REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISON

MISC CIVIL APPLICATION NO 193 OF 2014

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF AN APPLICATION UNDER S 14(3) OF ARBITRATION ACT- CHALLENGE TO ARBITRATOR

BETWEEN

ZADOCK FURNITURES SYSTEMS LIMITED.....1ST CLAIMANT

AND

MARIDADI BUILDING CONTRACTORS

LIMITED.....2ND CLAIMANT

AND

CENTRAL BANK OF KENYA.....RESPONDENT

RULING

Challenge to arbitrator

[1] Central Bank of Kenya has applied for Hon. Mr. Justice Torgbor, to be removed as the sole arbitrator in the arbitral proceedings among the parties herein. The applicant has also asked for any other relief which the court may deem fit, and of course, costs of the application. The Originating Motion dated 5th May, 2014 is expressed to be brought under Section 14(3) of the Arbitration Act and is supported by the Affidavits of JOHN MBALUTO, NEALA WANJALA and ERASTUS MWONGERA.

The Applicant's gravamen

[2] The reasons given by the Applicant/Respondent for removal of the sole arbitrator are that: 1) he departed from the procedure agreed by parties; 2) he acted unfairly and in a partisan manner such that he made unjustified accusation which insinuated gross misconduct on the part of counsel for the Respondent; 3) he has descended into the arena, made the dispute a personal matter

between him and the Respondent's counsel his own and has taken an adversarial posture in the dispute; 4) he is unable to take proper record of the proceedings an or has deliberately distorted the record of the proceedings; 5) he has failed to treat parties with equality; 6) he has betrayed the trust of parties by writing down and publishing off-record discussions among the parties; and 7) his overall conduct has destroyed the confidence of the Respondent in his ability to act fairly and reach a just decision in the arbitral proceedings.

[3] The sticky incident was on the stenographic recording of proceedings which had been agreed among the parties. It had been agreed that Mr. Amoko being the most senior advocate would source for a stenographer, hence appointment of Ultimate Hansard. The said Ultimate Hansard seconded M/S Mbugua to record the proceedings. The Respondent has given an incident on 13th March 2014 whereat M/S Mbugua was subjected to an intense and intimidating interrogation of by the arbitrator on a matter which did not require such interrogation. She was questioned by the arbitrator on her academic qualifications, professional background, years of experience, the process of transcribing of proceedings, the manner she was engaged and by whom, particulars of her boss and when the transcript in question was to be availed to the arbitral tribunal and the parties. The incident occurred after Mr. Mutubwa had raised queries on non-provision of the transcript for the previous day. According to the Respondent, the stenographer had been engaged by parties and the interrogation was not necessary. She answered all the questions and promised to deliver the transcript on 15th March, 2014. What surprised the Respondent's counsel was that the arbitrator and Mr. Mutubwa sought to pressure Mr. Amoko to accept the proceedings to be conducted in the absence of the stenographer on the pretext of saving time and costs. Mr. Amoko turned down the suggestion. The transcript was delivered as promised by the stenographer.

[4] Yet another matter. At one time, in the course of cross-examination by Mr. Amoko of Mr. Ogeto, the 1St Claimant's witness, the Respondent accuses the arbitrator of interference with the line of questioning and sometimes suggesting answers to the questions put to the witness. Again, the Respondent claims that parties engaged in off-record discussions on the understanding the discussions were not to be recorded. But on various occasions the arbitrator recorded and published off-record discussions among the parties. See paragraph 31 of Mbaluto's affidavit. In addition, on 13th March 2014, contrary to the agreement of the parties, the arbitrator issued an Order for Directions and gave a summary of proceedings before the transcript had been received as agreed. The Arbitrator send a letter dated 17th March, 2014 to parties which was woefully incomplete and replete with half-truths, inaccuracies, deliberate omissions, fabrications, unjustified accusations against Amoko and smacked partisanship. Amoko replied and pointed out all these shortcomings to the arbitrator. These happenings prompted the Respondent to file a challenge to the arbitrator under section 14(2) of the Arbitration Act but the arbitrator dismissed the challenge in his ruling of 30th April, 2014 which clearly support he is neither independent nor impartial in this matter which he has personalized. For those reasons, the Respondent applied for removal of the arbitrator.

