REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Miscellaneous Civil Application 506 of 2011

MISTRY JADVA PARBAT COMPANY LIMITED.....PLAINTIFF

VS

GRAIN BULK HANDLERS LIMITED..... DEFENDANT

RULING

1. By way of an originating summons brought under Section 14(3) of the Arbitration Act, the Plaintiff, Mistry Jadva Parbat & Company Limited (hereinafter called "MJP" or "Claimant") has applied to this court for orders for the removal of Mr. Norman Mururu (hereinafter called "the arbitrator") as the arbitrator in arbitration proceedings between the Plaintiff and the defendant, Grain Bulk Handlers Limited (hereinafter called "GBH" or "Respondent"). The arbitration proceedings arose from a dispute relating to a building contract that the parties entered into on 14th August 1995 which contract contained an arbitration clause subjecting disputes between the parties to arbitration.

2. The grounds upon which the application is brought to court are rendered on the face of the Originating Motion as follows:

a. The arbitrator has failed to treat the parties to the arbitration with equality;

b. The arbitrator has failed to give the Claimant MJP a fair and reasonable opportunity to present its case; and

c. The arbitrator has failed or neglected to follow the procedure prescribed by his directions which directions were made by consent of both parties.

These grounds are further buttressed by a supporting affidavit sworn by Mr. Geoffrey Muchiri on 2nd June 2011.

3. It is the Claimants case that the parties appointed the arbitrator on 17th March 2008 and he accepted the appointment on 7th April 2008. The parties held the first meeting with the arbitrator on 16th May 2008 when directions were agreed. Discovery of documents followed and this appears to have hit snag after snag with parties unable to meet deadlines and incessantly seeking extensions and reviews of the schedule for the proceedings. On 9th December 2010, the parties appeared before the arbitrator and signed a consent in terms of the following directions:

1) Counsel for the Claimant was to prepare a core common bundle of documents to become part of the agreed bundle of documents by 10th January 2011.

2) Counsel for the Claimant was to prepare a second bundle of documents “not agreed” by 10th January 2011.

3) The remainder of the documents was to be compiled into a third omnibus bundle by 10th January 2011.

4) Witness statements were to be exchanged on 31st January 2011.

5) Hearing was to commence 14th February 2011 and to proceed until 24th February 2011. Further hearing dates were reserved for 9th to 11th March 2011 and 21st to 25th March 2011.

6) Parties reserved the right to put in rebuttal statements upon application.

4. The Claimant further contends that on 31st January 2011, the Respondent was not ready to exchange the witness statements, resulting in the oral hearing of the proceedings being adjourned to 23rd March 2011. The parties then agreed to exchange witness statements on 1st March 2011. The statements were eventually exchanged on 16th March 2011 although a report of an expert witness Mr. Gichuhi was not annexed to his witness statement. The Claimant avers that the said report, made in October 2010, was necessary to support Mr. Gichuhi’s statement. The Claimant’s side then revised the witness statements and determined that there was need for a rebuttal statement. On 22nd March 2011, the Claimant applied for adjournment to allow for preparation and filing of further statements in reply or rebuttal of the Respondents’ statements. This application was objected to by the Respondent’s advocate and the arbitrator appears to have upheld the same by insisting that the hearing had to proceed on 23rd March 2011.He ignored the parties’ wish to argue the adjournment application and ordered that any intended objections be made orally. The Claimant further contends that the report of Mr. Gichuhi dated October 2010 was only received on 25th March 2011 when it was not possible for the Claimant to make a rebuttal to the report. The Claimant had supplied all its documents before the Respondents prepared their witness statements yet was not allowed reasonable time to consider the Respondent’s documents. The Claimant also complains that the arbitrator ignored its proposal on what order to call its witnesses and also ignored the fact that one Mr. Lalji who had represented the Claimant throughout the administration of the building contract had died.

5. In his submissions, Mr. Amoko, learned counsel for the Claimant told the court that as a result of the above course of events, the impartiality and independence of the arbitrator was called to question as it was clear that the Respondent was accorded ample time to prepare its case but the Claimant was not given ample time to prepare. In particular, there was a deliberate effort to keep away the expert document and to block the Claimant from the right to make a rebuttal to the report. Further, the arbitrator had failed to adhere to the procedure agreed by consent of the parties and had adopted his own procedure which was a breach of Section 20 of the Arbitration Act. That section allows the arbitrator to determine the procedure to be followed only if parties fail to agree on the procedure. A challenge to the arbitrator’s impartiality filed by the Claimant on 6th April 2011 had also been dismissed vide a decision of the arbitrator dated 4th May 2011. The arbitrator had indeed allowed the Respondents to respond to the challenge which was not allowed under Section 14(2) of the arbitration Act. The arbitrator was therefore too anxious to conclude the matter at the inconvenience of the Claimant.

6. Both the Respondent and the Arbitrator opposed the application. For the Respondent, learned counsel Mr. O.P. Nagpal opted to oppose the application on points of law and did not filed any replying affidavit. On his part, the arbitrator opposed the application through a replying affidavit sworn on 23rd June 2011. In his affidavit, the arbitrator avers that the matters complained of had fully been addressed in his letter dated 4th May 2011, ruling on the challenge made by the Claimant as to his impartiality. He further avers having given extensions to both parties on various occasions and having treated the parties equally and fairly.

