Zamara Risk and Insurance Brokers Ltd & 4 others v Mugo (Miscellaneous Civil Case E182 of 2021) [2021] KEHC 67 (KLR) (Commercial and Tax) (24 September 2021) (Ruling)

Neutral citation: [2021] KEHC 67 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL CASE E182 OF 2021

A MABEYA, J

SEPTEMBER 24, 2021

BETWEEN

ZAMARA RISK AND INSURANCE BROKERS LTD ..... 1ST APPLICANT

MICHAEL GITAU WAWERU ..... 2ND APPLICANT

SHERA BURHAN GULAMHUSEIN NOORBHAI ..... 3RD APPLICANT

SUNDEEP K. RAICHURA ..... 4TH APPLICANT

JAMES OLUBAYI ..... 5TH APPLICANT

AND

ERICK RUGO MUGO ..... RESPONDENT

RULING

1. The respondent is a former employee of the 1st applicant. He was also a member of the Employees Share Ownership Plan ("ESOP") established by Alexander Forbes Financial Services East Africa Limited and Alexander Forbes Risk and Insurance Brokers Limited by a deed dated 19/11/2015.

2. Clause 20 of the deed provided that in case of a dispute, there be recourse to arbitration by a single arbitrator appointed by the parties, failure to which the Chairman of the Chartered Institute of Arbitrators would appoint one upon the application of a party.

3. Upon the respondent's termination, he claimed for a refund of his shares from Zamara Actuaries, Administrators & Consultants Ltd which denied the claims. The parties failed to agree on an arbitrator causing the respondent to apply to the Chairman of the Chartered Institute of Arbitrators. The Chairman appointed one Azim Taibjee.

4. In its defence before the Tribunal, Zamara Actuaries, Administrators & Consultants Ltd alleged that it lacked locus standi to be sued for matters relating to ESOP. The respondent realized that he had brought a claim against the wrong party and made an application to enjoin the applicants to the arbitral proceedings. The same was allowed.

5. Aggrieved by that decision, the applicants filed an application dated 29/10/2020 challenging the joinder. The same was denied vide the arbitrator's ruling/interim award-2 delivered on 19/2/2021.

6. The applicants were aggrieved by that decision and filed the instant application dated 15/3/2021 under section 14 of the . The application was supported by the affidavit of James Olubayi, the 5th applicant which he swore on behalf of all the applicants on 15/3/2021.

7. The applicants sought orders to stay the arbitral proceedings pending the hearing of the application and orders to set aside the ruling/interim award-2. They also sought for the removal of the arbitrator.

8. The applicants' case was that the arbitrator lacked power to allow joinder as there was no provision under the allowing the tribunal to join new parties to ongoing arbitral proceedings. That only section 16 of the Nairobi Centre for International Arbitration that provided for such joinder under an elaborate process which was not followed. That the arbitrator thus acted in excess of his jurisdiction and was not impartial.

9. The respondent opposed the application vide his lengthy but an undated affidavit. He averred that the application was irregular as it was not predicated on any suit contrary to Rule 3 and 11 of the *Arbitration Rules*, 1997, and Order 3(1) and 37 of the *Civil Procedure Rules,2010*, 2010.

10. That the application was also wrongly brought under section 14 of the ("the Act") as opposed to section 17 of the Act. That the 5th applicant did not produce a written authority or 1st applicant's resolution approving the institution of the application. That the matter was res judicata by dint of section 14(3) of the Act as it had already been ruled against by the tribunal and no appeal had been preferred.

11. The respondent further averred that there were no compelling reasons to stay the proceedings. That there was no just cause to set aside the arbitral ruling/award. That the applicants had already submitted to the arbitrator's jurisdiction by filing a notice of appointment as opposed to a notice of appointment under protest. That presence of the applicants was necessary as they were parties to the trust deed.

12. The applicants filed a supplementary affidavit sworn by James Oluyabi on 20/4/2021. He contended that the application was properly before Court. That the application challenged the arbitral award and was therefore was not res judicata.