[5] In the submissions filed herein, the Respondent justified the procedure they have adopted in filing these proceedings by way of an Originating Motion and relied on the case of **SAINT BENOIST PLAINTATION LIMITED v JEAN EMILE ADRIEN FELIX (1954) EACA 105.** The Respondent's challenge to arbitrator had been made under section 13(3) and 14(2) of the Arbitration Act. But on being rejected, the Respondent fell back to section 14(3) of the Arbitration Act and filed the application for the court to determine the matter. These proceedings were filed timeously. The Respondent replied to the 1st Claimant's objection to the form of the proceedings herein which it claimed did not clearly indicate the Applicant and the Respondents. The view of the Respondent is that the pleading by Oraro & Company Advocates for Central Bank of Kenya, the Respondent in the arbitral proceedings. And invariably, the party moving the court is, de facto, the applicant whilst the party served is the Respondent. The objection is trivial and technicality which should not fetter the court from dispensing substantive justice. It should be disregarded. See **CHEMWOLO v KUBENDE (1986) KLR 492, GITHERE v KIMUNGU (1976-1985) EA 101**

and **Article 159(2) (d) of the Constitution.**

[6] The Respondent also replied to the accusation levelled upon it by the 1st Claimant that it is guilty of material non-disclosure at the *ex parte* hearing of this application. The alleged undisclosed facts include; i) that matter had been fixed for hearing on 5th May, 2014; ii) the date of the arbitrator's appointment; iii) that this challenge is res judicata; and iv) that the 1st Claimant's reply to the challenge had been omitted. The 1st Claimant has not established material non-disclosure for it has not shown that; a) the undisclosed fact is material to the issue to be decided; b) the motive for the alleged non-disclosure; and c) the advantage the Respondent gained over the other parties. See the case of **BRINK'S MAT LTD v ELCOMBE & OTHERS (1983) 3 All ER 188** and **MARY WAIRIMU GIKUNJU v R & 3 OTHERS (2014) eKLR.** Other issues were responded to especially that the challenge was served on the 1st Claimant; that the issue of stenographer was never resolved by consent as alleged and the Respondent did not acquiesce to the proceedings of 5th March 2014 as they wrote to the arbitrator that they would be making an application in the High Court for determination of the challenge.

[7] The Respondent stated that its application is meritorious and had not been opposed by the 2ND Claimant and the arbitrator for they did not file a replying affidavit or grounds of opposition. Even the letter dated 15th May, 2014 written by the arbitrator to court does not constitute a reply to the application. The Respondent implored the court to treat their application to be un-opposed in so far as it relates to those two. In any event, the said letter by the arbitrator is full of vitriol directed to Mr. Mbaluto, Mr. Amoko and their client. The arbitrator just confirms he intended to exclude Mbaluto which will deny the Respondent of legal representation of choice guaranteed under Article 50(2) (g) of the Constitution. See the Further Affidavit by WALTER AMOKO on this.

[8] According to the Respondent, the test for removal of an arbitrator was set out in **MODERN ENGINEERING v MISKIN 15 BLR 82** where LORD DENNING put it as follows;

> ***''The proper test to apply when considering whether to order removal was to ask whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion…The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying, ''I have not had any fair hearing''.***

[9] The Respondent concluded that taking into account all the above, the arbitrator failed the test. But instead of appreciating the substance of the challenge filed before him, he dismissed and termed it as ''misplaced''. Kenya courts have applied the above test, for instance in the case of **MISTRI JADVA PARBAT COMPANY LTD v GRAIN BULK HANDDLERS LTD HCCC NO 506 OF 2011, MUTAVA J** applied the dicta by Lord Denning. He departed from the agreed procedure on the use of stenographer in recording proceedings. He was bound by the agreed procedure and he ought not to have departed from it whether on account of saving costs or time. Any saving at the expense of fairness is unjust. See the case of **TOWN & CITY PROPERTIES v WILTSHIER (1988) 44 BLR 114** and **DLG v LAING INVESTMENTS (1992) 60 BLR 117.** The arbitrator did not act as an impartial arbitrator. He failed in interrupting Mr. Amoko and insisting that he be brief like Mr. Mutubwa. This approach was more of ''inquisitorial'' as opposed to adversarial approach he should have adopted as an arbitrator. Therefore, he did not give the Respondent equal opportunity to present its case, test the opponent's case or treat the Respondent alike. See the case of **TOWN & CITY PROPERTIES (ibid)** which quoted with approval Michael M and Stewart B, ***Commercial Arbitration.*** By suggesting answers to a witness, the arbitrator misconducted himself. See **FOX v WELLFAIR 19 BLR 59.**

[10] The Respondent considered the language used by the arbitrator in the proceedings as well as his letter to the Court to be quite unsavory and characteristic of unbridled attack on counsels for the Respondent. He even accused counsels for the Respondent ‘’of stepping into their client’s shoes’’ and acting without instructions. As an arbitrator, his words and responses ought to have used measured and circumspect. See **TURNER (EAST ASIA) v BUILDERS FEDERAL 42 BLR 128.** In dismissing the challenge, the arbitrator did not render faithful, honest or disinterested decision. The height of the arbitrator’s impartiality is seen when he showed interest in the fees paid to the Respondent’s advocates since 2012. See his letter to court.

