



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL APPLICATION NO 618 OF 2019

NANCY WANGUI NJUGUNA.....1ST APPLICANT

JAMES NJUGUNA KAGWIMA

(Trading as Glorious Primary School).....2ND APPLICANT

VERSUS

NANCY NJERI GITAU.....1ST RESPONDENT

JAMES MUTA GITAHU.....2ND RESPONDENT

MATTHEW K. ITONGA.....3RD RESPONDENT

RULING

1. In their Notice of Motion application dated and filed on 23rd April 2019, the Applicants sought for orders that this court determine the termination or otherwise of the 3rd Respondent's mandate vis-à-vis various pronouncements in Nairobi **CMCC No 13299 of 2004 Nancy Wangui Njuguna vs Nancy Njeri Muta**, **Nairobi HCCC No 766 of 2006 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another** and **Nairobi Court of Appeal Civil Appeal No 98 of 2009 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another** in regards to the conduct of arbitration proceedings and that this court be pleased to give any further orders that it deems necessary in the interest of justice. The said application was supported by the Affidavit of the 1st Applicant on her own behalf and on behalf of the 2nd Applicant herein.

2. The Applicants contended that they entered into a Memorandum of Understanding with the 1st Respondent for the running of a school/venture on Plot 489 (sic). However, a dispute arose between them and the 1st Respondent in the way she was running the venture/school and they filed **CMCC No 13299 of 2004 Nancy Wangui Njuguna vs Nancy Njeri Muta** to restrain the 1st Respondent from running the school and/or decision making of the school.

3. As the Memorandum of Understanding had a clause requiring that all disputes be referred to arbitration, the Applicants and the 1st Respondent entered into a consent to refer the matter to arbitration. Two (2) years later, the Applicants filed a Notice of Discontinuation in **CMCC No 13299 of 2004 Nancy Wangui Njuguna vs Nancy Njeri Muta**. Subsequently, they filed **Nairobi HCCC No 766 of 2006 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another** which was seeking the same prayers as in **CMCC No 13299 of 2004 Nancy Wangui Njuguna vs Nancy Njeri Muta**.

4. The High Court stayed the proceedings in the High Court, overturned the lower court's decision to uphold the Notice of Discontinuation and referred the parties back to arbitration. The High Court directed that the arbitration be concluded within one hundred and fifty (150) days with leave to extend the period. The Court of Appeal upheld the decision of the High Court in that regard.

5. The Applicants stated that no arbitration was concluded within the stipulated period and hence they sought leave to amend the plaint in **CMCC No 13299 of 2004 Nancy Wangui Njuguna vs Nancy Njeri Muta** and to have the dispute determined by the court but the said application was rejected and the parties referred back to arbitration. Together with the 1st Respondent, they had appointed the 3rd Respondent to be the arbitrator to hear and determine their dispute. However, since 2006, the matter was still unresolved and that despite being requested to proceed with the matter, he had failed to do so. They averred that it was paramount that the resolution of the matter be expedited.

6. They pointed out that they were ready and willing to abide by any terms and conditions that would be imposed by the court for the

granting of the orders that they had sought herein. It was their contention that the 1st respondent would not suffer any prejudice if the application was allowed and urged this court to allow their application as they stood to suffer irreparably and their rights would be infringed without being given a chance to be heard fairly.

7. In opposition to the said application, on 25th November 2019, the 1st and 2nd Respondents filed a Notice of Preliminary Objection that was dated 21st November 2019. On the same date, they also filed a Replying Affidavit that was sworn by the 1st Respondent on 21st November 2019 on her own behalf and on behalf of the 2nd Respondent herein.

8. The 1st and 2nd Respondents averred that the Applicants had frustrated the arbitration process by declining to submit themselves to the arbitral process and purporting to terminate the arbitral proceedings vide a letter dated 10th November 2009, irregularly and/unlawfully withdrawing CMCC No 13299 of 2004 with the intention of defeating the arbitral proceedings, filing HCCC No 766 of 2006 seeking similar orders, which proceedings were stayed and parties ordered to proceed to arbitration and that they Applicants had sought to have the said decision set aside, which was evidence of abuse of the court process.