7. In his submissions, Mr. O.P. Nagpaltold that the Court that the Respondent had not filed a replying affidavit as the Arbitration Act does not compel the Respondent to do so. This was essentially because an

application of the present nature was a contest between the applying party and the arbitrator. He submitted further that the arbitrator had accorded parties an opportunity to address him on the question of time. He argued that the parties had been dealing with peripheral matters, and the arbitration itself had never commenced. The arbitrator had given all parties ample time. With regard to the rebuttal statement, Mr. Nagpal argued that filing of rebuttal statements was not an automatic right and a party could only seek to file such if there was need, and upon application to the arbitrator who would then consider and make appropriate directions. He submitted that the arbitration had commenced a long time ago and should not be hampered by minor complaints. He also told the court that the Claimant's application to court was time-barred within Section 14(2) of the Arbitration Act.

8. For the arbitrator, learned counsel Ms. Mutea told the court that the parties were still at preliminary stages of deciding on the time table for this arbitration. The only complaints related to the issue of adjournment. She submitted that the Arbitrator had utilized his discretion in determining how to regulate the procedure of the arbitration. On the issue of rebuttals, Ms. Mutea submitted that the arbitrator had allowed parties to apply but that the claimant had sought to reply in writing to the witness statement. The witness could be orally cross examined. In any event, the arbitrator had by his letter of 4th May 2011 allowed the claimant to revive the application to rebut the witness statement in writing. Ms. Mutea also submitted that the facts of the cases cited by the Claimant were entirely different from the present case. On the alleged failure by the arbitrator to follow agreed procedure, Ms. Mutea argued that no procedure had been agreed. That is why in the letter of 4th May 2011, the arbitrator was concerned that it had taken three years to determine the matter. She urged the court to compel the parties to proceed before the present arbitrator.

9. I have carefully considered the application and the affidavits sworn for and against the affidavit together with the annexures thereof. I have also considered the rival submissions of learned counsel for the respective parties and the authorities cited to bolster such arguments.

10. The issues that arise for my determination can be summarized as follows:

1) Whether the challenge to the Arbitrator and the present application were made on time;

2) Whether the claim of lack of impartiality and independence on the part of the arbitrator is merited;

3) Whether the Claimant was accorded ample time to prepare its case; and

4) Whether the Arbitrator is in breach of the procedure agreed by the parties.

11. With regard to the contention by counsel for the Respondent that the challenge was not brought within the time allowed under Section 14(2) of the Arbitration Act, the said section provides that a party may challenge an arbitrator with regard to any matter referred to in Section 13(3) within 15 days of becoming aware of any circumstance referred to in that section. Section 13(3) allows a challenge on an arbitrator on grounds, *inter alia*, of existence of circumstances which give rise to justifiable doubts as to his impartiality and independence. Looking at the chronology of events as relates to the challenge, it is on record that the Arbitrator declined to grant an adjournment on 23rd March 2011. The Claimant made a decision to challenge his impartiality and gave notice of the challenge on 24th March 2011, which was well within the 15 days allowed under Section 14(2). The reasons for the challenge then followed on 6th April 2011 which date was itself within the said prescribed time. The Arbitrator's ruling was made on 4th May 2011 and the present application made on 2nd June 2011, again within the 30 days allowed under Section 14(3) of the Arbitration Act. The challenge was therefore made within time.

12. On whether the Arbitrator in the present matter was independent, the impartiality and independence of the arbitrator was challenged on three grounds, namely, exhibiting bias in favour of the Respondent, failure to accord the Claimant an opportunity articulate its case and finally failure to adhere to the procedure agreed by and with the parties.

13. In support of the allegation of bias, the supporting affidavit of Geoffrey Muchiri is replete with many incidences in which the Arbitrator is shown to have been more than willing to accede to the requests of counsel for the Respondent without commensurate readiness and zeal to accommodate the Claimant's counsel. Paragraphs 15, 23, 32, 42, 56,61,68,73, 90-93,124-128, 132-134 and 139-142 of the supporting affidavit capture the occasions upon which the Arbitrator exhibited bias in favour of the Respondent. In my analysis, the incidences captured under the above paragraphs provide sufficient basis for supposing that the Arbitrator did not treat the parties equally and in many occasions favoured the Respondent. This is particularly so when requests such as for extension of time were granted to the Respondent with no or rare consultation with the Claimant. In the case of **DLG v. Laing Investments (Bracknell) Limited 60 BLR 112**, the conduct of an arbitrator of imposing time tables on the parties, applying directions without the consent of the parties, adopting discovery proposals of one party without consultation of the other, denying one party adjournment and failing to address requests of the parties were cited as grounds entitling the court to remove the arbitrator. Similar grounds exist in the present case before the court.

