IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPL. NO. E671 OF 2020

BETWEEN

WEST PARK LIMITED................................APPLICANT

AND

VILLA CARE LIMITED...................1ST RESPONDENT

KENNETH WYNE MUTUMA.........2ND RESPONDENT

RULING

Introduction and background

1. This decision concerns a challenge to the appointment of the Arbitrator under **sections 13** and **14** of the ***Arbitration Act*** ("the ***Act***"). The applicant (also referred to as "West Park") has moved the court by the Notice of Motion dated 27th March 2020 seeking an order that the 2nd respondent, Kenneth Wyne Mutuma ("the Arbitrator") be removed as arbitrator in the reference between it and the 1st respondent (also referred to as "Villa Care").

2. The facts giving rise to the application are set out on the face of the application and the supporting affidavit of Norman Khagai Asega, the advocate for West Park dealing with the reference before the Arbitrator, sworn on 27th March 2020. The application is opposed through the affidavit of the Villa Care's advocate, Joseph Makumi. Both parties filed written submissions to support their respective positions. I note that the Arbitrator is entitled to appear in the matter in accordance with **section 14(4)** of the ***Act*** but has elected to leave the matter to the court to decide on the basis of the material before it.

3. Before I deal with the matters in dispute a brief background will suffice. By a letter dated 6th August 2019, the Chartered Institute of Arbitrators ("the Institute) nominated the Arbitrator to arbitrate a dispute between the parties concerning commissions payable in respect of marketing services for part of a property belonging to West Park. He accepted the appointment by his letter of 13th August 2019.

4. By a motion dated 27th February 2020, West Park moved the Arbitrator for an order that, *"The Honourable Arbitrator Dr Kenneth Wyne Mutuma does recuse himself from hearing and determining this dispute."* In his deposition in support of the application, Mr Asega stated that there existed justifiable grounds for existence of conflict of interest between the Arbitrator and Villa Care and that West Park had lost faith in the Arbitrator's ability to be impartial owing to his failure to disclose material change of circumstances that would bring about the conflict of interest. The facts upon which the application was based are that the Arbitrator had accepted to act as arbitrator in another reference between Villa Care and another company, Waiyaki Way Developers Limited, where Mr Makumi was acting for Villa Care

5. The Arbitrator dismissed the application by an interlocutory ruling dated 12th March 2020 on the ground that the applicant had not established a case for recusal. The applicant has now challenged the Arbitrator under **section 14** of the ***Act***. Under **section 14(3)** thereof, the High Court has original jurisdiction to determine the matter on the facts brought before whereupon it may confirm the rejection of the challenge or may uphold it and remove the arbitrator.

Issues for determination

14. The substantive question for resolution is whether West Park has established grounds for removal of the Arbitrator under **sections 13** of the ***Act*** which provides as follows:

13. (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.

15. From the depositions and submissions, West Park raised three grounds to challenge the Arbitrator as follows:

(i) That the Arbitrator accepted an appointment as arbitrator in a reference in which Villa Care was the claimant and was represented by the same Advocate in the present case.

(ii) The Arbitrator failed to disclose the appointment to the parties timeously.

(iii) That the Arbitrator allowed an oral application for leave to amend by the advocates for Villa Care.

Applicant's Case

16. Counsel for West Park raised two issues for resolution. The first was whether the Arbitrator was guilty of non-disclosure and therefore in breach of **section 13(2)** of the ***Act*** and second, whether there exists a conflict of interest between the West Park and the Arbitrator.

17. Counsel for the applicant explained that the Arbitrator's duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence to all the parties is from the time of appointment, throughout the proceedings until determination of the matter. Counsel relied on the case of ***Modern Engineering v Miskin*** **[1981] 1 Lloyds LR 513** where the court considered that the question in such circumstances is whether the way the arbitrator conducted himself in such a way that the parties can no longer have confidence in him. Counsel submitted that it is for the parties to determine whether or not doubts arise as to the impartiality or independence of the arbitrator. Counsel submitted that even if the Arbitrator thought nothing of the subsequent appointment, it was his duty inform the parties of the development.

18. On the second ground, counsel for the applicant submitted that the Arbitrator failed to make the disclosure without delay and it was counsel who raised the issue and in any case, the disclosure could even have been made in ordinary correspondence when the conflict became apparent. He contended following the failure to make the disclosure, West Park was apprehensive that Villa Care and the Arbitrator were working together to defeat the course of justice with the Arbitrator acting as a gate keeper for Villa Care. Counsel submitted that justice must not only be done but also be seen to be done as it is important that parties have confidence in the arbitrator as the arbitral process is consensual. He added that given that the matter in the two references were similar there was a real likelihood that the decision reached in whichever matter that is first concluded would be replicated given that the only variable in both matters was West Park.

