REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 480 OF 2013 (PREVIOUSLY NO 533 OF 2012 (O.S)

IN THE MATTER OF AN APPLICATION ACT, 1995, ACT NO. 4 OF 1995

AND

IN THE MATTER OF AN APPLICATION BY EDWARD MURIU KAMAU, NJOROGE NANI MUNGAI, PETER MUNGE MURAGE, ESTHER NJIRU-OMULELE & ISAIAH MUNGAI KAMAU, All Trading as MURIU, MUNGAI & Co. ADVOCATES

UNDER SEXTION 12 OF THE ARBITRATION ACT, 1995 AND RULE 3(1) OF ARBITRATION RULES, 1997,

FOR THE APPOINTMENT OF AN ARBOTRATOR

AND

IN THE MATTER OF A PARTNERSHIP DISPUTE

BETWEEN

EDWARD MURIU KAMAU, NJOROGE NANI MUNGAI, PETER MUNGE MURAGE, ESTHER NJIRU-OMULELE and ISAIAH MUNGAI KAMAU, All Trading as MURIU, MUNGAI & Co. ADVOCATES……...CLAIMANTS

Versus

JOHN SYEKEI NYANDIEKA.....RESPONDENT

RULING

[1] The Claimants have asked the Court to appoint a single Arbitrator to hear and determine a dispute between the parties herein from among the following:-

a. Mr. Njoroge Regeru

b. Mr. Steven G. Kairu

c. Mr. Dan K. Ameyo

[2] The application has been brought by way of an Originating Summons under Order 46 Rules 2, 3 and 20 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act Cap. 21 Laws of Kenya, section 12 of the 1995 Arbitration Act and all enabling provisions of law. The Application was supported by the affidavit and supplementary affidavit of Peter Munge Murage sworn on 17th September, 2012 and 18th January, 2013 respectively. According to the claimants, the law firm of Muriu, Mungai & Co. Advocates ("the Firm") was registered on 17th October, 1996. All the parties herein were at all material times Advocates of the High Court of Kenya and were Partners of the aforesaid firm. It was averred that the Respondent was offered partnership in the Firm by a first supplemental Partnership Deed dated 1st July, 2009 where he was offered 5% shares in the Firm on account of his expertise and personal achievement in the area of intellectual property. On 4th March, 2010, the Respondent resigned from the Partnership with immediate effect. It was deposed that the Partnership Deed stipulated that any outgoing Partner should give adequate notice and precluded an outgoing Partner from soliciting business from the firm's clients for a period of six (6) months. The claimants' contention is that the Respondent in breach of these provisions, solicited the firm's clients while planning his departure; failed to give adequate notice of resignation; refused to hand over his portfolio or work after resignation; interfered with the firms information and technology system; and further to this, induced two of the Firm's employees to also resign and join his prospective employer. According to the Claimants, the Partnership Deed executed by the parties stipulated that inter alia any dispute between the partners shall be referred to arbitration. And now there is a valid dispute at hand that should be referred for Arbitration on account of the aforementioned grounds.

[3] It was therefore the claimant's assertion that since the parties to the dispute were unable to agree on a compromise Arbitrator, the issue of the choice of Arbitrator was referred to this court. It was further contended that the appointment of an Arbitrator had been referred to the Chairman of the Chartered Institute of Arbitrators, where Mr. D. Ndonye was nominated as the sole Arbitrator. An objection was raised on this appointment, since Mr. D. M. Ndonye had previously worked in the same company as the Respondent and consequently, Mr. D.M Ndonye declined to proceed with the arbitration. In light thereof, the Claimants propose Mr. Njoroge Regeru, Mr. Steven G. Kairu or Mr. Dan K. Ameyo who are all senior and respectable members of the bar to be better placed to handle the dispute between the parties which was mainly a Partnership dispute. It was also averred that the Respondent has not offered any valid grounds as to why any of the nominees should not be appointed as a sole Arbitrator. The Claimants further denied the allegations of tax fraud, falsified accounting and corruption claims as perpetuated by the Respondent. According to the Claimants, these allegations were intended to mislead the Court as there is no evidence to support the accusations.

