REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E451 OF 2019

KENYA MEDICAL WOMEN'S ASSOCIATION.....APPLICANT

VERSUS

REGISTERED TRUSTEES GERTRUDE'S GARDENS .....RESPONDENT

PAUL NGOTHO, ARBITRATOR.....INTERESTED PARTY

RULING

Background

1. On or about May 2012, the applicant and the respondent entered into a negotiation on a lease over Land Reference Number 37/262/2 Kodi Road, Nairobi which was to culminate into a formal lease to be executed by the parties indicating the monthly rent to be paid to the applicant.

2. A dispute arose regarding the agreed terms with the applicant demanding payment of arrears from the respondent as per their own interpretation of what was agreed.

3. The respondent sought an injunction to stop the applicant's agent (Keysian Auctioneers) from auctioning its property and further to have the matter referred to Arbitration as per Clause 3(F) of the lease.

4. Pursuant to a court order dated 13th March 2017 the matter was referred to Arbitration and **Mr. Paul Gathu Ngotho** was appointed by as the Arbitrator.

5. On 23rd May 2018, the Arbitrator invited the parties for a preliminary meeting in which all issues on the agenda were discussed and agreed upon.

6. On 22nd June 2018 parties were served with Order for Directions Number 3 enumerating the issues discussed and agreed upon at the preliminary meeting especially paragraph E- on Settlement wherein the Arbitrator ordered that: -

> **"The parties having attempted negotiations previously, are agreeable in principle to mediation, even though that is not a contractual requirement, in order to save time and costs. The parties may seek mediation independently or seek the Tribunal's help in the appointment of a mediator. While mediation is voluntary, the Tribunal will consider a party's refusal or failure to cooperative in the apportionment of costs regardless of the outcome in these proceedings."**

7. The above order on directions precipitated the filing of the Originating Summons that is the subject of this ruling.

Originating Summons

8. This ruling is in respect to the Originating Summons (O.S) dated 9th December 2019 wherein the applicant seeks the following orders: -

> **a. That the Honourable court be pleased to terminate the mandate of Paul Ngotho, sole Arbitrator from continuing to preside over the arbitration dispute between the applicant and the respondent herein.**

b. That the Honourable court be pleased to order fresh appointment of a different sole Arbitrator by the Institute of Surveyors of Kenya as provided by the contract to determine the dispute.

c. That the Honourable court be pleased to order that these arbitral proceedings be concluded within six (6) months from the date of appointment of different Arbitrator.

d. The costs of this application be provided for.

9. The Originating is supported by the affidavit of the applicant's National Chairperson **Dr. Christine Sadia** and is premised on the grounds that-:

1. The respondent as tenant filed Nairobi High Court Miscellaneous 390 of 2016 REGISTERED TRUSTEES GERTRUDE'S GARDENS versus KENYA MEDICAL WOMEN'S ASSOCIATION & KEYSIAN AUCTIONEERS against the applicant landlord challenging distress for unpaid rent arrears arising from its lease agreement dated 11th September 2013 over LR No. 37/262/2 KODI ROAD, NAIROBI.

2. The High Court (Honourable Mr. Justice F. Ochieng) gave the ruling and order dated March 2017 in referring to arbitration the entire rent dispute and the distress for rent dispute, in accordance with the arbitration agreement contained in the lease.

3. The respondent applied to the Chartered Institute of Arbitrators Kenya (CIArb-K) to nominate an arbitrator. However, the first appointed sole arbitrator recused himself due to personal matters. Thereafter, it emerged that the stipulated appointing authority was not CIArb-K but was the Institution of Surveyors of Kenya(ISK)

4. Consequently, the respondent applied to ISK which them appointed Mr. Paul G. Ngotho as sole arbitrator. Parties thereafter filed pleadings, statements and documents in compliance with various Orders for Directions.

5. However and instead of Arbitrating the dispute referred to him as required by his mandate, the Tribunal purported to issue Order for Directions No. 3 compelling mandatory mediation or else the Tribunal would make an unfavorable order for costs against any party refusing to cooperate.

