



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 489 OF 2015

SHREE HAREE BUILDERS LIMITED.....APPLICANT

VERSUS

BAZARA ALEX TABULO.....1ST RESPONDENT

WALTER ODUNDO.....2ND RESPONDENT/ARBITRATOR

JUDGMENT

Background

1. The Originating Summons dated 4th November 2015, is brought under Sections 15 (1) (a) and (2) and 19 of the Arbitration Act, No. 4 1995. It seeks the following orders:

- 1) That the mandate of walter Odundo as the sole Arbitrator in the matter of an arbitration between the Applicant and the 1st Respondent be terminated;**
- 2) That a substitute Arbitrator be appointed by the Chairman, Architectural Association of Kenya;**
- 3) That the fees due and/or payable to the 2nd Respondent be determined by this Honourable Court;**
- 4) That the costs of this summons be provided for.**

2. The summons is predicated on the grounds set out in it's body and is supported by the affidavit of Sailesh Kerai sworn on 4th November 2015. The Applicant contends that the 2nd Respondent is no longer independent nor impartial in the proceedings. According to the Applicant, there are justifiable reasons to doubt the independence of the Arbitral Tribunal.

3. A brief background to the present proceedings is as follows. On 8th September 2015, pursuant to section 14 (1) of the Arbitration Act, the Applicant wrote to the Arbitrator informing him of their intention to file an application for his recusal on account of want of independence and/or impartiality. On 25th September 2015 the Applicant filed the said application by filing a formal statement of the reasons for challenging the Arbitrator. The Applicant accuses the Arbitrator for failing to hear the challenge on his impartiality and/or independence first and instead opting to hear an objection on the Arbitral Tribunal's jurisdiction. The said objection application according to the Applicant was filed by the 1st Respondent after they had filed their statement of Defence and counterclaim. The Applicant's position therefore is that the 1st respondent waived their right to raise objection on the issue of jurisdiction.

4. The Applicant is apprehensive that the Arbitrator's decision to first entertain the question of jurisdiction is evidence of the Arbitrator's want of independence and/or impartiality as the application in any event is contrary to Section 17 (2) of the Arbitration Act. The Applicant referred to its Statement of the reasons for the challenge and asserted that the Arbitrator's conduct of the proceedings had given rise to justifiable doubts as to his impartiality for failing to treat the parties equally.

5. The Applicant accuses the Arbitrator of issuing threats and/or directions not supported by any known provision under the Arbitration Act and the Rules made thereunder. The Applicant is apprehensive that the 2nd Respondent is determined to scuttle the Arbitration proceedings under the guise of the issue of jurisdiction

6. In view of the foregoing circumstances, it is the Applicant's case that the Arbitrator has become unable to perform the functions of his

office hence the application herein.

7. The 1st Respondent relied on a Replying affidavit sworn by himself on 23rd November 2015 and filed in Court on 30th November 2015 which was filed in support of the application dated 4th November, 2015.

8. The 1st Respondent confirms that on 28th July 2015 he filed an application challenging the jurisdiction of the Arbitral Tribunal to hear and determine the dispute pending before it. That the Applicant was served with the said application and they filed a Replying affidavit opposing the application. The 1st Respondent proceeded to give a chronology of events that transpired in the tribunal as will later be referred to in this ruling. The 1st Respondent's contention is that the Applicant has failed to comply with the Arbitration Tribunal's direction and is now forum shopping.

9. It is essentially the 1st Respondent's case that the Arbitrator has powers to direct the proceedings before him where the parties to a dispute cannot agree on the way forward. Therefore, the 1st Respondent contends that the prayers sought by the Applicant are untenable and that the Application lacks merit. In the circumstances, the 1st Respondent prays that this Court dismisses the present Application with costs.

10. The 2nd Respondent did not participate in the proceedings though served.

11. The Originating Summons proceeded by way of affidavit evidence. The Applicant adopted his submissions filed on 4th February, 2016 in support of the Notice of Motion dated 4th November, 2015 and the authorities filed in support of the said motion. The 1st Respondent relied on their written submissions filed on 12th February, 2016 and his list of authorities of the same date.

