REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CASE NO.37 OF 2017

RUNJI & PARTNERS CONSULTING

ENGINEERS &PLANNERS LTD……...……..RESPONDENT

VS.

NATIONAL WATER CONSERVATION AND

PIPELINE CORPORATION ……..……..APPLICANT

TOM ONYANGO OKETCH…….....ARBITRATOR/RESPONDENT

RULING

1. A dispute has arisen between Runji & Partners Consulting Engineers & Planners Ltd **(Claimant)** and National Water Conservation and Pipeline Corporation (**Applicant**) concerning the Muruny (Siyoi) Kapenguria Water Project. That dispute was referred to Arbitration by Tom Onyango Oketch (the Arbitrator).

2. However there is a challenge to the Arbitrator which has found its way to the High Court under the Provisions of Section 14(4) of the Arbitration Act. In a Notice of Motion dated 2nd February, 2017 the Respondent, in the main, seeks the following order:-

> "THAT this Honourable Court be pleased to issue an order that Tom Onyango Oketch, the Honourable Arbitrator, do disqualify himself from constituting the Arbitral tribunal and hearing the dispute between the Claimant/Respondent and Respondent/Applicant".

3. Prior to moving the High Court the Respondent had requested the Arbitrator to disqualify himself from constituting the Arbitral Tribunal. That request was made pursuant to the provisions of section 14(2) of the Arbitration Act which requires that the challenge to an Arbitrator be taken up in the first instance with the Arbitrator. Section 41(1) and (2) of the Arbitration Act provides 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".

In a Ruling made and published on 6th January 2017, the Arbitrator refused to disqualify himself.

4. The Affidavit sworn on 2nd February 2017 by Mr. Andrew M. Wanyonyi in support of the Motion reveals that it is predicated on the alleged conduct of the Arbitrator in another Arbitration between Masinde Muliro University of Science &Technology and Alfatec Contractors Limited (hereafter the MMUST matter) where Mr. Oketch was also the Arbitrator. The Respondent would be privy to information in that matter because the University is represented by the same Law firm that is representing the Respondent herein. The Law Firm being Wekesa & Simiyu Advocates.

5. Relying on information given to him by Mr. Ben Makasi Simiyu, an Advocate practicing with the said Firm, Mr. Wanyonyi depones that the Arbitrator had exhibited high handedness and harshness to their Client (MMUST) and favoritism of the Alfatech. A matter which the said firm raised with the Honourable Arbitrator. Further, that the Arbitrator had, after a determination from the Court, overstepped his

mandate by opening up issues that had been determined and advanced the interests of one of the Parties. Details of what proceeded in the MMUST matter, in as far as it is relevant herein, must necessarily be the subject of this Court's rendition.

6. The Application was opposed by the Claimant who raised six grounds. Leaving out what is clearly issues of evidence, the Claimant thought that the application was an unjustified interruption to the Arbitral proceedings which ought to be seamless and efficient. That the Motion was baseless, frivolous and mischievous. Notably, it is asserted, the Application does not point out any errors of Law and Fact in the ruling of the Arbitrator dated 6th January 2017. Lastly the Claimant views the application as part of a scheme by the Respondent to delay the Arbitral proceedings.

7. Before giving its analyses of the issues raised in this application the Court makes the following general observations.

8. In their nature Arbitration proceedings are consensual and parties thereto must have maximum confidence in the Arbitral Tribunal. In addition there is a finality about Arbitral awards because the Jurisdiction to set aside such awards is limited. For this reason, and as validly submitted by the Respondent, issues of bias or lack of integrity of the Arbitral Tribunal must not be shunted aside and need to be interrogated when raised.

9. There are two types of bias, actual bias and imputed bias. Mustill J. in **Bremer vs. Ets Soules** [1985]1 Llyod's L.R.160, says this of the two categories of bias:-

"There are three material situations in which the High Court has power to remove an arbitrator for 'misconduct' under section 23 of the Arbitration Act, 1950.

> (1) Where it is proved that the arbitrator suffers from what may be called 'actual bias'. In this situation, the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavorably towards him, for reasons peculiar to that party, or to a group or of which he is a member. Proof of actual bias entails proof that the arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.
>
> (2) Where the relationship between the arbitrator and the parties, or between the arbitrator and the subject matter of the dispute, is such s to create an evident risk that the arbitrator has been, or will in the future be, incapable of acting impartially. To establish a case of misconduct in this category, proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of 'imputed bias".

My understanding is that the Applicant sees Actual bias on the part of the Arbitrator in respect to the MMUST matter and imputed bias in respect to the matter at hand.