19. As regards the oral application for amendment made during the arbitral proceedings, Mr Asega deponed that after the ruling on the recusal was delivered, Mr Makumi made an oral application to amend his pleadings despite the fact that the pleadings had closed and the matter certified ready for hearing. He further stated that without requesting him to respond and disregarding the rules of procedure, the Arbitrator granted leave to amend the pleadings. That it is only after he raised an objection that the Arbitrator directed that Mr Makumi to file a formal application. Counsel argued that the Arbitrator's conduct in this instance was indicative of bias.

20. Counsel for the applicant relied ***Bremer v Ets Soules*** **[1985] 1 Lloyd LR 160** where Mustill J., explained that an arbitrator may be removed for actual bias where a party proves that the arbitrator is predisposed to favour a party or act unfavourably towards another or imputed bias where there relationship between the arbitrator and the parties or the relationship between the arbitrator and the subject matter is such as to create an evident risk that the arbitrator has been or will in the future be incapable of acting impartially. In the latter case, proof of actual bias in unnecessary.

21. The applicant submitted that Arbitrator will not act impartially as he failed to disclose the conflict of interest between him and Villa Care and the familiarity between them set out meets the requirements for removal of the arbitrator.

1st Respondent's Case

22. In response to the application, Villa Care took the position that none of the grounds raised fall within the ambit of **section 13(3)** of the ***Act*** to warrant removal of the Arbitrator.

23. On the issue of disclosure, Counsel for the 1st respondent submitted that the Arbitrator was still within time to disclose his subsequent appointment on 13th February 2020 being the earliest opportunity when the tribunal sat after his subsequent appointment as there was nothing urgent about informing the parties by email as there was no agreement on the manner of communication. He contended that nothing bars an Arbitrator from accepting a subsequent appointment in a matter involving Villa Care as a party and the same advocates representing it. In his view, the facts do not demonstrate any circumstances in the Arbitrator's conduct denoting conflict of interest or bias against West Park.

24. Counsel further submitted that the circumstances which the applicant complains of are not uncommon as an advocate may appear before the same judicial officer representing the same party against different defendants in different matters. He maintained that unless there is evidence to demonstrate bias, the relationship between the advocate and the judicial officer or even Arbitrator is always professional and acceptable. Counsel maintained that even when cases are similar, the duty of the Arbitrator is to make a decision based on the case before him on its merits and there is nothing to imply that the Arbitrator in this case would do otherwise.

25. In response to the complaint that the Arbitrator dealt casually with the oral application, Counsel submitted that an application to amend has no formula or procedure and the making of the application was within its right to make an oral application in light of **section 24(4)** of the ***Act*** which allow parties to amend the claim or defence unless otherwise agreed or unless the tribunal considers it inappropriate. Counsel submitted that the Arbitrator dealt with the applicant's objection and directed a formal application be filed. In these circumstances no bias could be implied.

26. Counsel for the respondent cited the decision of Gikonyo J., in ***Chania Gardens Limited v Gilbi Construction Company Limited & Another*** **NRB HC Misc Appl No 482 of 2014 [2015] eKLR**, to submit that it is not enough to merely state that the arbitrator is incapable of acting impartially in the arbitration. Cogent evidence is required to prove the misconduct, and invariably, the specific instances or matter constituting the misconduct must be tabled before court. This will show the distinction between misconduct and mere perception. Counsel urged the court to adopt the test stated by **Steve *Gatembu*** in ***Arbitration Law and Practice in Kenya*** (p 54) that;

> *The test whether a person is in position to act judicially and without any bias has been suggested 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*".

27. Counsel concluded that from the facts of this case, the applicant had not established any grounds from which a reasonable person would think that there is 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.

Determination

28. Resolution of the three grounds on which the challenge to the Arbitrator is grounded depends on the test to be applied and the threshold of evidence necessary to conclude that there are, "*circumstances exist that give rise to justifiable doubts as to his impartiality and independence*."