6. In issuing the directions for mandatory mediation, the Arbitrator abdicated his mandate, acted without jurisdiction and exceeded the scope of the reference before him, as follows: -

a. The Tribunal assumed a jurisdiction as mediator not vested to him by parties. His appointment was as arbitrator over the reference, not mediator.

b. The arbitration agreement DID NOT prescribe mandatory mediation neither did the court order any such mediation.

c. The Tribunal ignored the pleadings and evidence before him showing that earlier attempts at direct negotiations were unsuccessful. The Tribunal's election for mediation was therefore impractical to the unique circumstances of the case and doomed to fail.

The order for mandatory mediation was therefore a mere delay tactic intended to drag out the matter.

7. The order for mandatory mediation was meant to distract the parties and 'keep them busy' at the threat of sanction, confirming that the tribunal lacked capacity to take on the reference to arbitration at the time.

8. The applicant herein was greatly aggrieved by direction for forced mandatory mediation and filed the application for recusal of the Arbitrator. Parties exchanged pleadings and submissions on the recusal application.

9. However and even before writing the recusal ruling as required of him, the Tribunal purported to issue a demand for further deposit on costs to the tune of Kshs 840,000/= with interest thereon from 30 days of demand.

10. When the applicant herein wrote protesting against the demand for further deposit and requesting for unconditional delivery of the recusal ruling while giving reasons therefore, the Tribunal replied denying the request and penalized the applicant to pay Kshs 140,000/- also with interest thereon for merely daring to request for a delivery of a pending interlocutory ruling.

11. The applicant has now lost total confidence in the Arbitrator and is no longer willing to continue submitting its case before the said arbitrator. The applicant no applies for this Honourable court to terminate the Arbitrator's mandate as provided in Sections 14 and 15 of the Arbitration Act, on grounds that: -

12. One, the Tribunal lacks capacity and is ill –suited to conclude the reference before him. The Tribunal's hardliner position is unreasonable and unjustified because:

a. There is no statutory provision, legal precedent or rules governing arbitration which permit the Arbitrator to withhold writing any interlocutory ruling conditional to payment of additional costs.

b. The Tribunal neglected, misunderstood and misapplied the rule that costs follow the event by purporting to impose costs even before the event, the event here being the delivery of the recusal ruling. By law, costs for delivery of any ruing are apportioned in the ruling itself. The order for costs is therefore consequential, NOT a condition precedent.

c. There is no factual or legal justification for imposing interest on costs before writing the ruling apportioning the costs in the first place. Costs can only fall due once actual services are rendered by writing the ruling.

d. There is no factual or legal justification for penalizing a party to pay Kshs 140,000/= with interest thereon merely for requesting delivery of a pending ruling, and which request was unopposed in any event.

e. The imposition of a penalty of Kshs 140,000/= for merely responding to a letter is unfair, excessive and extravagant charging of costs by the Arbitrator. This breached the overriding statutory objective requiring affordable resolution of disputes, including arbitration disputes.

The collective demand for costs amounts to reasonable grounds of concluding that the Tribunal deliberately and unfairly inflated arbitral expenses to the applicant's detriment.

13. Two, there exists demonstrable and justifiable doubt as to the Arbitrator's impartiality and independence as well as capacity to conclude the Reference before him for the legal reasons that: -

a. The arbitrator unreasonably and unjustifiably delayed to write or deliver the recusal ruling since the last submissions were filed in February 2019. The delay shows lack of capacity to conduct the proceedings with reasonable dispatch.

b. The significant demand of Kshs 840,000/= and interest thereon contemplates continuation of the main arbitration proceedings yet no decision has been rendered on the recusal motion.

c. The imposed penalty of Kshs 140,000/- and interest thereon shows the Tribunal has descended into the arena of dispute between the parties and thereafter elevated its unmerited demand for costs above discharging his mandate requiring him to first write the recusal ruling before claiming any costs relating to writing of said ruling.

d. The Tribunal failed to appreciate that an interlocutory ruling is not an Arbitral Award; and there is no provision for advance payment of tribunal costs before delivery of interlocutory ruling whether in the arbitration agreement, the court order referring the matter to arbitration, the orders for directions issued, or in any statutory provision, legal precedent or rules governing arbitration.

