



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**  
**MISC APPL.NO.122 OF 2017**  
**CONSOLOG ENGINEERING SERVICES LIMITED.....CLAIMANT/APPLICANT**  
**AND**  
**WATER SERVICES TRUST FUND.....RESPONDENT**  
**RULING**

This is a ruling on application dated 27<sup>th</sup> April 2017 filed by the Claimant seeking to enforce the arbitral award dated 25<sup>th</sup> November 2016 plus costs of enforcement proceedings. Grounds on the face of the application are that final award was made on 28<sup>th</sup> November 2016 in favor of the Applicant directing the Respondent to pay the Applicant a sum of kshs 3,079,080 within 14 days of taking up the award failure which it will attract interest of 12% per annum until payment in full. The Respondent was further directed to pay costs of kshs 330,600 or to be taxed by the taxing officer if not agreed; that the Respondent has not settle the claim despite being notified.

The application is supported by affidavit sworn by Felix Nthiga Mutuura the managing director of the claimant. He averred that the arbitration was conducted by Dr.Laibuta and was delivered in his favor on 25/11/2016.He averred that the Applicant and the Respondent entered into a contract on 21<sup>st</sup> November 2014 in which the Respondent appointed the Applicant as an Independent oversight agent to provide consultancy services involving desk and field appraisal.monitoring project implementation, supporting beneficiaries in accounting and reporting in WRUAs and CFA funded projects of the upper Natural Resources Management Project(UTGNRMP).He averred that despite the Respondent being notified of the award the claim has remained unsettled. He prayed that judgment be entered in favour of the claimant in terms of the award.

In response the Respondent filed replying affidavit sworn by Virginia Nzioka corporation secretary of the Respondent. She averred that the appointment of the arbitrator was not done professionally. She averred that by letter dated 18<sup>th</sup> January 2016 the arbitrator wrote to the Respondent indicated that the chartered institute of arbitrators had appointed him as sole arbitrator by letter dated 11<sup>th</sup> January 2016;and by email of 22<sup>nd</sup> January 2016 informed the Respondent of preliminary meeting scheduled for 25<sup>th</sup> November 2016 at the institute offices and second preliminary meeting on 2<sup>nd</sup> February 2016 by email of 28<sup>th</sup> January 2016.she averred that on 2<sup>nd</sup> February the Respondent received an email from the arbitrator addresses to the institute and copied to Respondent which had attachment showing that he received confirmation of appointment on 28<sup>th</sup> January 2016.she stated the arbitrator apologized to the parties for the confusion that may have been created by the confusion in the earlier communications. She averred arbitrator assumed his role before the chartered institute of arbitrators notified the Respondent of

appointment of arbitrator hence appointment was devoid of professional appointment. She added that the arbitrator went ahead to ask for fees per scale at kshs 15,000 per hour and deposit of kshs 180,000 be made which the Respondent was convinced constituted to professional impropriety. She averred that the Respondent dissociated itself from the arbitration process and objected to the arbitrator's appointment. She averred that the objection was overruled by the arbitrator and that the Respondent was aggrieved of the decision and opted out of the process. She stated that the Respondent had reason to believe that there was no good will on the arbitrator's part.

I have perused and considered affidavits filed by both parties herein together with annexures. I have also considered rival submissions by counsels herein. Clause 24.1 of the contract attached to the application provide that parties should use their best efforts to settle amicably all disputes arising or in connection with the contract. Clause 24.2 provide for appointment of sole arbitrator if parties to settle the dispute amicably. It provide for appointment to be agreed by both parties in writing and if parties fail to agree the chairman of chartered institute of administrators to appoint upon request of either party with sufficient notice to the other party. The Applicant has attached to the affidavit in response to replying affidavit communication between the parties herein. A letter dated 8<sup>th</sup> October 2015 the Applicant requested the Respondent to concur/agree on appointment of single arbitrator to resolve the dispute. The Respondent was given 14 days to do so. The Respondent response by letter dated 19<sup>th</sup> October 2015 was that they could not concur as they were seeking legal opinion from the Attorney General through ministry of water and irrigation. By letter dated 21<sup>st</sup> October 2015, the Applicant intimated that they would go ahead and request the chairman institute of arbitrators as per the contract if no concurrence is received within the time set in the initial letter. This was done by letter dated 9<sup>th</sup> November 2015. The letter was copied to the Respondent. By letter dated 12<sup>th</sup> November 2015 the Respondent indicated to the chairman of institute of arbitrators that they could submit to the arbitrator as they were awaiting opinion from Attorney General. By letter dated 11<sup>th</sup> January 2016 the chairman institute of arbitrators notified Dr. Kibaya I. Laibuta of nomination as sole Arbitrator. The institute appointed him by letter dated 28<sup>th</sup> January 2016 after his acceptance of terms of service.