12. The Applicant has asked this Court to terminate the mandate of the Arbitrator pursuant to Sections 15 (1) (a) and (2) and 19 of the Arbitration Act, No. 4 1995. (hereinafter the Act) Section 15, titled "Failure or impossibility to act" provides as follows at paragraph (1) (a) and paragraph 2 respectively:

“(1) 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) ...

(c) ...

(2) 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.

Section 19 of the Act provides as follows:

“The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case.”

13. The Applicant is apprehensive that based on the correspondences exchanged, the relationship between them and the Arbitrator has become antagonistic and in all fairness they cannot expect any justice from the said Arbitrator. The Applicant has also accused the Arbitrator of issuing threats and/or directions not supported by any known provision under the Arbitration Act. At this juncture, it is noteworthy that although the Applicant's Originating summons has been brought under section 15 (1) (a) and (2) of the Arbitration Act, a number of issues raised in the said application touch on the challenge as to the independence of the Arbitrator. This Court is aware of the fact that the Applicant's first recourse when it comes to challenging the independence of the Arbitrator is the Arbitral Tribunal itself pursuant to section 14 (2) of the Arbitration Act. In that regard, this Court only exercises appellate jurisdiction. In that case, the Court will restrict itself to the provisions of section 15 (1) (a) of the Act and refrain from addressing any issues as concerns the Arbitrator's independence.

14. I will begin with the correspondences between the parties herein and in particular the Applicant and the Arbitrator. It is from the said correspondences that the Applicant alleges unfairness on the part of the Arbitrator and submits that he has failed to take control of the Arbitration proceedings.

15. On 2nd September 2015, the Applicant's Advocates wrote to the Arbitrator expressing their reservations on the slow progress of the arbitration and possible escalation of costs and requested for a meeting to address the said concerns. (See Applicant's **annexure marked SK 7**) The Applicant noting they had filed their statement of claim on 11th December 2013 were of the view that there was delay in the arbitral process. The Arbitrator responded on 4th September 2015 (SK 8) and requested the Applicant to give him a clear purpose of the meeting and its intended agenda so that he would give the matter consideration and issue necessary orders. The Applicant's contention is that the purpose of the proposed meeting was specifically stated in their letter of 2nd September 2015. As can be gleaned from the Applicant's said letter, the purpose of the meeting (or mention as requested by Applicant) was to address their concerns which included the possible escalation of costs and the alleged delay in the process. That notwithstanding, the Arbitrator sought a clear purpose and the intended Agenda of the said meeting in order to give the matter consideration and issue necessary orders. I do not think the Arbitrator went beyond his mandate in seeking such directions. In the penultimate paragraph of their letter, the Applicant states as follows:

“In the premises, it is our humble view that the matter be mentioned before yourself on a date convenient to both parties to enable the Claimant address its patently genuine concerns.”

16. My view of the foregoing paragraph is that it was general, in that, what could be inferred is that the Applicant had concerns including those that could be deduced from the letter. I do not discern any unreasonableness or lack of impartiality on the Arbitrator's part in their aforesaid letter as the Arbitrator did not decline to give the Applicant a hearing. The Arbitrator appears to have been ready to consider the matter and issue necessary orders once the Applicant presented him with the clear purpose of the meeting.

17. The Applicant responded to the Arbitrator vide their letter dated 7th September 2015 (SK 9) and indicated their intention to file a formal application challenging the Arbitrator's independence and impartiality. The Applicant indeed filed the said Formal Application on 25th September 2015 and by a letter dated 30th September 2015 (SK 10) requested the Arbitrator to give them an early hearing date. As is now clear, the Applicant abandoned the meeting/mention they had requested for earlier to address their concerns as they did not respond to the Arbitrator's letter requesting for a clear purpose and intended agenda of the meeting.