14. On failure to accord the Claimant adequate opportunity to present its case, this allegation is anchored upon a number of grounds namely, failure by the Arbitrator to accord the Claimant adequate time to respond to a voluminous report by an expert witness called Mr. Gichuhi; the insistence by the Arbitrator on the order in which evidence would be tendered by the Claimant as explained in paragraph 132 of the supporting affidavit; the rejection of an application by the Claimant for adjournment of the hearing scheduled on 23rd March 2011 to enable the Applicant file further statements by way of reply to the Respondent's Witness Statements and the Arbitrator's direction that the rebuttal statements should be introduced orally. In my view, these incidences give sufficient ground to make the deduction that the Arbitrator made decisions and directions whose effect was to muzzle the Claimant in the presentation of its case. In effect, the Claimant has lost confidence in the arbitrator. Faced with a similar scenario, **Lord Denning MR** in the case of **Modern Engineering Vs. Miskin 15 BLR p.93 at p.96** laid down the test that the court should apply as follows:

'The judge put this case test to himself in his judgment: Are the circumstances such as demonstrate that the arbitrator is not fit and proper person to continue to conduct the arbitration proceedings? I do not think that was the right test. I would ask whether his 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 can 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 a fair hearing".

I think the same test applied to the present case would return an unfavorable result for of the arbitrator, in view of the conduct detailed above.

15. Finally, on the allegation that the Arbitrator failed to conduct the proceedings in accordance with the agreements of the parties, the many directions and timescales that the Arbitrator set and which were seldom met demonstrate in no uncertain terms that the Arbitrator completely lost control and direction of the proceedings and was fully exposed to the whims of the haphazard changes at the instance of both parties. A clear demonstration of the Arbitrator's lack of control and direction of the proceedings is the Arbitrator's summary rejection on 22nd March 2011of the Claimant's request for adjournment of the hearing scheduled for 23rd March 2011 to enable the Claimant file written rebuttals to the Respondent's Witness Statements only to turn around on 4th May 2011 to allow the Claimant to revive the application to rebut the witness statement in writing, apparently to repair the dent caused by the challenge to his impartiality that had long been filed. Why did the Arbitrator reject the request in the first place, and why was he now willing to accommodate it? Either decisions are not informed by any documented fact and point to arbitrariness in the treatment of issues by the Arbitrator.

16. If indeed one was to go by the argument made on the part of the Respondent that the parties were still dealing with pre-arbitration issues, and when such engagement had dragged on from March 2008 to April 2011 which is exactly three years, one would shudder to imagine the time the arbitration proper would

take. The present state of affairs is one that hardly accords with the Arbitrator's letter of appointment dated 17th March 2008 from the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) which emphasized the need for Arbitrator to execute his duties expeditiously, with utmost impartiality and in accordance with the agreement between the parties. There is very little to show for the time and resources expended so far and there is no indication that this state of affairs would change, if the arbitration proceedings herein are left under the same stewardship of Mr. Norman Mururu.

17. It cannot be overemphasized that the advantages of arbitration over litigation include the ability of the former to secure speedier and cost effective resolution of disputes compared to the latter. This in an amiable environment that leaves parties' business relationships fairly intact. Where however arbitration proceedings are clogged up with preliminary matters and procedural technicalities that more or less match the rigidity of litigation, such proceedings miss the essence of intercession and comparative informality that arbitration serves. Courts should, in such circumstances, not hesitate to intervene in order to shelter the place of arbitration in dispute resolution. As Bingham J. observed in the case of **C.M.A. Maltin Engineering Limited Vs. J. Donne Holdings Limited 15 BLR p.68** at p.75 :

"A party who seeks, for understandable reasons to dispense with the formalities of ordinary litigation should not without more be treated as wishing to dispense with the fundamental rules underlying the administration of justice, however informal; and while courts should be slow to intermeddle with the procedural conduct of arbitrations, it has a responsibility to safeguard the ultimate integrity of the arbitration process".

18. For these reasons, I am convinced that it is in best interests of parties that the present arbitrator be removed from the present proceedings as it has been sufficiently shown that he has lost not only control and direction in the proceedings but has also lost credibility in the eyes of at least one of the parties to the proceedings. I will therefore allow the Originating Motion, as I hereby do, with costs to the Claimant.

19. With regard to the directions I am required to give under 14(7) of the Arbitration Act, I note from the appointment letter of the Arbitrator dated 17th March 2008 that "Guidelines for Remuneration Charges" were attached to the letter but these were exhibited in the annexture to the supporting affidavit of Geoffrey Muchiri sworn on 2nd June 2011. I further note that in his letter to the parties dated 19th May 2008, the Arbitrator fixed his fees at an hourly rate of Kshs. 17,500/- and requested the parties to pay a deposit of Kshs. 250,000/- plus VAT each.

Given the removal of the Arbitrator through this ruling, and given that the arbitration itself had not commenced, I would exercise my discretion to allow the Arbitrator to contend with and retain the respective deposits of Kshs. 250,000/- plus VAT already paid by the parties.

Should any party not have paid its deposit as yet, I direct that the party pays the same to the Arbitrator, within 14 days from today.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JANUARY 2012

J. M. MUTAVA
JUDGE