[11] Therefore, the Respondent concluded that despite the inconveniences which may arise on the removal of the arbitrator, it is far important that arbitrations are conducted in a proper manner. See **MODERN ENGINEERING CASE (supra).** The Respondent had been badly treated by the arbitrator. The arbitrator’s conduct fell short of fundamental fairness and he should be removed. He should also account for all the fee paid to him by parties and be made to refund to parties the surplus fee.

Claimants’ opposition

[12] The 1st Claimant filed a Replying Affidavit sworn by VICTOR SWANYA OGETO and written submissions in opposition to the application herein. It submitted that the Motion is incompetent as it does not accord with mandatory provisions of section 14(3) of the Arbitration Act which entitles the arbitrator to appear and be heard by the court before determining the application. The 1st Claimant says it is mandatory that the arbitrator appears and is heard before any order is made. In support of that position, the 1st Claimant cited the interpretation of section 24 of the UK Arbitration Act in Halsbury’s Law of England Volume 2(3), 4th Edition (Reissue) which it submitted is *pari material* to section 14 of Kenya Arbitration Act. In the present application, the arbitrator has not been cited as a party, thus, determination of the application in the presence of that omission offends Article 50 of the Constitution as the arbitrator will be condemned un-heard. The 1st Claimant also referred the court to **SAID JUMA CHITEMBWE v EDWARD MURIU & OTHERS** and **MILLER CONSTRUCTION LTD v JAMES MOORE EARTHMOVING (2001) 2 All ER** on the point. On that basis, the 1st Claimant submitted that the application should be dismissed. I will deal with this issue in great detail later as the arbitrator raised some salient issues on that section.

[13] The 1st Claimant further took out seven objections which are of a technical nature. The first- the application herein is a non-starter in so far as it states that it is taken out by the Respondent. Without amending the Motion, the application is fatally defective. The second- that Zadock and Maridadi were not joined as parties in this application. But let me not reserve this issue for it is straight forward. Those two are impleaded as parties in these proceedings albeit as 1st and 2nd Claimant. The third- the rules do not envisage an Originating Motion used to initiate these proceedings. The 1st Claimant premised his last objection on the Arbitration Rules, 1997. The fourth- the application is entirely new and different from the initial challenge which had been taken out before the arbitrator. Section 14 does not allow the party challenging the arbitrator to file a different challenge from the one dealt with by the arbitrator. No affidavit evidence was filed in support of the first challenge. The fifth- the application does not cite any provision on which it is founded. It cited the case of **JOEL K. YEGON & 4 OTHERS v JOHN ROTICH & 4 OTHERS [2004] eKLR**. The sixth- the challenge should have been made within 15 days of becoming aware of the alleged circumstances of impartiality which was 12th and 13th of March, 2014. The challenge before the arbitral tribunal was time barred. The seventh- the order of stay in the application cannot be granted in light of section 14(8) of the Arbitration Act which provides that parties may commence, continue and conclude arbitral proceedings while an application under section 14(3) is pending before the Court. The prayer for stay is asking the court to re-write an Act of Parliament thus contravene the legislature’s wisdom in enacting section 14(8) of the Arbitration Act. All these defects and breaches in pleadings make the suit irredeemably fatal and

should be dismissed. In view of the multiple defects, the 1st Claimant is of the opinion that the overriding objective of the Court in Article 159 of the Constitution, which acts as a double edged sword, cannot save the application for those defects affects natural justice, fair trial and due process. It cited **HUNKER TRADING LTD v EELF OIL KENYA LTD [2010] eKLR** and **John Karuri case [2004] eKLR**.

[14] The 1st Claimant accused the Applicant of non-disclosure of material facts which have been pointed out in the submissions by the Applicant above. They cited the famous case of **OWNERS OF MOTOR VESSEL LILIAN 'S' v CALTEX (K) LTD (1989) KLR 1** that a party in interlocutory proceedings must make full disclosures and failure to make such disclosures will result into discharge of the orders obtained ex parte. According to the 1st Claimant, the non-disclosure lends the ex parte orders herein to being discharged. The 1st Claimant made submissions on the merits of the application. It stated that the ruling by the arbitrator absolved the Applicant and so it could not understand how the Applicant was aggrieved by such ruling. It also submitted that the arbitrator is a person of high standing in society and possess exemplary competence, ability, integrity and qualifications. His ability cannot be in question as alleged. The grounds of challenge are based on a probability of bias and not on any ''apparent'' or ''manifest'' bias and impartiality on the part of the arbitrator to warrant his removal in law. These requirements are similar to those for disqualification of a judicial officer. See **REG v COUGH (1993) AC 646.** Relying on the article by Professor Margaret L. Moses, ***Reasoned Decisions in Arbitration Challenges, (2012),*** the 1st Claimant submitted that the challenges on the way the arbitrator was managing the proceedings is a procedural issue which should be generally viewed as vexatious and only intended to delay proceedings. The 1st Claimant another article by Professor James Crawford, ***Challenges to Arbitrators in ICSID Arbitrations, (2013)*** to support the position it has taken that lack of independence by the arbitrator must be manifest as opposed to being only possible. The application fails the test and should be dismissed.