14. Three, the delay in writing or delivering the recusal ruling contravenes the applicant's right to fair hearing in that it is denied a hearing of its case for more than 2 years since the matter was referred to arbitration in October 2017, at great expense, more particularly,

> **a. The applicant is greatly prejudiced having been dragged to court by the respondent who in turn shows no keenness to progress or advance the arbitral proceedings.**
>
> **b. The delay is proving expensive to the applicant in legal fees and related expenses. The Arbitrator's demanding for further deposit and the subsequent penalty has only inflated the applicant expenses.**
>
> **c. Again, the delay is immensely prejudicial to the applicant who is kept out of its money for a long time because the subject Kodi Road property is the key income-generating asset for the applicant which is a NGO with voluntary membership of Kenyan female Doctors and Dentists. One the one hand, the applicant (then a landlord) counterclaims sums in excess of Kshs 17 million against the respondent for accrued rent arrears over a long duration and cumulative interest thereon, and costs of these proceedings. Conversely, the respondent (then a tenant) in the claim merely seeks interpretation of the rent Clause in the lease agreements that they voluntarily signed upon legal advice signifying their consent to be bound thereby showing little or no prejudice suffered by the respondent.**
>
> **d. The delay shows that there is no reasonable prospect of expeditious conclusion of the arbitration proceedings before the present arbitrator.**

15. As a result, the applicant now invokes the principle of party autonomy which applies not only to choosing arbitration as the preferred dispute resolution method, but also autonomy in choosing their preferred arbitrator. Both conditions must co-exist before any party voluntarily submits its dispute for determination before a specific arbitral tribunal.

16. The applicant is not keen to continue submitting its dispute to the said arbitrator hence his motion of termination of his mandate by the court.

17. The applicant is not keen to continue submitting its dispute to the said arbitrator hence his motion of termination of his mandate by the court.

13. The respondent opposed the application through its Preliminary Objection dated 29th April 2020 and the replying affidavit sworn by **Daniel Kiragu**. The respondent listed the following grounds in the Preliminary Objection.

a. The application herein is frivolous and an abuse of the court process, an attempt by the applicant to scuttle the expeditious disposal of the claim as there is a similar application pending before the Arbitral Tribunal.

b. The Honourable Tribunal's direction in promoting alternative forms of dispute resolution mechanisms is in line with the guiding principles set out in Article 159(1) (c) of the Constitution of Kenya as is well within the confines of its authority and the law.

c. No sufficient grounds have been advanced by the applicant to justify a disqualification and recusal of the Arbitrator from presiding over the Arbitral proceedings.

d. The purported grounds advanced in the Applicants Notice of Motion are grossly inaccurate and cannot warrant the disqualification of the appointed Arbitrator.

14. The respondent's case is that the applicant is circumventing a similar application dated 2nd November 2018 that is pending before the arbitrator wherein it seeks the same prayers as in the present application. The respondent adds that the arbitrator withheld the ruling in the said similar application because the applicant refused to honour its obligation to pay its lawful share of the Arbitrator's fees.

15. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the termination if the Arbitrator's mandate so as to pave way for the appointment of a different Arbitrator.

16. Section 14 of the Arbitration Act (hereinafter "the Act") stipulates as follows on the subject of termination of an Arbitrator's mandate: -

Challenge procedure.

(1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

(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.

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

17. In **Chania Gardens Limited vs Gilbi Construction Company Ltd & Another *[2015] eKLR*** it was held that: -

"The first port of call to challenge the jurisdiction of an Arbitrator is the Arbitral tribunal in line with the principle that is commonly referred to in arbitration parlance in the german phrase, Kompetenz, Kompetenz. Therefore the jurisdiction of this court on matters of challenge of an Arbitrator is not original in nature……..Under Section 14 of the Arbitration Act, 1995 a challenge on an Arbitrator seeking his removal must first be heard by the Arbitrator."