10. The Grounds for challenge and removal of an Arbitrator are found in section 13 of The Arbitration Act. Section 13(3) is relevant here and provides:-

> "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 of if he is physically or mentally incapable of conducting the proceedings of there are justifiable doubts as to his capacity to do so".

11. I would agree with Justice Gikonyo on the approach to take in considering a challenge which is premised on a doubt of impartiality and independence when in, **Chania Gardens Limit v. Gilbi Construction Company Limited & another** [2015] eKLR , the Judge observed:-

'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. 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. The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the Court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was real likelihood of bias".

12. This Court was asked to note that the Arbitrator, though served with the Motion before Court, choose not to file any Response. The provisions of section 14(4) of the Arbitration Act, reads:-

> "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"

This provision safeguards the right of an Arbitrator not be condemned unheard as that would be against the rules of natural Justice. As correctly stated by Justice Gikonyo **in Zadock Furnitures Systems Limited & another Vs. Central Bank of Kenya** [2014] eKLR :-

> "Of course, the rationale underpinning the subsection to give the arbitrator an opportunity to be heard is because the matter constituting the challenge impinge on his integrity, health (mental and or physical), qualification, competence, character and conduct in general"

13. In the matter before court the Arbitrator has elected not to file a response to the challenge. This, however, does not take away the Respondent's burden of proving the grounds upon which the challenge is premised. Silence on the part of the Arbitrator does not automatically lead to a free ride and in particular where, like here, the Arbitrator had in a considered Decision given reasons why he declined to recuse himself.

14. The firm of Wekesa and Simiyu Advocates represented MMUST in an Arbitration between it and Alfatech. The Arbitrator therein was Mr. Tom Oyango Oketch (the Arbitrator here). Having heard the matter, the Arbitrator made and published an award on 16th July 2014. Unhappy with that Award, MMUST moved the High Court at Kakamega on 17th February 2015 in Miscellaneous Civil Application number 237 of 2014 seeking that it be set aside. The Application was premised on three broad grounds, namely, that the award was in conflict with the Public Policy of Kenya, it contained decision on matter beyond the scope of the Reference to Arbitration and that it dealt substantially with a dispute not falling within the terms of Reference to Arbitration. Of critical importance is that there was no allegation that the Arbitrator was either partial, lacked independence or was highhanded.

15. Earlier, on 10th December, 2014, Alfatech had sought leave to enforce the Award.

16. These two antagonistic requests attracted the Ruling of Njoki J. made on 30th November 2015. In it the Application by Alfatech was struck out for want of compliance. In respect to the Application by MMUST the Judge ultimately held as follows:-

> "It is apparent that the Claimant herein did not exhaust all the avenues that were available to it under the Act before it filed its Notice of Motion of application. Since the intention of the parties was to have the dispute settled amicably through arbitration, the claimant hereto shall refer the issues calling for correction of the award that are highlighted in this ruling, to the Arbitral Tribunal by making the requisite application under the provisions of section 34(6) of the Act. The respondent shall be at liberty to do likewise should there be any issues that call for correction that it needs to bring to the attention of the Arbitral Tribunal."

MMUST complains of what transpired thereafter.

17. It is common ground that after the Ruling, a Preliminary meeting of both parties was held before the Arbitrator on 5th February 2016. This is however a disagreement on what transpired on that day. The controversy is captured in Directions No.6 that were issued by the Arbitrator following the meeting. For purposes of the matter at hand, this court produces the last part of Order No. 3 of those Directions:-

> "The Arbitral tribunal at paragraph 7.2.13 shows a summary that brought together 'tools and equipment" and "hoarding and fencing" that were initially submitted under separate heads. I referred to Hon. Justice Njoki Mwangi's statement under paragraph 78, that the claimant shall refer the issues calling for correction of the award that are highlighted in the ruling; and that the respondent shall be at liberty to do likewise should there be any issues that call for correction that it needs to bring to my attention. In view of the aforementioned clarification, both counsels requested me to write to the Hon. Justice Njoki Mwangi for reconsideration on her ruling under paragraph 69. Consequently, the time table referred to above under item No. 2 is hereby suspended"

18. It was later alleged by Counsel for MMUST that this Direction did not reflect what transpired and it demonstrated bias on the part of the Arbitrator. This Court shall come back to this later.

19. After the giving of those directions, the Arbitrator, through a letter of 11th February 2016, wrote to Njoki J. seeking a reconsideration of the ruling of 30th November, 2015. That would have been misadvised because there is procedure for seeking Review of an Order of Court (in its Civil Jurisdiction) under order 45 of the Civil Procedure Rules. Indeed in a letter of 17th February 2016 by the Deputy of the High Court at Kakamega, the Arbitrator was advised that the affected party should move the Court through a formal application.