[15] The 1st Claimant elaborately reproduced a work of this court in the case of **JAN BONDE NIELSON v HERMAN PHILIPUS STEYN & 2 OTHERS [2014] eKLR** to illustrate the allegation that Mr. Amoko or the Applicant may be on forum shopping. I will not entertain the 1st Claimant's insinuations which impinge on the conduct of Mr. Amoko since, in that case, he simply applied for recusal of the judge in the matter on the grounds which he believed was plausible and the court decided the application on its merit. But, I will make a general remark, that, forum shopping, especially by advocates-but that is not the case here- is one thing that will tincture the role of advocates as ministers of justice and which is capable of bringing the entire justice system down. And any such legal practitioner is not worthy to sit in the eminent chairs of the legal profession. Nonetheless, the substance of the above case is eminently relevant to the circumstances of this application and the relevant parts will be utilized.

[16] The 1st Claimant continued to submit that the Applicant distorted the facts around the stenographer. It is true the order for parties to engage a stenographer was made but it was for the benefit of and was to be sourced by the parties. It was not for the arbitral tribunal's record which is confidential according to Rule 7 of the Arbitration Rules, 1997. To that extent the presence of any stranger must be agreed between parties. There was no agreement that Amoko was to source the stenographer except that his nominee was not objected to. The problem arose when the transcripts were not provided for verification and the fee for the stenographer was also not tabled before the parties who were expected to meet the same. It also emerged the stenographer may not be qualified. Thus, the arbitrator was entitled to inquire on these issues in accordance with Rule 16(c) (5) and 10 of the Arbitration Rules, 1997. The issues on stenographer were subsequently resolved by consent and are, therefore, res judicata. It made submissions on the off-record recordings. The recorded incidents were unusual but the arbitrator was categorical that there were no adverse inference drawn upon those recordings and observations. So, the Applicant suffered no prejudice whatsoever.

[17] More was submitted by the 1st Claimant; allegations that the arbitrator assisted a witness are

being made for the first time and were not part of the initial challenge before the arbitrator. It is not true that he descended into the arena of litigation. The tribunal is entitled to ask for clarifications as well as seek for better evidence under Rule 16(C) (5) and (10) of the Chartered Institute of Arbitrators Rules, 1998. This is exactly what the arbitrator did and Mr. Amoko was not stopped from or impeded in his cross-examination of the witness. The Applicant was not prevented from presenting its case and no complaint of that kind was made or recorded anywhere. Counsel for the Applicant was sometimes discourteous to the tribunal but the arbitrator was quite accommodating. In sum, all the allegations being put forward by the Applicant are fictitious, scandalous, libelous, and meant to embarrass the tribunal. This is a classic case for forum shopping. The entire application lacks merit and should be dismissed. This court is enjoined under Article 159(2) (c) of the Constitution to promote arbitration. It should do so here by disregarding the allegations as misplaced.

Representations by the arbitrator

[18] Although the arbitrator insisted; 1) that his entitlement to appear under section 14(4) of the Arbitration Act is not mandatory but optional; and 2) that he was not under compulsion to file a response or within a time limit; he nonetheless wrote a letter to court dated 15th May 2014. He intimated to the Court that he is content with the Court determining the application on the basis of the documents submitted to the arbitral tribunal, the findings in and the merits of his ruling on the challenge. He, however, took issue with the order issued on 6th May, 2014 and termed is as commanding him to file a response and appear to be heard by the Court. To him, in so far as the said order uses the mandatory word ‘’shall’’, it might be mistaken for contradicting the express provisions of the Act, and that puts the legality, correctness and effect of the said order in issue before the court. He wrote further, that:

> ***Even more importantly, the power of the Court under section 14 to determine the application does not include or extend to grating a stay of the arbitral proceedings as prayed, thereby rendering the application a nullity and the D/R's Order ultra vires and void ab initio.***