Upon being notified of nomination the arbitrator communicated to the Respondent by letter dated 14<sup>th</sup> January 2016 for 25<sup>th</sup> January 2016.

I have perused a letter dated 2<sup>nd</sup> February 2016 by the Respondent which accuses the arbitrator of self-imposing himself as appointed arbitrator and the appointment being devoid of any professional appointment and denial of any communication on appointment from chartered institute of arbitrators. The same letter denied receiving any communication on appointment of arbitrator. The chairman chartered institute of administrators advised the Respondent to raise any issues with the arbitrator by a letter dated 29<sup>th</sup> February 2016. By letter dated 11<sup>th</sup> February 2016 the Respondent indicated that it would subject itself to arbitral proceedings by Dr. Laibuta and accused him of impartiality, open unfairness and bias against the Respondent. The arbitrator ruled on the objection by the Respondent. The objection was dismissed by ruling delivered on 29<sup>th</sup> April 2016. There is no indication that the Respondent appealed against the arbitrators ruling.

While highlighting submissions filed, Mr. Amadi for the Respondent indicated that prior to April 2016 the Respondent was a unit under the ministry of water and irrigation and as such it could not proceed in any litigation without involving the Attorney General. He submitted that the water Act was enacted in April 2016 and it mandated the Respondent to consult external lawyers. He submitted that the arbitration process was flawed as evidenced by correspondences where the Respondent was seeking time to consult. He added that the arbitrator assumed his role before sufficient notice was given to the Respondent and that to date no notice has been given to the Attorney general or the ministry contrary to section 37 of arbitration Act. He concluded that the arbitral process was flawed, unfair and against the rule of natural justice; that the application herein be dismissed and the Respondent be given an opportunity to submit and participate in the arbitral process.

Counsel for the claimant submitted that the arbitration clause did anticipate that the Respondent did not

have capacity, he submitted that the agreement was signed between parties. He added that there is no evidence to show that opinion was sought from the Attorney general. He submitted that due notification was issued and that the process was not flawed or unfair.

There is no dispute that the contract between parties herein provided for arbitration process in case of any dispute which parties fail to resolve amicably. It is also evident that the parties herein did not agree on sole administrator and that the chairman chartered institute of arbitration appointed a sole administrator as provide in clause 24.2 of the contract.

What I wish to consider is whether the Respondent was granted an opportunity to participate in the arbitration process under Dr. Laibuta.

From perusal of correspondences attached the Respondent was called upon to agree on sole arbitrator. After appointment of the arbitrator it is evident that he communicated with both parties. This is confirmed by responses by the Respondent to the arbitrator's communication. It is further confirmed by objection raised by the Respondent in which ruling was delivered. There is no appeal to the ruling. The Respondent having failed to file appeal against the ruling should have subjected itself to the arbitrator and participated in the arbitration process. The Respondent has indicated that they were awaiting opinion from the Attorney General but no such communication to the Attorney general has been shown. That aside at the time of executing the contract, it must have been in the mind of the drafters and executors of the agreement that such opinion would be sought. I believe that must have been taken into consideration when time for notice was set. The Respondent has denied being notified but the correspondences attached clearly confirm that the Respondent was aware of the arbitration process. What was the Respondent objecting to if it had no knowledge of the arbitration process? I do not see any flaw in the arbitration process. The Respondent deliberately refused to subject itself to arbitration process. A party given an opportunity to be heard and failed to do so cannot turn around to say that an arbiter acted against the rule of natural justice. The Respondent should have appealed against the ruling of the arbitrator if not satisfied. The arbitration process was agreed by the parties and correspondences show that the Respondent was involved in all the stages. I do not see any reason to dismiss the application herein. I find the application merited and allow with costs to the claimant.

**Dated, signed, and Delivered at Nairobi this...29<sup>th</sup> .....day of...September2017**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT/CLAIMANT

.....COUNSEL FOR RESPONDENTS

**RACHEL NGETICH**

**JUDGE**