The Respondent did not remain mum

[4] The Respondent opposed the application. In his affidavit in reply, sworn on 2nd November, 2013, the Respondent averred that he was a Partner with the Firm vide the First Supplemental Partnership deed dated 1st July, 2009 and executed on 7th July, 2009. The deed indicated that 5% of the Firm's share capital was due to him as a share of profit which amount was to be paid this amount from the profit pool made by the Firm on a quarterly basis. The respondent continued; that the Respondent accepted to take up a 5% share in the Firm at an alleged value of Kshs. 25 million, believing that the firm was valued at Kshs. 500,000,000/=. But, according to the Respondent, this valuation was a gross misrepresentation of the value of the Firm. The management of the firm did not make good their intention of deducting the Respondent's share of the profit to go towards the purchase of his shares. It was also the Respondent's contention that he was only permitted to inspect the audited partnership accounts of the firm for the years 2005, 2006 and 2007 after signing the Partnership deed, wherein he learnt that the firm had declared losses in 2005 and 2006; and made a profit of slightly more than Kshs. 600,000/=. That state of affairs was at variance with the representation made to the Respondent that the firm was valued at Kshs. 500,000,000. The Respondent contended that he was unhappy with the running of the firm and the various scandals affecting the firm, including the criminal and corruption charges leveled against the Managing Partner, Mr. Muriu, wherein he decided to resign from the Partnership. The Respondent further contended that the partners of the Firm declined the Respondent from serving the contractual period as per the Partnership Deed, and as such, he cannot be held liable for failure to give or serve out the notice

period. The Respondent further denied that he was liable to refund any drawings as claimed by the Claimants. He asserted that he did not breach any provisions of the Partnership Deed with regard to the Clients of the Firm. It was also the contention of the Respondent that he did not induce any staff of the Firm to leave employment as alleged. That any such employee left the Firm out of his or her own volition.

[6] The Respondent stated that he is opposed to the appointment of a sole arbitrator to hear and determine the dispute from the proposed list of senior advocates because the nature of the dispute requires an auditor with over 20 years' experience to determine the extent of the fraud alleged by the Respondent. Mr. DM Ndonye, had a background in the auditing and that is why he had been proposed by the Chartered Institute of Arbitrators, but the appointment was objected to on grounds that there was a potential conflict of interest, given that Mr. Ndonye and the Respondent had previously worked for the same company. To the Respondent, contrary to the Claimant's assertions that the dispute at hand was over a Partnership, the matter is a complicated accounting dispute between the Firm and the Respondent, in which the senior advocates proposed lacked in qualifications to handle as there are serious allegations of fraud, fraudulent accounting, tax evasion and misrepresentation of valuations advanced. In the circumstances, the Court should appoint an arbitrator who is an accountant with a reputable accountancy/audit firm and who is a Senior Partners in his Firm and who has the requisite proven experience of not less than 20 years in forensic accounting and partnerships.

[7] The application was canvassed by way of written submissions by the respective parties but the large part of the submissions reproduced or amplified the depositions in the affidavits filed in. The Claimant's filed the submissions on 21st May, 2014, while the Respondent filed his submissions on 4th June, 2014.