[19] The arbitrator also doubted the competence of the challenge especially because it was filed by and at the instance of Mr. Mbaluto, who is not a party in the arbitration. He stated in his letter that the affidavits by Mbaluto are intended to correct fundamental flaws and defects in the challenge that was unsuccessful, and being afterthoughts on controversial issues they raise questions of admissibility. Mr. Mbaluto has also not filed or agreed on the issues for determination by the arbitrator. In addition, the application does not point out the questions the arbitrator answered for Mr. Ogeto to the prejudice off the CBK. The arbitrator says, even if Mr. Mbaluto's team took away the arbitrator's documents, he did not draw any adverse inference therefrom. On the basis of the above, it is clear Mr. Mbaluto is only trying to find fault in the arbitrator, control the arbitration or influence the outcome with his preferred arbitrator. He firmly believed resorting to court was a way of intimidating the arbitrator, an act he termed as vexatious innocence. In the premises, the arbitral proceedings should be allowed to proceed to final conclusion in line with section 14(8) of the Arbitration Act.

THE DETERMINATION

Issues

[20] Several issues have arisen. Some are of a technical nature while others are of preliminary importance. But the ultimate issue is; whether circumstances exist which give rise to justifiable doubts as to the impartiality and independence of the arbitrator herein. Arguments that the arbitrator; disregarded the agreed procedure for recording proceedings; prevented the Applicant to present its case; suggested answers to a witness; was hostile to counsels for the Applicant; and that all these things eroded the confidence of the Applicant in the arbitrator to conduct the proceedings, shall be discussed in order for the Court to determining the ultimate question of

removal or otherwise of the arbitrator. But there are those issues of a technical nature and of preliminary significance. These issues are; the competence of the application; and the proper interpretation of section 14(4) and (8) of the Arbitration Act. The former entails strands of arguments such as; application is time barred; no provision of law is cited as the basis of application; an Originating Motion is foreign to our law; the challenge is entirely different from the unsuccessful challenge; and the challenge has been initiated by a person who is not a party to the arbitral proceedings.

COMPETENCE OF APPLICATION

Time-barred

[21] The 1st Claimant was quite vocal that the application is time barred for having been filed outside the 15 days' time limit set under section 14(2) of the Arbitration Act. I wish to state that the application before this court is made pursuant to section 14(3) of the Arbitration Act and, therefore, the challenging party who was unsuccessful before the arbitral tribunal should apply to the High Court for relief 30 days after being notified of the decision to reject the challenge. The ruling rejecting the challenge was delivered on 30th April, 2-14 and this application was filed on 5th of May, 2014. It is not out of time.

No provision of law cited

[22] This argument that the application does not cite any provision of the law is not entirely defensible. The title of the application indicates it is an application for challenge under section 14(3) of the Arbitration Act. The argument, thus, fails. However, for the sake of jurisprudence; although it is desirable to cite the relevant provisions of the law on which an application is premised, with the enactment of Article 159(2) (d) of the Constitution, there has been a paradigm shift; insistence now is on courts to decide cases on the substance rather than technicalities. And, if a court is to pay undue regard to technicalities will do so contrary to the constitutional desire that courts should serve substantive justice.

Originating Motion unknown to law

[23] The other argument; is that Originating Motion is not known to law of Kenya and more specifically, the Arbitration Act, and Rules. Several instances were cited in the Arbitration Rules where the mode of applying has been provided for a particular purposes say, by way of Originating Summons or Notice of Motion or Chamber Summons. But none of the rules provides the form which an application under section 14(3) of the Arbitration Act should take. And as an Originating Motion is an acceptable way of commencing substantive proceedings, I do not think, in the statutory circumstances of Kenya, there is anything that prohibits use of an Originating Motion to initiate a proceeding under section 14(3) of the Arbitration Act. I am minded also that Kenya follows after common law tradition, and practices in England which is covered by the reception clause, makes the decision in the case of **SAINT BENOIST PLAINTATION LIMITED v JEAN EMILE ADRIEN FELIX (1954) EACA 105** a good procedural guide and its adoption thereof is are permitted here. Even going by the spirit of the Constitution which is bent at reducing formality in the commencement of pleadings, these arguments in favour of an Originating Motion are still plausible. Except I should say that an Originating Summons is provided for in the Arbitration Act and other statutes as a way of initiating primary proceedings and perhaps a party who may employ that procedure where appropriate to commence proceedings, even under section 14(3) of the Arbitration Act may confront little or no resistance. One other thing; I find something peculiar with our arbitration law-perhaps it is not important- that any recourse to the High Court by a party, even on being aggrieved by the decision of the arbitrator, is consistently by an application and the common words which are used are; ***shall apply to the High Court*** or ***request from the High Court.*** And seldom is the word ‘’***appeal’’*** used. I should think, the reason is to remove the arbitral proceedings from the rigours of the technical processes of appeal by making it simple, which in a way, recognizes arbitration is a consensual process, and it

must be kept simple and expeditious. For those reasons, I will not strike out the Originating Motion. The application is competent.