13. The applicants filed their submissions dated 29/4/2021 with supporting authorities. The respondent also filed his submissions dated 14/5/2021 with supporting authorities. I have seen and considered the pleadings, evidence and submissions herein.

14. The issues for determination are whether the arbitrator's jurisdiction was properly challenged and whether he should be removed. However, before addressing those issues, I will first address what appears to be a preliminary objection raised by the respondent.

15. The respondent did so on several grounds; that the application was not properly before court as it was brought under the wrong provision of the law; that there was no substantive suit upon which the application was predicated upon; that the applicants failed to produce written authority or the 1st applicant's resolution to bring the application and that the matter was res judicata having been determined by the tribunal.

16. On the first ground, it was the respondent's submission that the application ought to have been brought under section 17 of the Act which provides for appeals to the High Court. I do not agree with this submission. It is clear that the application was brought under section 14 of the Act. That section provides for removal of an arbitrator. Prayer 5 of the application seeks the removal of the arbitrator.

17. Even though the applicants also challenged the arbitrator's ruling on joinder, it cannot strictly be said that the application is brought under the wrong provisions. The prudent thing for the applicants to have done was to quote all the relevant laws that supported their orders. However, failure to do so cannot automatically lead to the death of the application.

18. This Court is bound by Article 159 of the *Constitution of Kenya,2010*. Dismissing the application on grounds of failing to quote all the necessary laws would be too technical and not just. That ground is rejected.

19. The second ground was that the Motion was not predicated upon any suit and was therefore defective. Counsel for the respondent relied on *Fidelity Bank Limited vs John Joe Kanyali* (2014) eKLR wherein it was held that a Notice of Motion is not a manner prescribed for instituting a suit. I have considered the authority.

20. That was a civil matter. The Court must remain alive that the dispute before it emanates from an arbitral proceeding. In *Anne Mumbi Hinga vs. Victoria Njoki Gathara* [2009] eKLR the Court of Appeal held: -

> " A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the *Civil Procedure Act* and rules do not apply to arbitral proceedings because Section 10 of the makes the a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the ..."

21. In *Kamconsult Limited Vs Telkom Kenya Limited and Another* (2016) Eklr, it was held that the is a complete code by itself except as regards enforcement of the award/decree where the Arbitration Rules 1997 apply, and the Civil Procedure Rules where appropriate.

22. Section 14 (3) of the provides: -
"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.

23. The Act does not specifically provide for the procedure to be used in an application to the High Court under that section. Indeed, Rule 3 of the Arbitration Rules 1997 excludes section 14 in the use of originating summons when approaching the High Court. The Rule provides: -

> " (1) Application under section 12, 15, 17, 18, 28 and 39 of the Act shall be made by Originating Summons ..."

24. Having found that the application was properly brought under section 14 of the , the strict procedure for bringing a matter before court under section 17 as provided for by the Arbitration Rules 1997 at Rule (1) and (3) does not apply. There being no specific procedure provided for in the Act, the respondent's submission that the applicants ought to have approached the Court only by way of originating summons fails.

25. His submission that the application is defective for lack of a substantive suit is based on the *Civil Procedure Act* which is not applicable in arbitral proceedings. Accordingly, that ground also fails.

26. The other ground of the objection, was that the applicants failed to produce written authority or the 1st applicant's resolution to bring the application. On this, I fully associate myself with the case of *Kandara Residence Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties)* [2020] eKLR wherein the court held: -

> " ... it is important to note that though over time, there has been a requirement for a written authority to be presented, the Courts have pointed out that the said written authority is not necessary as long as the deponent has stated that he has the said authority... therefore this court finds and holds that the Preliminary objection based on non-existence of the 1st Plaintiff and lack of written authority are not merited and the Court dismisses the same".