[8] The Claimants in their submission emphasized that the dispute between the parties arises from an alleged breach of contract by the Respondent. Therefore, the proposal by the Respondent that the matter should be arbitrated by an Arbitrator with a background in accounts and auditing was untenable. The proposed candidates in the list of the proposed Arbitrators presented by the Claimants composed of experienced lawyers who could effectively arbitrate the matter at hand. They also pressed that the Respondent is at liberty to engage expert witness in accounting as provided for under the Arbitration Act, 1995, Section 27 (1) of the Arbitration Act. But the Respondent was of a different view. He offered circumlocutions in his rejoinder that even the Claimants were also at liberty to call an advocate as a witness to address the narrow but well known laws of partnership. He based his argument on what he called as basic appreciation of commercial practice that in choosing arbitration as a mode of dispute resolution, parties prefer that the Arbitrator will amongst other things, possess the necessary skill and expertise to deal with the dispute at hand. The Respondent further pointed out that the then Chairman of the Chartered Institute of Arbitrators (Kenya Branch) JB Havelock (as he then was) fully appreciated this fact and proceeded to appoint an arbitrator with an accounting background to hear and determine the dispute. Further, the Respondent relied on the case of **CANADIAN REISSURANCE CO. v LLOYD'S SYNDICATE PUM 91 (1995), 17 CCLI (3d) 165 BLR (3d) 102, 1995 CarswellONt 2356** to buttress his argument that relevant experience and expertise in the subject matter was paramount when the Court is tasked in appointing an Arbitrator. In view of the foregoing, it was argued that the persons proposed to arbitrate the matter did not have the requisite qualifications and expertise in the field of accounting. It was further pointed out that Mr. Steven Gatembu Kairu is now a Judge of the Court of Appeal, while Mr. Daniel Ameyo has purportedly been mentioned unfavorably in the Ango-leasing debacle. With Regard to Mr. Njoroge Regeru, it was the Respondent's submission that he has worked closely with the firm on various cases and there are therefore serious possibilities of bias. In conclusion the Respondent urged the Court to dismiss the application and order that an Arbitrator with an accounting and or forensic audit background was best placed to hear and determine the various issues between the parties.

COURT'S RENDITION

[9] The tone and pitch of the submissions show this is a hotly contested matter. And all the rival submissions and the pleadings seem to be made from the professional affiliation of the each divide. If I am not wrong, the Claimants are advocates and so they prefer an advocate, whilst the Respondent is an accountant and prefers an accountant for arbitrator. Apart from that, what matters is that the Court or any appointing authority is obliged to appoint only suitable arbitrator with requisite qualifications to resolve

the dispute between the parties. Parties to these proceedings were parties to a Partnership Deed dated 5th May, 2004, followed by a Supplemental Partnership Deed dated 7th June, 2004 and finally the First Supplemental Partnership Deed dated 1st July 2009. By virtue of the provisions of clause 27 of the Partnership Deed dated 5th May, 2004; any dispute arising between the Partners, including any outgoing Partner, about the Partnership or its accounts or transaction would be submitted to arbitration as per the Arbitration Act, 1995. According to the said clause, an Arbitrator would be nominated on the request of any Partner by the Chairman for the time being of the Institute of Arbitrators and according to the provisions of the Arbitration Act. None of the parties have denied the existence of this clause or the existence of a dispute. The point of contention is therefore one of qualifications of the Arbitrator who will be able to resolve the issues completely and conclusively.

[10] Several arguments were put forward by the claimant's counsel who explained in very great detail why the court should find that the dispute at hand is one on the partnership between the partners and therefore proceed to appoint an arbitrator with a legal background. The Respondent on the other hand insisted the crux of the dispute revolves around whether or not there was fraudulent accounting because the Claimant's misrepresented to him inter alia on the real value and the financial soundness of the firm, which makes it prudent to appoint a sole arbitrator from a list comprising of persons with a financial and accounting background.

[11] These sentiments, makes me to ponder yet another point; that despite the explicit nature of Clause 27, such disputes still arise on appointment of a suitable arbitrator, and it is precisely for that reason that section 12 of the Arbitration Act, 1995 was enacted. But I think parties should strictly adhere to the prescriptions of section 12 of the Arbitration Act having in mind the ramifications of section 12(8) of the said Act when the appointment is done by the Court. The section is the jurisdictional pillar of and empowers the Court to intervene in the arbitral process and appoint a sole arbitrator on a party's application if the parties fail to avail themselves of a method for arbitrator selection set forth in their agreement or if there is a lapse in the naming of an arbitrator or arbitrators. Section 12(9) of the Arbitration Act is relevant as it sets out some guiding factors when the Court is appointing the sole arbitrator. The Court should have regard to any qualifications required of an arbitrator by the agreement of the parties, such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and in case of a sole arbitrator, take into account the advisability of appointing an arbitrator of a nationality other than those of the parties. These prescriptions are broadly cast due to the nature of the varied arbitral disputes which may arise; some relate to accounting, others on fraud, corruption, tax evasion, performance of contracts etc. Almost invariably, in all arbitral proceedings, most often the arbitrator may need to determine purely and typical legal issues of jurisdiction and interpretation of the contract. Even the way the profession of arbitration is structured answers to the law.