Initiator of Challenge not party in the arbitration

[24] The challenge before me was filed by Oraro and Company Advocates for the Respondent. That kind of impleading of parties elicited an objection from the 1st Claimant and in another sense, from the arbitrator. Oraro and Company are advocates for the Respondent in the arbitral proceedings and from the record and the pleadings before the Court; the challenge has been filed by and on behalf of the Respondent. In real sense, the Respondent in the arbitral proceedings is, therefore, the Applicant here. The situation is not difficult to unravel and I find little difficulty in seeing that. I hold the Applicant herein is the Central Bank of Kenya. Since the issue of who is the right party was also eminent in the challenge before the arbitrator, I wish to give it much deeper treatment. I will fall back to the Constitution on legal representation. Legal representation is a right and should be respected in quasi or judicial or even in administrative proceedings where a determination of a right is involved. The Arbitration Act recognizes legal representation of parties in the arbitral proceedings. For example, see section 25(5) of the Arbitration Act. I therefore, take the view that a challenge initiated by an advocate on behalf of a party, is neither the advocate's nor in violation of section 14 of the Arbitration Act.

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.

The question of stay of arbitral proceedings

[29] The 1st Claimant and the arbitrator also submitted at length on stay orders issued by the Court. They based their arguments on section 14(8) of the Arbitration Act which provides as follows:

> ***(8) While an application under subsection (3) is pending before the High Court, the parties may commence and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application id decided, and such an award shall be void if the application is successful.***

The arbitrator was forthright on his submission when he wrote:

> ***Even more importantly, the power of the Court under section 14 to determine the application does not include or extend to grating a stay of the arbitral proceedings as prayed, thereby rendering the application a nullity and the D/R's Order ultra vires and void ab initio.***

The 1st Claimant urged that by asking for a stay of proceedings, the Applicant is asking the court to re-write an Act of Parliament which shall be out-right contravention of the legislature's wisdom in enacting section 14(8) of the Arbitration Act.

[29] 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. Therefore, in view of the above rendition, in the absence of agreement of the parties, Section 14(8) of the Arbitration Act and the entire corpus of the Arbitration Act does not deny the Court jurisdiction to hear an application for stay and issue deserving relief of an interim measure in the form of stay of arbitral proceedings while an application under section 14(3) of the Arbitration Act is pending. Except, the Court should be careful not to impede expeditious progression of arbitral proceedings, and in fact, should be extremely wary to grant a stay of arbitral proceedings unless compelling reason or reasons exist. The stay order herein on prima facie basis was merited.

THE MAIN ISSUE

Are there circumstances that give rise to justifiable doubts as to impartiality and independence of arbitrator?

[30] As I have stated, 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 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. And the arbitrator recognized that fact. 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. To illustrate this, I am content to cite a work of the Court in the case of **JAN BONDE NIELSON [2014] eKLR:**

> ***…the appropriate test to be applied in determining an application for disqualification was laid down by the Court of Appeal in R v DAVID MAKALI AND 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''.***

[31] Therefore, whereas I agree with the arbitrator in his ruling that the circumstances under the particular ground in issue must *relate to the substantive dispute at hand such as the arbitrator's financial interest or previous involvement in the subject matter in dispute or pertinent and proven relationship with one or more of the parties in the arbitral proceedings;* the list is not exhaustive as peculiar circumstance or others not foreseen in decided cases may exist in a case but which meet the standard of justifiable doubt as to impartiality and independence of the arbitrator. That is why I stated earlier that the court must consider all the material before it in reaching a decision. And also, I am aware ''***the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before''.*** See **Suleiman v Amboseli Resort Ltd (2004) e KLR 589** ***Ojwang Ag. J (as he then was).*** But, of course, justifiable doubts as to the impartiality and independence of the arbitrator do not include peripheral or imagined or fanciful issues or mere belief by the applicant. I will apply the stringent test above, and ask; are grounds urged by the Applicant circumstances which raise justifiable doubts as to the impartiality and independence of the arbitrator?

