERESTED PARTY

MR. MUTUA FOR APPLICANT

MR. MAKORI FOR 3RD INTERESTED PARTY

COURT ASSISTANT: TUPET