18. On 12th October 2015, the Arbitrator wrote two letters, each addressed to the Applicant's Advocates and the 1st Respondent's Advocates respectively. (SK 11) In the said letter(s), the Arbitrator noted that the 1st Respondent's application challenging his jurisdiction was to be determined before the Applicant's application challenging the independence of the Arbitrator. The Applicant was directed to file and serve written submissions on the objection to jurisdiction and informed the parties that his ruling on the objection application would be made on Notice. Apparently, the Arbitrator in a letter dated 25th August 2011 had requested the parties to file submissions. The 1st Respondent had complied but the Applicant had not yet complied. In the letter(s) of 12th October 2015 the Arbitrator also gave a chronology of events in the Arbitral proceedings as at that point and it is clear that the Applicant had not complied with of the some directions given.

19. The Applicant was aggrieved by the Arbitrator's decision to first determine the 1st Respondent's application on objection to jurisdiction. This can be seen in their letter of 12th October 2015. The Applicant's inquiry is as to which comes first between the issue of recusal on account of the alleged lack of independence and impartiality of the Tribunal and the issue of the jurisdiction of the Tribunal. It is the Applicant's assertion that constitutionally, the recusal application ought to be heard first as it would be difficult to reconcile how the Tribunal whose independence is in question would want to hear any other application first without dealing with the matter of bias. The Applicant further contended that the 1st Respondent's objection to jurisdiction was contrary to section 17 (2) of the Arbitration Act as the 1st Respondent filed the same after putting in their Defence. It is however also provided under Section 17(4) that the Arbitral Tribunal has the discretion to admit a late application to its jurisdiction where it finds that the delay is justified.

20. It is not in dispute that the Applicant's application challenging the independence of the Arbitrator was filed subsequent to the 1st Respondent's objection to the Arbitral Tribunal's jurisdiction. The Arbitrator decided to hear the 1st Respondent's first.

21. The Tribunal has the powers to determine both applications before it derived from sections 14 (2) and 17 of the Arbitration Act. In this case, the Arbitrator decided to determine the 1st Respondent's objection to the jurisdiction of the Arbitral Tribunal, which application had been filed earlier than the Applicant's and he gave his reasoning for that decision. It is within the powers and mandate of the Arbitral Tribunal to decide on how to conduct the arbitration proceedings in a manner it considers appropriate so long as it affords the parties a fair and reasonable opportunity to present their case. (See Section 20 of the Arbitration Act).

22. The Applicant seems to have been adamant all along that his application was to be heard first despite directions being given by the Tribunal to the contrary. In addition, the Applicant did not comply with most of the directions given by the Tribunal and in particular with regard to the directions given towards the hearing of the applications. This was an attempt to subvert procedure(s) as laid out by the Arbitral Tribunal. The Tribunal accommodated the Applicant a number of times by extending time for filing certain pleadings and therefore the Applicant cannot be heard to say that they were not treated with equality. It is evident that the Applicant was dissatisfied with the fact that the Arbitrator failed to heed to their persistent requests for determining their application on the challenge to his impartiality first. This is not reason enough to hold that an Arbitrator has become unable to perform his functions.

23. On the issue of delay, it is not disputed that the Arbitration was commenced sometime in 2013. The Applicant avers that it filed its statement of claim sometime in December 2013. The Applicant has also not disputed that the Tribunal gave the parties time to amicably settle the dispute through negotiations. It is clear the said negotiations were not successful hence the parties continued with the arbitration. From the account given by both parties on the occurrences at the Tribunal coupled with the correspondences therein from the year 2013 to sometime in September 2015 when the Applicant first raised the issue of delay, I cannot see a deliberate failure by the Arbitrator to conduct the said proceedings with reasonable dispatch. The Applicant has also not substantiated their arguments that the Arbitrator was at the 1st Respondent's mercy when it came to allocating dates and timeframes for the arbitral procedures or meetings. It has not been shown that the Applicant protested the dates given by the Tribunal or that the same were inconvenient for them whether or not they were at request of the 1st Respondent. In any case allocating dates convenient to the parties goes to ensuring that the Tribunal has afforded the parties a fair and reasonable opportunity to present their case.

24. With the foregoing, I find it hard to conclude that the Arbitrator failed to treat the parties with equality and that he has become unable to perform the functions of his office as an Arbitrator. Consequently, I dismiss the Originating Summons with costs.

Date, signed and delivered at Nairobi this 23th day of May, 2018

B. THURANIRA JADEN

JUDGE