20. An application was filed by Alfatech. It was a motion of 7th April, 2016. That application suffered an early setback when Kariuki J. on 27th September 2016 upheld a preliminary objection that the Court did not have jurisdiction either under the Arbitration Act or The Civil Procedure Rules to review to its decision of 30th November 2015.

21. Having set out that background, this Court takes the view that the question before it is settled by what it makes of the meeting of 5th February 2016 and the Directions issued pursuant.

22. The opening words to Order No. 3 of the Directions is as follows,

> "I referred both Counsels to the Hon. Justice Njoki Mwangi ruling under paragraphs set 69 whereupon she set aside the additional arbitral Award that was made over and above the sum of Kshs.3,019,500.00 that was claimed by the Respondent".
>
> It is the Arbitrator speaking. And it would seem true that as alleged by MMUST it was the Arbitrator who raised this issue on his own Motion.

23. Yet that alone cannot be evidence of bias. While an Arbitrator is expected to be neutral and evenhanded, he cannot stand aside like a timid or disinterested bystander and fail to raise an issue in the proceedings that could impact on the fair and just resolution of a matter before him. What is critical is whether the issue raised is valid and that it is not raised to the prejudice of any of the parties before Court.

24. This Court's attention is drawn to the email of the Advocates for MMUST which came hot in the heels of the communication of directions No.6. It is an email to the Arbitrator. This email is important and ought to be reproduced in full:-

"Good afternoon,

We acknowledge receipt of the Order of Directions No. 6 as well as the Copy of the Letter to Hon. Lady Justice Njoki Mwangi. We note from the record that the submissions made by Counsels during the proceedings are missing. We also respectfully take great exeption with the sentence that says, "both counsels requested me to write to the Hon. Justice Njoki Mwangi for reconsideration on her Ruling at paragraph 69".

The said sentence in effect suggests that the Claimant is agreeable to the Court "reconsidering her ruling" which is not the case. It was our position and still is our position that the Arbitral Tribunal cannot open up that matter and that is why we objected to further Arbitral proceedings until the matter is adjudicated on by the Court wherein both parties submit on the issue and the Court makes its determination. This is opposed to submitting on the issue during the Arbitral proceedings where there is no jurisdiction.

We are therefore persuaded that the neutral position considering the issue was not raised by any party would be, "both Counsels requested me to write to the Hon. Justice Njoki Mwangi for parties to submit and determination of the issue raised by the Arbitrator".

25. Clearly, from the email, Counsel for MMUST does not say that the issue raised by the Arbitrator is illegitimate, frivolous, unnecessary or idle. What Counsel insisted was that the issue be remitted back to Njoki Mwangi J for argument by Parties before the Judge could decide. Indeed, the opportunity for that matter to be determined through argument to court was presented when Alfatech moved the Court through the Application for Review. Upto there, this Court taking up the persona of a reasonable and fair minded man informed of the circumstances of the MMUST matter, cannot read any bias in the Arbitrator. The Arbitrator could not have lost impartiality or independence simply because it is him who identified that an issue need to be resolved in respect to paragraph 69 of the Ruling.

26. But that is not all there is to the Complaint by MMUST. In the email of 11th February 2016, the lawyers for MMUST takes issue and exception with the statement by the Arbitrator that "*both counsels requested me to write to the Hon. Justice Njoki Mwangi for reconsideration on her Ruling at paragraph 69*". In the email the Lawyer asserts,

"we are therefore persuaded that the neutral position considering the issue was not raised by any party would be, "both counsels requested me to write to the Hon. Justice Njoki Mwangi for parties to submit and determination of the issues raised by the Arbitrator".

Let this Court accept that the Lawyers position was the more accurate and fairer description or characterization of the outcome of the proceedings of that day, would the misdescription or mischaracterization by Arbitrator be evidence of bias? Is the lack of impartiality and independence manifest? While the lawyers now read bias, they did not raise it in the immediate email to the Arbitrator. This email would have been the early opportunity to raise those fears. I take a view that the Lawyers for MMUST did not do so because bias was not manifest or apparent.

27. There is now a further allegation the Arbitrator was high handed and Harsh. Yet going through the entire documents (including affidavits made for and behalf of MMUST), this new allegation was never raised.

28. Having considered what transpired in the MMUST Arbitration and that the Arbitrator is not accused of bias or misconduct in the present application, I see no valid reason for his disqualification. The Arbitrator correctly applied the provisions of section 13(3) and found that there were no circumstances that give rise to justifiable doubts as to his impartially and independence. This Court too reaches the same decision.

29. The Notice of Motion of 2nd February 2017 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 25th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Bukania h/b Simiyu for Applicant

Njagi for Respondent

Alex - Court Clerk