9. They urged this court to strike out the present application as the Applicants had failed to comply with the directions of the High Court and the Court of Appeal and had instead filed several applications which they termed, mischievous. They raised similar issues in their Notice of Preliminary Objection and added that the present application was in breach of Sections (6) and (7) of the Civil Procedure Act Cap 21 (Laws of Kenya) and Orders (3) and (4) of the Civil Procedure Rules, 2010.

10. On his part, on 24th February 2020, the 3rd Respondent filed Grounds of Opposition dated 21st February 2020. He also asserted that the 1st and 2nd Respondents that the Applicants had filed multiple court cases relating to the issues that had been raised herein. It was his further contention that the proceedings were out of time in terms of Section 4(a) of the Limitation of Actions Act Cap 22 (Laws of Kenya).

11. He pointed out that the 2nd Applicant was not a party in the previous suit. He was categorical that he was an independent arbitrator and asked that no adverse order be made against him. He stated that he had never been moved for further hearing in the arbitral proceedings and that he was willing to abide by any orders of the court.

12. In their Written Submissions, the Applicants were emphatic that they forwarded their documentation to the 3rd Respondent but that he never commenced the arbitral proceedings and hence his failure to act could not be put down on them to deny them justice. They further stated that they wrote to the Chartered Institute of Arbitrators which suggested names of arbitrators to replace the 3rd Respondent herein but that the 1st and 2nd Respondents rejected the names.

13. The Applicants also asserted that the 3rd Respondent and the 1st and 2nd Respondents had a previous business relationship prior to the 3rd Respondent's appointment as an arbitrator, which he did not comment about when asked to recuse himself due to a conflict of interest and that on 17th September 2016, he did write to them informing that that he was not able to continue arbitrating the matter.

14. In this regard, the Applicants relied on Section 15 of the Act (**sic**), Section 14 (2,3,4,5 and 6) (**sic**) of the Arbitration Act and the cases of Josephat Murage Miano & Another vs Samuel Mwangi Miano Miano & Another [1997] eKLR , Nyanga'u vs Omosa Nyakwara [1986] KLR 712 amongst other cases where all the cases looked at removal of an arbitrator due to misconduct in support of their case.

15. They further urged this court to award them costs and that the application be allowed as follows:-

- 1. That the mandate of the 3rd Respondent be terminated.**
- 2. That the 3rd Respondent does surrender all documents deposited with him by the respective parties within seven (7) days in regards to this matter.**
- 3. That parties to consent on appointment of a new arbitrator within the next thirty (30) days failure to which each party is at liberty to write to the Chartered Institute of Arbitrators to appoint an arbitrator on the parties' behalf.**
- 4. That costs be awarded to the Applicants.**

16. Despite having been granted an opportunity to file his Written Submissions, the 3rd Respondent had not filed the same at the time of reserving the Ruling herein. On the other hand, the 1st and 2nd Respondents submitted that the 3rd Respondent ought not to have been enjoined in the proceedings herein as he was an independent and non-partisan party. They further argued that parties had not shown how he had failed to take action. They reiterated his assertion that the 2nd Applicant was not a party in the previous proceedings and that his name ought to be struck out of the proceedings herein.

17. Having perused the parties' affidavit evidence, preliminary objection and Written Submissions, it appeared to this court that several issues had been raised herein. They were as follows:-

- 1. THAT the 2nd Applicant ought to be struck out from the proceedings herein.**
- 2. THAT the present application was *res judicata*.**

3. THAT the mandate of the 3rd Respondent ought to be terminated.

4. THAT the 3rd Respondent ought to be removed for misconduct and conflict of interest.

5. THAT another arbitrator ought to be appointed to proceed with the pending arbitral proceedings.

18. The court therefore dealt with the same under the following distinct and separate heads.

I. STRIKING OUT OF THE 2ND APPLICANT FROM THE PROCEEDINGS

19. Order 10 Rule 2 of the Civil Procedure Rules provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

20. Whereas both the Respondents had all argued that the 2nd Applicant herein was not a party to the previous proceedings, this court could not make a determination of the same on the following grounds:-

1. THAT there appeared to be pending in court HCCC No 766 of 2006 of which the 2nd Applicant herein was a party. The present proceedings are miscellaneous in nature and hence this court could not for a fact state that he was not a necessary party to the proceedings herein.