On stenographer

[32] The Applicant argued that parties agreed on the use of stenographer in the recording of arbitral proceedings. But, somewhere, during the proceedings, the arbitrator treated the stenographer in a manner not consistent with the duty of an arbitrator by subjecting her to intense but unnecessary interrogation on experience, her boss, qualification etc. The arbitrator then ordered the stenography machine to be switched off and he resorted into his recording of the arbitral proceedings contrary to the agreed procedure of stenographic recording of the arbitral proceedings. The Applicant interpreted the incident to be a grave matter of departure from agreed procedure, thus, misconduct on the part of the arbitrator. I admit the Arbitration Act is heavily pro-parties' autonomy. But, an allegation that the arbitrator departed from the procedure agreed by the parties will need much more for it to constitute a circumstance that raise justifiable ground as to the impartiality and independence of the arbitrator, hence, his removal. First, from the way the Order for Direction was recorded and what transpired in the arbitral tribunal, it is not clear-cut that the recording of the arbitral proceedings was to be by stenographer. Parties were at liberty to engage stenographic services to record the proceedings. This said Order for Direction provided discretion for parties to engage stenographic services in recording proceedings and cannot be said to be the agreed procedure in the recording of proceedings under section 20 of the Arbitration Act. Absent concrete agreement on the stenographic services in recording proceedings, and in the face of questions that had been raised about the stenographer, the arbitrator was right to fall back to his discretion to conduct the arbitration in the manner he considers appropriate under section 20(2) of the Arbitration Act. The recording of arbitral proceedings is a matter for the arbitral tribunal and the action he took on stenographic recording of proceedings is a procedural issue and the decision thereof did not compromise the integrity of the record itself. In any case, the issues which arose on the stenographer, to wit, qualification, availing of the transcripts, and the fee of the stenographer were within the jurisdiction of and ought to have been investigated by the arbitrator as he did. The inquiry thereto was not an interference or an act of bias or misconduct on the part of the arbitrator as alleged by the Applicant. There is no particular style of carrying out an inquiry on such issues when they arise, and therefore, it will be invincible judicial folly to try to prescribe one here. I should state that the choice by an arbitrator of a particular procedure, unless it breaches his duty or completely negates the object of arbitration under the Arbitration Act should not be a basis for

removal of arbitrator. The Applicant may have been discontent with the inquiries on the stenographer or the resort to recording proceedings by the arbitrator, but there is nothing to show the arbitrator breached his duties under the Arbitration Act or the constitutional right of the Applicant. And, as long as the issue on stenographer is used to establish misconduct or to impugn the record, it is not matter which is apparent or manifest on the record or an action by the arbitrator which caused or will cause substantial injustice on the party challenging the arbitrator. The ground fails the test and is dismissed. See the literally works by Professor Margaret L. Moses, ***Reasoned Decisions in Arbitration Challenges, (2012),*** and by Professor James Crawford, ***Challenges to Arbitrators in ICSID Arbitrations, (2013)*** on the weight a court should place on a challenge based on procedural issues especially given that an arbitrator will always retain a measure of discretion in applying any of the procedures followed in the arbitral proceedings.

Erosion of confidence

[33] Erosion of confidence in the arbitrator is too wide a concept which is incapable of specific definition or which could be tethered to a defined catalogue of incidents. To me, I should think, it is the totality of the varied incidents a party may possibly plead in a challenge to the arbitrator. It will include allegations of bias, prejudice, misconduct, incompetence et al. For that reason, it will be perilous to try and treat such ground as a stand-alone. I should think even the dicta by Lord Denning in the case of **MODERN ENGINEERING v MISKIN** should be seen within the broad sense I have enunciated. I will therefore, consider all the other grounds presented by the Applicant to see whether they justify only one and inescapable conclusion that the integrity of the judicial process was so compromised such that no reasonable person will say the arbitrator will deliver justice to the party challenging the arbitrator.

Denial of opportunity to present its case

[34] I will consider two matters under this head; the allegations that the arbitrator assisted a witness to answer questions; and prevented the Applicant's counsel to cross-examine a witness. These two allegations are serious, and if proven, they constitute misconduct and denial of right to fair trial. Such would be an affront of Article 50 of the Constitution as well as a negation of the very duty of the arbitrator as an adjudicator of disputes. Indeed, an allegation that a party was prevented from presenting its case is a potent ground for setting aside an arbitral award. The allegation that the arbitrator assisted a witness, Mr. Ogeto, ought to have been attended by such succinct particulars and proof of the specific questions asked and answers supplied by the arbitrator. The Applicant did not direct the Court to such questions and answers. Even looking at the record, there is nothing to support the allegation that the arbitrator assisted a witness or provided evidence on behalf of Mr. Ogeto in the sense of **FOX v WELLFAIR CASE**. The ground fails. I turn to the other allegation that the applicant was prevented from presenting its case because the arbitrator interrupted and prevented Mr. Amoko from carrying out cross-examination of Mr. Ogeto. The arbitrator sought for clarifications on certain issues especially on the documents he was cross-examining the witness on; the location in the bundle or whether the document was before court etc. The only comment I should make is that all parties as well as the arbitrator are bound by the overriding objective of the law and each should work towards achieving the objective. None, including the arbitrator should overdo its role. I find nothing which show that the arbitrator impeded cross-examination. The arbitrator may seek for clarification in order to understand and follow the proceedings, for; ultimately he will render a decision on all the issues in controversy. The arbitrator is also entitled to seek to know the relevance of a question to the issue in controversy; and needless to state the right of cross-examination does not extend to asking irrelevant or scandalous questions. However, even when seeking for clarifications, the arbitrator should avoid engaging counsels or parties in a protracted argument which may be mistaken for undue interference with cross-examination. The arbitrator's engagement with Mr. Amoko may have been leisurely and expansive but it did not amount to impeding or denial of an opportunity for the Applicant to present its case. Perhaps that is what infuriated Mr. Amoko and in the heat of the moment, he believed the incident would pass for justifiable grounds to remove the arbitrator. My overall impression out of the entire circumstances in this case is that the arbitrator did not