[12] The appropriateness of a sole arbitrator or panel will depend on the nature, value and complexity of the specific dispute between the parties. Without doubt, the resignation of the Respondent from the Firm's partnership led to the intended arbitral proceedings herein. The entire dispute between the parties is primarily one arising from alleged contractual breach of the obligations contained in the Partnership Deed by the Respondent. The Respondent has indicated that he intends to raise a counterclaim on issues on the Partnership's account including the real value of the firm at the time of the execution of the Partnership Deed. All these are legal issues and they do not assume a different character because there are allegations of misrepresentation or fraud or other illegalities. And that is quite separate from the evidence that is needed to prove the particular dispute which may need expert witness in law, accounting, bank fraud, corruption, or tax evasion etc. Thus, the law and the arbitration rules recognize only arbitrators who are accordingly accredited and certified by the relevant arbitrators' professional associations on satisfying their requisite qualifications. And where there is specialist technical knowledge or industry expertise is resolved by the calling in expert witness. This is provided in the Arbitration Act, 1995 Section 27(1) which stipulates:

> ***"Unless otherwise agreed by the parties, the arbitral tribunal may-***
>
> ***a. Appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and***

b. Require a party to give the expert any relevant information or to produce or provide access to, any relevant documents, goods or other property for inspection."

[13] In our case, the parties did not set the particular qualifications of the arbitrator. There is also nothing which makes it imperative that the arbitrator should have industry-specific knowledge as matters raised are not industry-specific which will need for particular qualifications on the custom, terminology and standard forms of contract used only in the specific industry. Thus, I do not see the need of calling into play the case of **CANADIAN REINSURANCE CO. v LLOYD'S SYNDICATE PUM 91 (1995), 17 C.C.L.I (3d) 165.** It is worth repeating, the intended arbitration proceedings herein are not of a nature that cannot be presided over by a person with the training of lawyer, to be more specific, an Advocate of the High Court of Kenya. Any counterclaim raised by the Respondent with regard to the firm's accounts and the true value of the Firm will be adequately dealt with by calling in an expert witness to testify during the proceedings. Equally, the dispute could still be presided over by an arbitrator with training in accounting. .

[14] Having said that, the circumstances of this case are such that Clause 27 of the Partnership Deed dated 5th May, 2004 is still available for use by the parties in the appointment of the sole arbitrator. A dispute has been declared and no party says anything to the contrary. The sole arbitrator who was appointed resigned or withdrew or better still, declined appointment for good reason. So no party is in default here. This application may not, therefore, strictly speaking be said to be one arising out of the procedure under section 12(5) and (7) of the Arbitration Act. I think, in the circumstances of this case, the dispute being between the Partners, and is about the Partnership or its accounts or transactions, the Arbitrator should be nominated on the request of any Partner by the Chairman for the time being of the Institute of Arbitrators and according to the provisions of the Arbitration Act. I direct, therefore, due to the matters which have been raised, each party to submit, within 21 days a nominee to the Chairman for the time being of the Institute of Arbitrators. Then, the Chairman for the time being of the Institute of Arbitrators shall, within 14 days of the submission of the list of nominees, appoint a sole arbitrator from the list submitted. The proposed candidates and the appointment must adhere to and be on the basis of this ruling. A comprehensive resume of each candidate shall also be submitted to the appointing authority together with the proposed nominee. But I must quickly state that the Hon. Mr. Justice Steven Kairu Gatebu is now a judge of the Court of Appeal Judge and as such is not eligible to act as a sole Arbitrator in the proposed arbitral proceedings. I must also say that the insinuations by the Respondent on possibility of partiality on the part of Njoroge Regeru, as well as allegations on Dan Ameyo's adverse mention in connection with Anglo-leasing cases have no basis. I make this decision out of best judgment of the Court; acutely aware that arbitration is a consensual process; the jurisdiction of this Court in 12(8) of the Act; and with abundance of caution about the effect of appointment of an arbitrator by the Court under section 12(8) of the Arbitration Act.

Dated, signed and delivered in open Court at Nairobi this 22nd day of September, 2014

F. GIKONYO

JUDGE