2. THAT the issue of striking out of the 2nd Applicant herein was not an issue that had been placed before the court for hearing and determination. The Respondents were at liberty to file a separate application seeking to have him struck out of the proceedings herein.

21. For the foregoing reasons, this court was not persuaded that it should order that the 2nd Applicant should be struck out.

II. RES JUDICATA

22. Section 6 of the Civil Procedure Act states that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

23. Section 7 of the Civil Procedure Act further provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. Although the 1st and 2nd Respondents had argued that the present application had raised the same issues the Applicants had raised in CMCC No 13299 of 2004 Nancy Wangui Njuguna vs Nancy Njeri Muta, Nairobi HCCC No 766 of 2006 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another and Nairobi Court of Appeal Civil Appeal No 98 of 2009 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another, they did not place the relevant evidentiary proof before this court to enable it make a determination on that issue.

25. This was a miscellaneous application, independent of the Nairobi HCCC No 766 of 2006 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another and in the absence of any proof, this court could not for a fact determine that the present application *res judicata* as had been submitted by the 1st and 2nd Respondents herein.

III. TERMINATION OF THE 3RD RESPONDENT'S MANDATE

26. The mandate of an arbitrator can be terminated either on his removal after a successful challenge under Section 14 of the Arbitration Act No 4 of 1995 or due to failure or impossibility to act as provided in Section 15(1), (2) and (3) of the Arbitration Act.

27. In a letter dated 10th November 2009 attached to the 1st and 2nd Respondents' Replying Affidavit, the Applicants' advocates wrote to the 3rd Respondent informing him that although they were willing to proceed with arbitral proceedings, they felt the strong need to appoint a fresh arbitrator to commence the arbitration process afresh. The Applicants therefore terminated the arbitration process that was pending

before the 3rd Respondent.

28. This termination was objected to by the 1st and 2nd Respondents vide their letter of 13th November 2009 also attached to their Replying Affidavit pointing out that the 3rd Respondent's appointment could not be terminated unilaterally as he had been jointly appointed by both parties to the dispute.

29. Subsequently, several correspondence was exchanged between the Applicants' and Respondents' advocates on the issue of refund of the deposit that had been paid to the 3rd Respondent. No solution was found on this issue and in their letter of 2nd December 2009 to the 1st and 2nd Respondents' advocates, they suggested that there had been a conflict of interest as the 3rd Respondent had purportedly wanted to a business relationship with the 2nd Respondent which the latter rejected.

30. Notably, the 3rd Respondent did not respond to these assertions and the same remained unrebutted and/or uncontroverted. Having said so, the Applicants did not file any challenge for his removal on the grounds provided for in Section 13(3) of the Arbitration Act.

31. The said Section 13 (3) of the Arbitration Act provides as follows:-

“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.”

32. His mandate could not therefore be terminated under Section 14 of the Arbitration Act as aforesaid.

33. Turning to the issue of the failure or impossibility of the 3rd Respondent to perform his duties, this court noted that he did not respond to the averments in the Applicants' Supporting Affidavit opting to file Grounds of Objection instead. The Applicants had asserted that the dispute between them and the 1st and 2nd Respondents had been pending before the 3rd Respondent since February 2006.

34. This court saw a letter dated 10th August 2006 from the 3rd Respondent to the Applicants' and 1st and 2nd Respondents' advocates indicating that he wished to conclude the arbitration proceedings as soon as possible. There does not appear to have been any response to this letter and if there was, none had been placed before this court for perusal. What was attached to the Supporting Affidavit was a letter dated 30th October 2009 by the 1st and 2nd Respondents asking the 3rd Respondent to fix a mention date for purposes of taking directions. There was no indication that the said mention date was ever fixed.

35. Subsequently, the Applicants were directed by the Court of Appeal to proceed with the resolution of the dispute outside court whereupon they sought the appointment of any arbitrator other than the 3rd Respondent herein. This was, obviously, not the correct procedure as the 3rd Respondent's mandate had not been terminated as aforesaid.

36. Be that as it may, it was not clear what transpired thereafter because on 23rd June 2016, the 3rd Respondent wrote to them stating that he was not able to refer the matter back to court as much water had passed under the bridge, which the Applicants objected to.

