



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
MISCELLANEOUS CAUSE NO. 302 OF 2018
IN THE MATTER OF THE KENYA ARBITRATION ACT, 1995
AND
THE KENYA ARBITRATION (AMENDMENT) ACT, 2009
AND
IN THE MATTER OF ARBITRATION
BETWEEN
KISUMU NATIONAL POLYTECHNIC.....APPLICANT
-VERSUS-
MESSRS CELL ARC SYSTEM LIMITED.....RESPONDENT
R U L I N G

1. Kisumu National Polytechnic hereinafter referred to as the Polytechnic, is a state corporation established under the Technical and Vocational Education and Training Act. Cell ARC System, hereinafter referred to as Cell ARC, is a company incorporated in Kenya under the Companies Act.

2. Those two entities, on 30th September 2010 entered into a contract in which parties agreed to refer their dispute therein to a Sole Arbitrator. The Chartered Institute of Arbitrators, Kenya Branch (CIArb), appointed the Sole Arbitrator, Mr. Festus Mukunda Litiku to preside over the parties' dispute. The Arbitral Award was published, by the Arbitrator, on 4th May 2018.

3. The Polytechnic filed a Notice of Motion dated 5th July 2018 for order for this Court do set aside the Arbitral Award of Mr. Festus Mukunda dated 4th May 20178, in its entirety.

4. Cell ARC also filed a chamber summons dated 17th September 2018 seeking the Court do adopt the Arbitral Award and that judgment be entered by the Court.

5. Looking at the two applications, it is clear that if the Polytechnic succeeds in its prayer to set aside the Arbitral Award, the chamber summons of cell ARC will have been spent.

6. For the purpose of the determination of the application of the Polytechnic, it is not necessary to consider the process of the decision of the Arbitrator. This is because the Polytechnic alleges that the Arbitrator's award was tainted with gross *mala fides*, undue influence, fraud, dishonesty and was in flagrant breach of the common law and common decency. These acts of the Arbitrator, the Polytechnic itemized as:

i. Personally visiting the applicant's (the Polytechnic) premises during the pendency of the Arbitration contrary to the Arbitration Rules with a view to solicit for inducement.

ii. Inordinate delay in releasing the award despite communication to the parties eight months prior vide a letter dated 10th May 2017 indicating that the Final Award was ready.

iii. The Sole Arbitrator unreasonable attributing the delay in publication to supposed changes he was making to the final award pursuant to the visit to the applicant (the Polytechnic) premises.

7. Through the affidavit of Joyce Nyanjoni, the principal of the Polytechnic it was deponed that the Sole Arbitrator unprocedurally visited the Polytechnic premises with a view to solicit for inducement which the principal flatly declined to give the Sole Arbitrator.

8. That the learned advocate for the Polytechnic wrote a letter, dated 23rd May 2018, to the Sole Arbitrator in which letter the Learned Advocate expressed the Polytechnic's displeasure and regret over his conduct.

9. It needs to be stated that the Sole Arbitrator did not deny having visited the Polytechnic by letter dated 28th May 2018 which in part he stated:-

“The visit to Kisumu Polytechnic was not a solicitation visit as you allege but rather was prompted by the fact that despite my letters, no response was being received and it was not clear whether my letters were being received. When I happened to be in Kisumu on other business, I decided to check on whether the institution was aware of its obligations under the arbitration to avoid possible accusation of not having made sufficient effort to communicate with them. I saw the principal in the presence of the principal's son, and, upon the principal's assurance that the respondent (the Polytechnic) would attend to them, I left while her son was still in her office.”

10. The Sole Arbitrator further stated in that letter that his visit to the Polytechnic was aimed at him raising a concern of the Polytechnic's failure to respond to his correspondence.

11. It is that visit by the Arbitrator to the Polytechnic's premises in the absence of Cell ARC that leads the Polytechnic to seek to reject the award because the Polytechnic alleges it is tainted with gross *mala fides*.

12. This is a case where the Polytechnic is alleging that the Sole Arbitrator's behaviour in publishing his awards was under undue influence.

13. In the case of **CHANIA GARDENS LIMITED VS GILBI CONSTRUCTION COMPANY LIMITED & ANOTHER (2015) eKLR**, it was stated:-

“The test whether a person is in a position to act judicially and without any bias has been suggested to be:-

“do there exist grounds form 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.”

14. In the case **MURITHI WANJAO T/A WANJAO & WANJAO ADVOCATES VS SAMUEL MUNDATI GATABAKI & ANOTHER (2015) eKLR** the Court rendered itself thus:-

“... where a party alleges the way in which award was procured was contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on part of ... either Respondent or the Arbitrator acted in any manner that would lead the Court to the determination that there was interference with the final Arbitral Award.”

15. In this case the Polytechnic did not have to prove the actions of the Arbitrator. The Arbitrator confirmed having visited the Polytechnic premises. Not only is that against the CIArb (Kenya Branch) Arbitration rules but it creates an impression of biasness. The Arbitrator should not have visited the Polytechnic premises in the absence of Cell ARC. Such a contact of one party in the absence of the other before the Arbitral Award is published no doubt contrary to section 35 (2) (vi) of the Arbitration Act, which provides:-

“An Arbitral Award may be set aside by the High Court if:-

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption.”

16. Although there is no evidence before me that the Arbitrator was fraudulent or that he received a bribe, however in the eyes of those who may know that he visited the Polytechnic there may be suspicion that something untoward occurred. That alone proves, on a balance of probability, a basis to set aside the Arbitral Award.

17. Having reached that conclusion it follows there would be no basis to consider the Cell ARC chamber summons dated 17th September 2018.

18. Since the setting aside of the Arbitral Award cannot be attributed to any party no costs will be awarded.

19. In the end, the following are the orders of the Court:

a) The Arbitral Award of the Sole Arbitrator, Mr. Festus Mukunda Litiku dated 4th May 2018 is hereby set aside.

b) Each party shall bear the costs of the Notice of Motion dated 5th July 2018.

c) The chamber summons dated 17th September 2018 is hereby struck out with no order as to costs.

Dated, signed and delivered at Nairobi this 28th day of February, 2019.

MARY KASANGO

JUDGE

IN THE PRESENCE OF:

Sophie COURT ASSISTANT

..... COUNSEL FOR THE APPLICANT

..... COUNSEL FOR THE RESPONDENT