descend into the arena or lose his impartiality as the arbitrator as alleged. Accordingly, I reject the ground that the arbitrator prevented or impeded the Applicant from presenting its case.

Measured language

[35] Again, the Applicant accused the arbitrator of using unusually harsh language on the counsel for the Applicant which bordered on abuse and some, on insinuations that they acted without their client's instructions. I admit the arbitrator must carefully weigh his words; always measured and circumspect if he is to maintain the integrity and confidence of his office and decision. See **TIRNER (EAST ASSIA) CASE** on this. In extreme cases, use of unsavory language may be a ground for removal of an arbitrator. The language of the arbitrator herein may bear an element of arrogance or what I may call omnicompetent disposition. But I do not agree with the Applicant that, when the arbitrator termed the challenge as a case of ''the pot calling the kettle'' or reference to the counsels as ''stepping into their client's shoes'' amounts to unmeasured language. The latter reference to counsels was made by the arbitrator in his exposition in the ruling of the phrase ***''a party who intends to challenge''*** in section 14(2) of the Arbitration Act. An arbitrator cannot be removed for his decision on a challenge; even if he errs, it is just a matter for normal appellate judicial scrutiny and not a ground for removal. On that basis, I reject the argument that...***the arbitrator used a language that was not measured which completely eroded the confidence of the parties in the arbitrator to reach a just and impartial decision.***

Off-record proceedings

[36] Matters which the arbitrator recorded were unusual happenings attending the proceedings. Such matters need not be recorded particularly where they have been resolved in a mutual manner or are not intended to be part of the decision, or were mere incidents of no relevance or bearing to the proceedings. But even though the arbitrator recorded the unfortunate incidents, there were no adverse inferences that were drawn upon them, and the arbitrator was categorical about that fact in his ruling. I do not think in the circumstances, the recording will prejudice the Applicant in any way, or it can be a basis for removal of the arbitrator for lack of impartiality and independence in handling the case among the parties.

In the final analysis

[37] The Applicants have packaged the challenge in words and phrases which appear to be very powerful; but I think the actual grounds for the challenge are feeble in substance. Unless the court is careful, inflated trivial issues may easily pass for real and substantial grounds of removal of an arbitrator, which will run contra the constitutional principle of justice that courts should promote arbitration as one of the efficacious alternative dispute resolution mechanism. Needless to state, such challenges if they are not properly sieved will negate the intention of the Arbitration Act and the entire standards and practices in arbitration within the UNCITRAL Model Law. The court should be wary that those intent on obstructing arbitral process may file unmeritorious challenges of arbitrators in the High Court, thus, to defeat such maneuvers, courts should dispose of a challenge to arbitrator expeditiously. I find that there exist no circumstances that give rise to justifiable doubts as to the impartiality and independence of the arbitrator. Any person looking at what the arbitrator has done, will not have the impression in the circumstances of the case, that there was real likelihood of bias. The appropriate test, therefore, is that lack of impartiality and independence must be ''manifest'' as opposed to ''mere possibility''- ''almost certain'' when circumstances of the case are considered. The arbitrator in this case is a person possessed of impeccable qualifications, experience; unimpeached integrity, ability and resolve to follow through on the arbitral proceedings to a just, fair and proportionate conclusion. The allegations levelled against the arbitrator were based on suspicion and feeling of the counsels that the arbitrator cannot be impartial and independent. Some of the grounds cited are reminiscent of an infuriated counsel by the adjudicator and others are founded on inferences but which were not drawn upon any defined facts or state of things. Needless to remind, legal professionalism both for judicial officers and legal practitioners is modesty and possessing dignified mood in any legal

proceeding no matter the circumstances. The upshot of the entire analysis of the circumstances of this is that the challenge is dismissed. I also discharge the order of stay of the arbitral proceedings. It is so ordered.

Dated, signed and delivered in court at Nairobi this 30th day of October 2014

F. GIKONYO

JUDGE