37. In a letter dated 27th September 2016, the 3rd Respondent wrote to the Applicants' advocates informing them that they were not in a position to continue acting as an arbitrator and he was not averse to referring the matter back to court. The context of his inability to act was not clear to this court. The Applicants' advocates' letters to the 3rd Respondent culminating in a letter dated 5th July 2019 did not appear to have elicited any response to the 3rd Respondent and if there was any, none was placed before this court.

38. Although it was not clear why the 3rd Respondent stated that he was not able to proceed with the arbitration, this court noted that there was no extension of time to proceed with the arbitration after the expiry of the one hundred and fifty (150) days that had been granted by Ang'awa J (As she then was). She had also granted the Applicants leave to extend this period. There was no indication whether this leave was sought and granted.

39. Under Order 46 Rule 1 of the Civil Procedure Rules, it is stated as follows:-

“Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

40. It is important to point out that the dispute between the Applicants and the 1st and 2nd Respondents was referred to arbitration under the Arbitration Act because there was an arbitration agreement in the Memorandum of Understanding and not under Order 46 of the Civil Procedure Rules, 2010.

41. Ang'awa J therefore proceeded correctly in staying **HCCC No 766 of 2006 Nancy Wangui Njuguna & Another vs Nancy Njeri Muta & Another**. Having done so, it was the considered view of this court that no time limit ought to have been given by the court under Order 46 Rule 3 of the Civil Procedure Rules as the Arbitration Act under which the dispute herein had been referred under did not provide a time limit within which to complete the arbitral proceedings.

42. Indeed, Order 46 Rule 3 of the Civil Procedure Rules stipulates that:-

“The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.”

43. Bearing in mind that the 3rd Respondent may not have acted as leave to extend the time for proceeding with the arbitral proceedings was not sought and obtained but which this court will never be certain was the reason for not acting as he did not file any affidavit evidence and considering that the Ruling of Ang’awa J of 10th July 2007 was affirmed by the Court of Appeal on 29th April 2016 and leave was not extended, it was the considered opinion of this court that his mandate was terminated under Section 15(1)(a) of the Arbitration Act.

44. The said Section 15(1)(a) of the Arbitration Act provides that:-

The mandate of an arbitrator shall terminate if—

a. he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch; or

b. he withdraws from his office; or

c. the parties agree in writing to the termination of the mandate.

45. As the parties were not able to agree on whether the 3rd Respondent’s mandate had terminated, the Applicants proceeded correctly in seeking the termination of his mandate under as aforesaid under Section 15(2) of the Arbitration Act that stipulates that:-

“If there is any dispute concerning any of the grounds referred to in subsection (1)(a), a party may apply to the High Court to decide on the termination of the mandate.”

46. The Applicants’ dispute could not remain undetermined indefinitely when the 3rd Respondent had himself stated that he was no longer able to proceed and consequently, a new arbitrator had to be appointed herein as provided for in Section 16 (1) of the Arbitration Act that states that:-

“Where the mandate of an arbitrator is terminated under [section 14](#) or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.”

47. A new arbitrator could only be appointed under Clause 6 of the subject Memorandum of Understanding which stated as follows:-

In case this memorandum of understanding and/or any of the terms of the agreement hereinabove is/are frustrated by any obstacles, the parties herein agree to resort to a mutual arbitration by a mutually agreed arbitrator or arbitrators.”

48. It was a poorly drafted arbitration agreement as it did not have a default clause. Be that as it may, if the Applicants and the 1st and 2nd Respondents are unable to agree on the arbitrator, then they should proceed as provided in Section 12 of the Arbitration Act that gives the procedure of appointment of an arbitrator.

DISPOSITION

49. For the foregoing reasons, the upshot of this court’s Ruling was that the Applicants’ Notice of Motion application dated and filed on 23rd September 2019 was merited and the same is hereby allowed in the following terms:-

1. THAT the mandate of the 3rd Respondent in the dispute between the Applicants and the 1st and 2nd Respondents herein be and is hereby terminated forthwith.

2. THAT the Applicants and the 1st and 2nd Respondents herein do appoint a new arbitrator as set out in Section 12 of the Arbitration Act.

3. THAT there shall be no order as to costs.

50. The effect of this is that the 1st and 2nd Respondents’ preliminary objection dated 21/11/2019 and filed on 25/11/2019 was not merited and the same is hereby dismissed. There shall also be no order as to costs.

51. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of October 2020

J. KAMAU

JUDGE