27. The other ground was that the matter was res judicata as the applicant's application objecting to the joinder had been heard and determined by the arbitrator. I have already found that the gist of the application before me is removal of the arbitrator under section 14 of the . However, I do take cognizance of the fact that the applicants sought for an order that this court determines the application objecting joinder dated 29/10/2020. I agree with the respondent that such a prayer is not available to the applicants as it could only be raised on appeal. There is no appeal before me. All the objections are dismissed.

28. I now turn to the main issue before me, whether the applicants have established grounds for the removal of the Arbitrator. Section 14 of the Act provides for challenge procedure as follows: -

> "(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".

29. It is clear from the foregoing that there is a clear procedure provided for the removal of an arbitrator. The challenge must first be heard by the arbitrator before an application for his removal can be instituted in the High Court. In *Chania Gardens Limited v Gilbi Construction Company Limited & another* [2015] Eklr, Gikonyo J. observed: -

> "Undoubtedly, the challenge has to be decided first by the arbitrator before the party challenging the arbitrator applies to the High Court for removal of the arbitrator. The application before me offends all these gallant provisions which are aimed at protecting the arbitral proceedings, and therefore, serves irreplaceable purpose in adjudication of arbitrations. It would certainly fail on that front ..."

30. I fully endorse the foregoing in the present case. The applicants did not follow the laid down procedure. Their application has failed the procedural test. Will it survive on merit?

31. To answer this, I must make recourse to the grounds for removal of an arbitrator. These grounds are provided for under sections 13 of the Act which provides: -

> "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.
>
> (2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.
>
> (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.
>
> (4) 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".

32. The applicants raised two main grounds; that they were not given an opportunity to nominate the Arbitrator and that the arbitrator did not have jurisdiction to order joinder of parties. Are there circumstances which exist that give rise to justifiable doubts as to the impartiality and independence of the arbitrator?

33. In *Zadock Furnitures Limited and Another v Central Bank of Kenya* (2015] Eklr, Gikonyo J. correctly stated as follows: -

> " The grounds for removal of arbitrator are set out in section 13(3) of the Arbitration Act, but the one which is relevant to this application is...only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence... The words ''only if'' and ''justifiable doubts'' are important in a decision under section 13(3) of the Arbitration Act. And the arbitrator recognized that fact. The words suggest the test is stringent and objective in two respects: a) the Court must find that circumstances exist, and those circumstances are not merely believed to exist; and b) those circumstances are justifiable; this goes beyond saying that a party has lost confidence in the arbitrator's impartiality into more cogent proof of actual bias or prejudice".

34. Further, in *West Park Limited v Villa Care Limited & another* [2020] Eklr, Majanja J. observed: -

> " The test adopted by the Act is stringent. It is intended to weed out frivolous allegations not founded on facts. The application must be based on the circumstances that exist and those circumstances must be justifiable. This test is in consonance with the prevailing legal formulation for the test for recusal of judicial officers emerging from our superior court where the courts have held that the test is not subjective based on the feelings or belief of the parties aggrieved but of a reasonable person with knowledge of the facts in issue".

35. Guided by the foregoing, have the applicants made out a case? It appears that the main complaint arose out of the arbitrator's ruling that allowed the applicants to be joined in the proceedings. The other complaint is that the applicants were not given an opportunity to nominate an arbitrator.

36. Firstly, the arbitrator was not appointed by any of the parties to the arbitral proceedings. He was appointed in accordance with the Trust Deed to the parties' applicants are parties. The appointment was proper and the complaint that the applicants were not given an opportunity to appoint the arbitrator is but frivolous and does not lie.

37. As to the allegation of bias, that is also unfounded. The fact of joinder alone cannot connote impartiality or bias. There is no dispute that the applicants were parties to the Trust Deed. That they are the correct and proper parties to the dispute between the entity the respondent has issues with and the respondent. My view is that the arbitrator is the master of procedure and the court will not imply bias due to a misstep in the proceedings.

38. The upshot is that the application has not met the conditions for removal of the arbitrator under the Act. The entire application is without merit and is hereby dismissed with costs. The arbitral proceedings that were stayed pending the ruling may now be proceeded with without any further delay.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE