REPUBLIC OF KENYA

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[COMMERICIAL & ADMIRALTY DIVISION]

MISC CIVIL CASE NO 357 OF 2014

KENYA PIPELINE COMPANY LIMITED…………………..…APPLICANT

VERSUS

KENYA OIL COMPANY LIMITED………...…..…….1ST RESPONDENT

KOBIL PETROLEUM LIMITED……………………..2ND RESPONDENT

RULING

Removal of Arbitrator and stay of proceedings

[1] I am called upon to determine the Motion dated 4th August 2014. The Applicant seeks the following prayers *inter alia*;

1. **Pending the hearing and determination of this application, the Honourable Court be pleased to stay further proceedings before the Sole Arbitrator, MrAhmednasirAbdullahi SC in the Matter of an Arbitration between Kenya Oil Company Limited &Kobil Petroleum Limited v Kenya Pipeline Company Limited;**
2. **The Sole Arbitrator, MrAhmednasirAbduallahi SC, be disqualified and be removed from continuing to preside over the arbitral proceedings in the Matter of an Arbitration between Kenya Oil Company Limited &Kobil Petroleum Limited v Kenya Pipeline Company Limited;**
3. **This honourable Court be pleased to direct the parties to nominate and agree on the identity of a new arbitrator within such period as the Court shall specify;**
4. **Failing such agreement, the honourable Court be pleased to appoint a new arbitrator to act in the place of the said MrAhmednasirAbdullahi SC;**
5. **The costs of this application be provided for.**

[2] The application is expressed to be brought pursuant to Article 50(1) of the Constitution, Section 14 of the Arbitration Act, 1995, Order 51 Rule 1 of the Civil Procedure Rules and the inherent power of the Court. The application is premised on two major grounds that:-

a) By his words and conduct, the Sole Arbitrator MrAhmednasirAbdullahi SC has demonstrated a lack of impartiality in the conduct of the arbitral proceedings, and that the arbitrator cannot be trusted to make a determination in view of his remarks and comments. There is, therefore, a real apprehension that the arbitrator is incapable of conducting

the arbitral proceedings before him with the requisite impartiality. This is contrary to the Arbitration Act which places a continued obligation for the arbitrator to remain impartial throughout the arbitral proceedings; and

b) The amounts at stake in the pending determination are substantial.

[3] The application issupported by the supporting and supplementary affidavits of Gloria Khafafa sworn on 4th August 2014 and 5th December 2014 respectively, although it had been intimated in the application that the same was supported by the affidavit of Mrs Flora Okoth. The affidavit gave the facts giving rise to the arbitration; the agreement dated 10th May 1999 entered between the Applicant and the Respondents. The arbitrator published his award on 10th December 2009. The Award was appealed against to the High Court in **Civil Appeal No 13 of 2010** and further appealed on to the Court of Appeal in **Civil Appeal No 102 0f 2012**. In upholding the appeal, the Court of Appeal referred the matter back to the arbitrator to make a determination on assessment of loss and damages.

The Applicant's Gravamen

[4] The crux of the matter is that, during the pendency of the arbitral proceedings, the arbitrator had made certain comments during a live interview on television. The Applicant contended that the comments as expressed by the arbitrator demonstrated thathe (arbitrator) would not continue to remain impartial or independent in the pending arbitral deliberations. They urged further that the comments by the arbitrator demonstrated justifiable doubt as to the arbitrator's impartiality, and that the arbitrator in his decision dated 15th July 2014,in regards to the Applicant's challenge to the arbitrator's impartiality in a letter dated 11th July 2014, failed to appreciate the test for established impartiality. On the basis of the foregoing, the Applicant also prayed for the arbitral proceedings to be stayed until the hearing and determination of the application.

[5] The Applicant also filed comprehensive submissions to reinforce their avowed position. They urged that the challenge of the arbitrator was pursuant to Section 13(3) of the Arbitration Act, which adopted Article 12(2) of the UNCITRAL Model Law. They went further to define what impartiality entailed as reiterated in **Findlay v United Kingdom [1997] 24 EHRR**, **Alberto Matapo& 5 Others v Magistrate Bhila& Another HC 2794/10** and the duty to maintain the impartiality as enunciated in **Public Utilities Commission of the District of Columbia v Pollack (1952) 343 US 451** and **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others Supreme Court Petition No 4 of 2012**. Other cases cited are;**Republic v David Makali& 3 Others Criminal App Nos Nai 4 & 5 of 1994** which cited **Metropolitan Properties Co Ltd v Lannon& Others (1989) 1 QB 577**, **Veritas Shipping Corporation v Anglo Canadian Cement Ltd [1966] 1 Lloyd's Rep 7** and **Re the Owners Of the Steamship "Catalina" and the Owners of the Motor Vessel "Norma" [1938] 61 Lloyd's Law Report 360**.

[6] The Applicant amplified the submission that the arbitrator had the continued duty to maintain impartiality and independence and that perception or appearance or suspicion of bias in the eyes of a reasonable man is the test to be used where an officer presiding over judicial or quasi-judicial proceeding is accused of bias. They relied heavily on the latest decision of the Court of Appeal **KipkoechKangogo& 62 Others vs. Board of Governors Sacho High School & 5 others [2015] eKLR,**They also cited **HagopArdahalian v Unifert International SA (The Elissar) [1984] 1 Lloyd's Rep 206, Allison v General Council of Medical Education & Registration [1984] 1 QB 750**, **Laker Airways Inc. v FLS Aerospace Ltd & Another [1992] 2 Lloyd's Rep 45** and **Metropolitan Properties Co (FGC) Ltd v Lannon (1968) 3 All ER 304**. They further submitted that the Applicant has established that there was bias and impartiality on the part of the arbitrator in the arbitral proceedings following his words and conduct; he has satisfied the test in **MahomoMpali v Nthunya (2012) LSCA 16** quoted in **S v Roberts 1999 (4) SA 915 (SCA)** and **Porter v Magill [2002] 1 All ER 465**. It was submitted that fairness is the core tenet of justice and that is exactly the purpose of this application; the application should not be viewed as an exercise with ulterior move or hidden gain.

[7] The Applicant also responded to submissions with regard to the previous applications for bias and impartiality and stated that the principle of *res judicata* as spelt out under Section 7 of the Civil Procedure Act was not operative as the issue for disqualification of the arbitrator had not been finally determined between the parties. Reliance was placed upon the cases of **Henderson v Henderson [1843-60] All ER Rep 378-382** and **Fidelitas Shipping v VV/O Esportchles [1955] 2 All ER 4**. It was submitted that the provisions of Section 7 of the Civil Procedure Act were not operative as per the reading of Section 14(8) of the Arbitration Act, and that in any event, the Act does not anticipate *res judicata* to be an issue as a matter in which the impartiality of the arbitrator is challenged will be deemed not to have been fully concluded.

[8] In oral submissions, counsel reinforced the foregoing submissions. But three other matters were urged. The first one is; despite being served with the application for disqualification, the arbitrator did not file any position on the matter. The second is; counsel disclosed the existence of this application as he wrote to the other partiesinforming them that he was going to apply to the High court to challenge the arbitrator and ask for stay of arbitral proceedings. And third, bias is not one of the grounds on which an award could be set aside under section 35 of the Arbitration Act. Therefore, to ask the Applicant to wait and raise the issue after the final award is given will be setting them out to a journey without a remedy. On those reasons, they urged the court to allow their application.

Respondent says application misconceived

[9] The Respondents opposed the application for removal of the arbitrator. They filed their submissions. The Respondents argued that,the Applicant had waived its rights to derogate from the arbitral proceedings under Section 5 of the Arbitration Act, the Applicant and could not, therefore, challenge the mandate of the arbitrator. Again, the Respondent was of the view that this application only aims at defeating the Respondents' rights enshrined under Section 14(8) of the Arbitration Act. The Respondents contended that, under the special circumstances pursuant to Section 14 of the Arbitration Act, under which a concluded arbitration may be re-opened and re-litigated, it was encumbered upon the Applicant to enlighten the Respondents of their intended application challenging the conduct of the arbitrator, so as to allow the Respondents the opportunity of whether or not to elect to proceed with the arbitration, with full knowledge of the risks thereto. No such opportunity was accorded to the Respondents. It was submitted that the Applicant's conduct defeats the primary objective and purpose of the arbitration agreement, and goes contrary to the dictum as enunciated in **Court of Appeal No 80 of 1988 Pop-In- Kenya & 3 Others v Habib Bank AG Zurich**.

[10] According to the Respondent, this application is premised on the perception of bias arising from words uttered by, and conducts of the arbitrator, which impinges on his ability to be and remain impartial and independent in his determination of the arbitral proceedings. The Respondents asserted that those deposition were merely speculative, and do not meet the standard of proof on allegation of bias by the arbitrator. It was further submitted that this application comes after the arbitrator had already concluded the arbitral proceedings, and only at the time when he is writing the award. In any event, following the determination in **Civil Appeal No 13 of 2010** and **Civil Appeal No 102 of 2012**, the arbitrator's role is limited to the reassessment of damages based on the same proceedings that had been undertaken before the same tribunal, and that therefore there would be no room for the arbitrator to exercise bias as the proceedings and documents used were all within the possession of the parties herein. It was submitted that the application lacks merit as it did not exhibit any evidence or likelihood of bias or a predisposition or prejudice against the Applicant in the arbitral proceedings. The issue of bias had effectually and effectively been dealt with in **Civil Appeal No 13 of 2010. T**here was no factual basis to support the applicant's perceived fear and apprehension of bias.

[11] During Oral submissions, counsel emphasized that arbitration is intended to produce efficient and speedier resolution of disputes. This application is a negation of that tenet of justice. Secondly, once an award is made, bias could easily be read from the reasons provided for the decision, and will be a basis to apply to set aside the award under section 35 of the Arbitration Act. Thirdly, the Applicant concealed the fact that it had filed this application. The Applicant and the Respondents were before the arbitral tribunal the whole day during the arbitral proceedings, yet the Applicant failed to disclose the existence of this

application to the arbitral tribunal and the Respondents as a matter of legal obligation. The Respondent learned about the application two days after the arbitral proceedings had been concluded. This to them is a waiver of right to challenge and an unfair act by the Applicant. for those reasons, they seek the court to dismiss the application.

DETERMINATION

[12] I have considered all the arguments presented by counsels, the facts of this challenge and the applicable law. I take the following view of the matter. I see a mix of preliminary as well as substantive issues for the determination of the court.

The preliminary issues are:-

> ***(1)*** **On the arbitrators entitlement under section 14(2) to appear and be heard in an application for challenge;**
>
> **(2) Whether the challenge is properly made;**
>
> **(3) Whether the challenge in so far as it is based on bias is res judicata.**
>
> The substantive is:-
>
> **(4) Whether there exist circumstances that give rise to justifiable doubts as to the impartiality and independence of the arbitrator to conduct the arbitral Proceedings Herein.**

Arbitrator's entitlement to appear and be heard

[13] This issue was raised by counsel for the Applicant in his oral submissions but did not offer much elaboration. However, it is an important issue which I should discuss. Nonetheless, I do not wish to waste much judicial ink on the issue except to cite a work of the court in **ZadockFurnitures Systems Limited and Maridadi Building Contractors Limited and Central Bank of Kenya[2015] eKLR** as follows:

> **Arbitrator's entitlement under s. 14(4)**
>
> **[25] Section 14(4) provides as follows:**
>
> **(4) 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.**
>
> **[26] This subsection has been subject of much debate even in this application. It appears two schools of thought have emerged. On the one hand, the 1st Claimant submitted that the subsection uses the word ''shall'' thereby making it mandatory that an application under section 14(3) of the Arbitration Act cannot be determined before the arbitrator has been heard. On the other hand, the arbitrator argued in his letter to the Deputy Registrar dated 15th May, 2014 that his entitlement to appear and be heard is not mandatory but optional. He may or may not exercise it. Therefore, as an arbitrator, he is not under compulsion to file a response or within any time limit. And I presume following the arbitrator's thread of argument, he is not under compulsion to be heard. Based on his interpretation of section 14(4) of the Arbitration Act, he found fault with the order of this court issued on 6th May, 2014 requiring him to file a response and to appear to be heard by the Court. According to him, the word ''shall'' in the order might be mistaken for contradicting the express provisions of the Act which puts the legality,**

> **correctness and effect of the said order in issue before the court.**
>
> **[27] I take the following view on the matter. The word ''shall'' in the context of section 14(4) of the Arbitration Act refers to the right of the arbitrator to appear and be heard, and is a statutory expression of a much a higher constitutional principle of justice; that no party should be condemned unheard. The mandatoriness in the word ''shall'' as used in the subsection, is to ensure that the Court gives the arbitrator the opportunity to be heard. When the entire subsection is read, it becomes clear that there is a misconception in the submissions by the 1st Claimant in relating the word ''shall'' to the disposal of the application rather than to the arbitrator's entitlement. In that thinking, the word ''shall'' in the subsection, does not make the exercise of the entitlement to appear and be heard, mandatory. The arbitrator may or may not exercise it. However, the decision by the arbitrator not to invoke his right to be heard will not prevent the court from determining the application. The converse is; where the Court does not call upon the arbitrator to be heard or refuses him to be heard, the decision of the Court will lend itself to be set aside ex debito justitiae for being irregular and against rules of natural justice. Of course, the rationale underpinning the subsection- to give the arbitrator an opportunity to be heard- is because the matters constituting the challenge impinge on his integrity, health (mental and or physical), qualification, competence, character and conduct in general.**
>
> **[28] In the premises, the Court issued the order of 6th May, 2014 in the discharge of its mandatory obligation to call upon the arbitrator to appear and be heard on the challenge. It was, then, upon the arbitrator to make the decision on whether he will or will not exercise his entitlement, and how he will exercise the entitlement. The exercise of the entitlement may be by written memorandum or a letter or pleading or viva voce evidence. Calling upon the arbitrator to file a response does not mean he must file one. The arbitrator confirmed in his letter dated 15th May, 2014 that he does not wish to attend and that the Court should determine the application on the documents which were produced before him, the findings in and merits of his ruling on the challenge. He also made certain rejoinders in his said letter, which will be considered and accorded appropriate importance in this decision. Thus, the said letter by the arbitrator is sufficient exercise of his entitlement to be heard under section 14(4) of the Arbitration Act and all the arguments therein will be considered in this decision. Accordingly, the order of 6th May, 2014 is not a command; it is not tinctured by any illegality or incorrectness as claimed by the arbitrator.**

[14] Therefore, whether the arbitrator exercises his entitlement or not under section 14(4) of the Arbitration Act when called upon to do so or after service upon him of the challenge, the court should decide the challenge on its merits. I will so proceed.

Competence of Challenge

[15] The other two preliminary issues could be dealt with together under the broad title ''Competence of Challenge''. I will determine a) **Whether the challenge has been made in accordance with the law; and b) Whether the challenge in so far as it is based on bias is res judicata.** I will invert the order and begin with the latter which is straight forward issue. The procedure for challenging the arbitrator is set out in section 14 of the Arbitration Act and comes to court after the arbitrator has determined a challenge made to him under the said section. The challenge to the High Court takes the appellate stature. See section 14(3) and (5) of the Arbitration Act which provides as follows:-

> **14(3) ''If a challenge under agreed procedure or under subsection (2) is**

> **unsuccessful, the challenging party may, within 30 days <u>after being notified of the decision to reject the challenge, apply to the high court</u> to determine the matter. [Underlining mine]**
>
> **14(5) The High Court may <u>confirm the rejection of the challenge or may uphold the challenge</u> and remove the arbitrator. [Underlining mine]**

Thus, given the nature of challenge and the process in section 14(3) and (5) of the Arbitration Act, such challenge to the High Court should not, therefore, assume a totally different trajectory or challenge or matters which were not discussed before and decided by the arbitrator. Therefore, by law such challenge will never be *res judicata* as long as it is a form of ‘’appeal’’. The argument by the Respondent on the issue fails. In coming to this decision, I am aware of the peculiar events in this case as there were previous appeals No **Civil Appeal No 13 of 2010**, which was upheld in **Civil Appeal No 102 of 2012** and in which the issue of bias was considered. But, those appeals, do not bar the Applicant to challenge the impartiality of the arbitrator as soon as he becomes aware of any circumstances referred to in section 13(3) of the Arbitration Act. Bias or impartiality is one such ground. The only bar to future challenges which are based on the same facts, circumstances and grounds arises from section 14(6) of the Arbitration Act, and consists in the decision of the High Court on the challenge which the law says is final. Section 7 of the Civil Procedure Act will, in such circumstances apply and bring the doctrine of *res judicata* to estop litigation on matters which have been determined with finality by the court. This bar will apply to all other matters which the Applicant ought to have brought in the challenge but did not for any negligence or inadvertence. The following dictum in the case of **Henderson v Henderson**(supra) is apt here;

> **“…the court requires the parties to that litigation to bring forward the whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in exceptional cases, not only to points which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which the parties exercising reasonable diligence, might have brought forward at the time.”**

[16] The other issue; whether this application has been made in accordance with section 14 of the Arbitration Act is a substantial legal matter. The Respondents argued that the Applicant did not inform them or the arbitral tribunal of these proceedings until after the arbitral proceedings had been completed and exactly after two days thereof. They blamed the Applicant for concealing such important fact which may have provided the Respondent an opportunity to decide whether to proceed or not with the arbitral proceedings. I agree entirely with the Respondent that an application under section 14(4) of the Arbitration Act must be served on the Respondent and the arbitral tribunal promptly in order to enable parties including the Respondent to make a decision on whether to commence, continue and conclude arbitral proceedings despite the pendency of the challenge. It is important to note that our law has left the decision to commence, continue and conclude arbitral proceedings during the pendency of the challenge to the partiesunder section 14(8) of the Arbitration Act. This is an important step and aspect towards the recognizing of the consensual nature of arbitration as an alternative process of resolution of disputes.See what the court said on section 14(8) in the case of **ZadockFurnitures Systems Limited (supra):-**

> **On my part, I make the following reading of section 14(8) of the Arbitration Act. Unlike in other jurisdictions, the section vests in the parties the decision to commence, continue and conclude arbitral proceedings while and application under section 14(3) of the Arbitration Act is pending. The power is also discretionary and not mandatory. Out of this reading, one thing is clear; the arbitral tribunal cannot make the decision in section 14(8) of the Arbitration Act to commence, continue and conclude arbitral proceedings unless with the consent of the parties. Even when the arbitral proceedings are concluded under section 14(8) of the Arbitration Act, the**

arbitrator will not make an award until the challenge is concluded. This safeguard should not be taken to mean that the arbitral proceedings must proceed while the challenge is pending before the High Court. The practice adopted under section 14(8) of the Arbitration Act just emphasizes the consensual nature of arbitration. If Parliament intended the tribunal to make the decision to continue with the arbitral proceedings while an application for removal of the arbitrator under section 14(3) is pending, it would have enacted…the arbitral tribunal may…or something of that sort…instead of the parties may…as is the case with the provision in question. Contrast section 14(8) of the Arbitration Act with section 24(3) of Arbitration Act, 1996 of the UK which vests in the arbitral tribunal the discretion to continue with the arbitral proceedings while an application for removal of the arbitrator by court is pending. Section 24(3) of Arbitration Act, 1996 of the UK provides as follows:

(3) The tribunal may continue the arbitral proceedings and make an award while an application to the Court under this section is pending.

In molding an efficacious Arbitration Act, 1996 for the UK, the Departmental Advisory Committee on Arbitration law, realized that the power of the court to remove an arbitrator was prone to abuse by parties who intent on disrupting the arbitral process, and so they included subsection (3) of section 24 allowing the tribunal to continue while an application for removal is pending. But our section 14(8) of the Arbitration Act is fashioned differently as I have discussed above.

[17] The action by the Applicant of not disclosing the existence of this application to the Respondent and the arbitral tribunal is a concealment of material fact. However, I am hesitant to declare the concealment to be a waiver of right or an act which renders this application incompetent. My reasons are; the application has been made pursuant to section 14 of the Arbitration Act following the rejection of the challenge by the arbitrator; the decision thereto has also been annexed.Accordingly, the application adheres to the procedural rectitude provided in section 14 of the Arbitration Act for this type of applications. Therefore, in spite of the concealment, the application is proper and I will determine it on merits.

The real challenge

[18] The ultimate question this court will determine is: -

Whether there exist circumstances that give rise to justifiable doubts as to the impartiality and independence of the arbitrator to conduct the arbitral Proceedings herein.

As I have stated earlier, removal of an arbitrator by the court may be abused by those intent on disrupting the arbitral process. To this end, the law has set out a stringent test for removal of an arbitrator which is the same as that which applies in disqualification of a judicial officer from presiding over a case. 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 ifcircumstances 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. And the arbitrator recognized that fact in his decision in which he rejected the challenge based on bias. The words used in section 13(3) of the Arbitration Act 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; which go beyond saying that the arbitrator is unable to be impartial and independent in determining the dispute into more concrete matter. I will, therefore, utilize the test formulated by the Court of Appeal; whether the bias or prejudice portend 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. See the decision of the

Court of Appeal in ***R v* David Makali& Others C.A Criminal Application No Nai 4 And 5 Of 1995 (Unreported),** and reinforced in subsequent cases. **See R v Jackson Mwalulu& Others C.A. Civil Application No Nai 310 of 2004 (Unreported)** where the Court of Appeal stated that:-

> **''When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established''.**

That position of the law in Kenya was accordingly guided by the principle set out in**Metropolitan Properties Co., Ltd v Lannon (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 that:-**

> **''Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias''.**

The latest case of **KipkoechKangogo** (supra) discussed the test applicable and concluded that the test to be applied is that of a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias. And citing English cases, the Court of Appeal concluded that appearance of bias is one which has the possibility of shaking public confidence in the administration of justice. Nonetheless, they insisted that the Applicant must prove the facts which constitute appearance of bias. I will apply this test.

[19] In this case, the Arbitrator has been challenged on the basis of words he uttered in a live television interview. The relevant part of the interview has been reproduced at paragraph 15 of the affidavit in support of the application. Are these circumstances which*give rise to justifiable doubts as to his impartiality and independence?*The precise circumstances which the Applicant believes constitute the ground for removal of the arbitrator are as set out in paragraphs 15-21 of the affidavit of Ms Gloria Khafafa sworn on 4th August 2014 as well as in paragraphs 9 and 10 of the supplementary affidavit by the same deponent sworn on 5th December 2014. The gist of the matter was that the arbitrator MrAhmednasirAbdullahi SC made some comments, which the Applicant found to be so disparaging, to the extent that they brought into question the integrity and conduct of the arbitrator, and that further compromised the ability of the arbitrator to be and continue to be impartial and independent in the resolution of the arbitral proceedings. The Applicant made out their own interpretation of the interview to mean that *the Applicant is a corporation run by corrupt persons who are incapable of making proper decisions with respect to the award of tenders, are motivated by improper considerations including requiring inducement in the performance of their duties, are susceptible to manipulation in awarding of contracts and cannot be trusted to conduct the affairs of a public corporation with integrity and accountability.* The Applicant submitted that, the words and conduct of the arbitrator raises apprehension of bias, and that the final award would not be made fairly. These possibilities go against the basic tenets of justice. The Applicant raised this challenge before the arbitrator under Section 14(2) of the Act on 11th July 2014 and the arbitrator made his decision on the matter dated 15th July 2014. Being aggrieved by that decision, the Applicant filed the present application for determination by this Court pursuant to Section 14(3) of the Act.

[20] The circumstances which constitute justifiable doubt as to impartiality of the arbitrator need not necessarily relate to the substantive dispute at hand butthey should be of such nature which impeach the integrity of the arbitrator or would create real apprehension in the eyes of a reasonable person that justice will not be done by the arbitrator in the dispute at hand. Therefore, maintaining public confidence in the administration of justice is what matters in cases of recusal. But, and of course, matters which are reallyperipheral or imagined or fanciful or mere belief or opinion ofa person that the arbitrator will not be impartial are not in this bracket of circumstances which raises justifiable doubt on the impartiality of the

arbitrator. I will also add that personal opinion or orientations of the arbitrator on matters of a general nature are not circumstances which will raise justifiable doubt on the impartiality of the arbitrator. To include such would be overstretching the principles of recusal beyond their territorial right into almost complete gag of persons exercising judicial or quasi-judicial functions. The arbitrator stated in his ruling that matters he discussed were not related to this case and is merely his opinion on matters of a general nature, i.e. corruption. He explained at great length and provided the context in which he made the remarks which form the basis of this challenge. I have considered the remarks made and the decision made by the arbitrator and has come to the conclusion that the arbitrator was expressing his opinion on a matter of a general nature which he is entitled to. It is, therefore, necessary to consider whether there is a reasonable ground for assuming that there is a possibility for bias, and whether it is likely to produce in the minds of the public at large a reasonable doubt as to the fairness of the administration of justice. See **Republic v David Makali& 3 Others** (supra)) Tunoi, JA (as he then was) that;

> **"The test is objective, and the facts constituting bias must be specifically alleged and established."**

[21] Looking at the words uttered and the entire context of the interview, any reasonable person who listened to the interview will not make the inferences and conclusions which the Applicant has made. The conclusions and inferences made by the Applicant do not match or are not supported by the stated facts. They should be seen within the reality of things; that they are clearly made in the usual apprehension any litigant always has especially when he does not want the particular arbiter on his case. In **Civil Appeal No 13 of 2010**the following two sentences are of particular relevance;

> **"…The party alleging bias has the onus to prove it. It can be established by direct evidence or it must be clearly inferred from a set of facts."**

[22] Other than the conclusions made, the Applicant has not shown how the remarks by the arbitrator will bear, directly or otherwise, on the impartiality and conduct of the arbitrator. Also nothing shows that the arbitrator may be biased, or unfair and unjust in his deliberation, or in the making of the award herein. The truth of the matter is that he has been the arbitrator in this arbitration and the only outstanding issue is re-assessment of damages. He determined the issue of liability and it is expected that his decision will based on the evidence presented before him, and any strenuous matter will be easily discernible. Nothing is inconsistent with impartiality of the arbitral tribunal, as to amount to circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator. This is a case of fear or mere apprehension not based on any concrete evidence. In any event, the Applicant will also have another opportunity to apply for the setting aside of the arbitral award under section 35 or 37 of the Arbitration Act. Bias or impartiality or lack of independence is within the realm of misconduct of the arbitrator and is a ground for the setting aside of an arbitral award. I am, therefore, unable to accede to the argument by the Applicant to the contrary. The Arbitration law has been tailored to offer speedier, less expensive and proportionate resolution of disputes and delay of any sort must be avoided at all costs. That is why there are stalwart safe designs in the Act to prevent parties holding the process ad infinitum. Although parties have every right to litigate on their rights through all levels of the judicial system, one fact is not in dispute; that this arbitration has consumed considerable amount of time since March 2006. Accordingly, I confirm the rejection of the challenge by the arbitrator in his decision dated 15th July, 2014 was in order. The upshot is that I dismiss the application dated 4th August 2014 with costs to the Respondent. As a consequence thereof, the arbitrator shall write and publish the award herein as stipulated in law.

Dated, signed and delivered in court at Nairobi this 27th day of May 2015.

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F. GIKONYO

JUDGE