18. Sections 13(3) and 14(2) and (3) of the Act stipulates as follows: -

Section 13(3): -

(3) 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.

Section 14(2) and (3): -

(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.

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

19. A plain reading of the about Section of the Act show that an application challenging the mandate of an Arbitrator should, in the first instance, be made before the Tribunal itself before the same can be handled by the High Court in its appellate jurisdiction.

20. In the present case, the respondent alluded to the fact that a similar application is pending determination by the Tribunal. It is therefore not disputed that the Tribunal has not made a determination on the issue of the termination of its mandate. I therefore find that the instant application is premature and that the applicant has not followed the correct path in invoking this court's jurisdiction.

21. My above finding on the jurisdiction of this court to entertain the application notwithstanding, I am still minded to consider the applicant's grievance that the Arbitrator abdicated his mandate/obligations by issuing Directions No. 3 compelling the parties to go to mediation in default of which an unfavourable finding on costs would be made against a party who is unwilling to cooperate.

22. I note that the said Direction No. 3 was worded as follows at paragraph E thereof: -

"The parties having attempted negotiations previously, are agreeable in principle to mediation, even though that is not a contractual requirement, in order to save time and costs. The parties may seek mediation independently or seek the Tribunal's help in the appointment of a mediator. While mediation is voluntary, the Tribunal will consider a party's refusal or failure to cooperative in the apportionment of costs regardless of the outcome in these proceedings."

23. Apart from the impugned Direction No. 3, the applicant also challenged subsequent directions issued by the Arbitrator including orders on costs which, it argued, were unreasonable thus showing lack of independence and capacity by the Arbitrator to conclude the Reference.

24. My understanding of the impugned Direction No. 3E is that it was not made in favour of any specific party before the Tribunal but was merely an attempt by the Arbitrator to prevail upon the parties to embrace mediation as a mode of dispute resolution. To my mind, such a suggestion cannot by any stretch of imagination be interpreted to mean that the Arbitrator was biased or that there was any illegality in referring the dispute to mediation. I say so because Article 159(2) of the Constitution encourages courts and indeed Tribunals, in exercising their judicial authority, to be guided by principles of alternative dispute resolution.

25. The said Article stipulates as follows: -

"Article 159 (2) of the Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, 96 Constitution of Kenya, 2010 mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted."

26. My finding is that the mere fact that the dispute was referred to arbitration did not preclude the arbitrator from recommending mediation if he deemed it appropriate. In any event, the Arbitrator noted that mediation is voluntary save that refusal or failure to cooperate in the process would be factored in the apportionment of costs of the arbitration. I further find that besides issuing directions the Arbitrator had not made any findings on the substantive dispute before him from which the court can conclude that he was biased.

27. My take is that the Arbitrator was merely impressing upon the parties to opt for mediation which is a cheaper forum of dispute resolution. I find that the said direction on mediation cannot be said to be oppressive or favouring one party as the applicant seemed to suggest.

28. Furthermore, it did not escape the attention of this court that it is now over 4 years since this court (differently constituted) issued the ruling referring the dispute to arbitration in accordance with the arbitration agreement contained in the parties lease.

29. Arbitration, by its very nature, is intended to be a faster and more efficient method of settling disputes as opposed to the court process which is often dogged with numerous procedural hurdles. It however appears that the conduct of the arbitral proceedings in this matter has been sluggish to say the least. I note that there was also the claim, by the applicant, that the Arbitrator even withheld a ruling on the basis

that his fees had not been settled. My finding is that, if the allegation is true, then this ruling should be served upon the Arbitrator for his attention as this court's position is that he should conclude the arbitral proceedings in the shortest time possible and pursue his fees through the proper channels that are provided for under the law.

30. Having regard to the findings and observations that I have made in this ruling, I find that the Originating Summons dated 9th December 2019 is not merited and I therefore dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 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:

Ms Adunga for the Applicant.

Mr. Onyango for the Respondent.

Court Assistant: Sylvia