29. In making this determination, it is important to establish the test applicable. Both sides have cited various decisions on this point but the starting point must be **section 13** of the ***Act***. In this respect, I would adopt the words of Gikonyo J., in ***Zadock Furnitures Limited and Another v Central Bank of Kenya*** **HC Misc. Application No. 193 of 2014 [2015] eKLR** where he stated as follows:

> *[30] 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*

32. As the learned Judge suggests, 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.

33. In ***Justice Philip K. Tunoi and Another v Judicial Service Commission and Another*** **NRB CA Civil Appeal No. 6 of 2016 [2016] eKLR**, Court of Appeal adopted the decision in ***Porter v Magill*** **[2002] 1 All ER 465** where the court held that the test for apparent bias is *"[W]hether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." The same position was taken by the Supreme Court (per Ibrahim J.) in **Jasbir Rai and 3 Others v Tarlochan Singh Raid and 4 Others SCOK Petition No. 4 of 2012 [2013] eKLR** that, "The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."*

34. Based on the principles outlined has the applicant made out a case? From the evidence, it is not disputed that the Arbitrator accepted a subsequent appointed as arbitrator in a matter involving Villa Care which was represented by the same advocate representing it in these proceedings. It is important to note that the said appointment was not solicited as it was an appointment by the Institute. The appointment was subsequent to the present reference hence could not be disclosed at the time material to the appointment. The appointment was disclosed at the meeting of 13th February 2020 which was the earliest opportunity the issue could have been disclosed. While I agree with the applicant that it was possible to disclose this fact by email or by letter, the law and procedure does not prescribe the manner in which the disclosure should be made and in this case the opportunity where both parties were present was the earliest opportunity in relation to those proceedings.

35. The duty to disclose depends on whether the circumstance sought to be disclosed give rise to justifiable doubts about the arbitrator's impartiality and independence. In this case, the relationship between the Arbitrator on one hand and counsel for the 1st respondent and his client is not personal, it only arose because the Arbitrator was appointed to deal with the subsequent reference by the Institute. I agree with counsel for the 1st respondent that there is no rule that prohibits an arbitrator from handling subsequent reference involving one or more of the same parties or one involving an advocate who has appeared before him. Indeed, it is normal in a court setting for a judge to deal with the

same advocates representing the same parties in several disputes yet the issue of impartiality and independence for that reason only does not arise.

36. The two references are, in my view, separate and the arbitrator will be required to deal with each of them on their own merits. I do not see any reason that a person seized of these facts would conclude that the arbitrator would lack impartiality or independence. Having reached that conclusion, this is not a matter that the arbitrator had to disclose in the circumstances. It is for this reason that the disclosure was, as the Arbitrator noted, a matter of courtesy. Indeed it would be good practice to disclose the fact to the parties in order to allay their fears but ultimately the test is not based on the party's subjective view but on an objective consideration of the facts.

37. A similar situation arose in ***Halliburton Company v Chubb Bermuda Insurance Limited*** **[2018] EWCA Civ 817**. In that case the court was called upon to consider whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias and whether and to what extent he may do so without disclosure. On the first issue, the court concluded that:

> *[51] ……. Arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality. Objectively this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question and that is equally so where there is a common party.*

38. On the second issue, the court held that while non-disclosure would be a factor to be taken into account in considering the issue of apparent bias, the non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required. It concluded that:

> *[77] For reasons already given, viewed objectively, we do not consider that the mere fact of an appointment in a related reference with only one common party would in and of itself justify an inference of apparent bias. We accept that M's acceptance of a closely related appointment also involving Chubb may give rise to legitimate concerns in the eyes of Halliburton, and that these might have been alleviated by disclosure. However, as has already been explained, in order to lead to the objective conclusion of apparent bias something more would be required, and that must be "something of substance".*

39. The aforesaid position comports with the test set out in **section 13** of the ***Act*** and buttressed by judicial authority that requires something more, something of substance or circumstances that exist which would justify the removal of the arbitrator. The fact of a subsequent appointment without more falls short of the threshold.

40. The final ground of challenge is whether, by allowing the 1st respondent's oral application for amendment, the arbitrator was biased by waiving procedural requirements. On this issue, it is recognised that the parties have the right to amend their pleading subject to an agreed procedure. **Section 24(3)** of the ***Act*** provides as follows:

> *24(3) Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.*

41. Counsel for the applicant did not demonstrate what rules were agreed upon for making an application for amendment. As I understand, counsel for the 1st respondent made an oral application for amendment and when counsel for the applicant objected, the Arbitrator directed that a formal application be heard despite having acceded to the amendment. To any reasonable person following the proceedings, counsel for the applicant was given the opportunity to object and will of course ventilate his objection in due course to the formal application. I hasten to add that the Arbitrator is the master of procedure and the court will not imply bias due to a misstep in the proceedings. I do not find any facts that would justify recusal in this instance.

Disposition

42. For the reasons I have set out above, I dismiss the Notice of Motion dated 17th March 2020 with costs to the respondents.

DATED and **DELIVERED** at **NAIROBI** this **14th day of AUGUST 2020**

D. S. MAJANJA

JUDGE

Ms Wanja instructed by N. K. Mugo and Company Advocates for the applicant.

Ms Karwitha instructed by J. Makumi and Company Advocates for the 1st respondent.