



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS APPLICATION 926 OF 2011**

**JOHNSON KAGO MWAURA ..... CLAIMANT**

**VERSUS**

**ROSE NDUTA GITHUA ..... 1<sup>ST</sup> RESPONDENT**

**BIA BORA DISTRIBUTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> respondent's application dated 23<sup>rd</sup> November, 2011 which seeks the following orders:

“1. ....

2. ....

3. ....

4. **That the Award made by the Honourable Arbitrator, Mr. Steven Gatembu Kairu on 05<sup>th</sup> August, 2011, be set aside.**

5. **That the applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.**

6. **That the costs of this application be provided for.”**

2. The facts that gave rise to the application are that the 2<sup>nd</sup> respondent, a company that was incorporated in 1998, had three shareholders, **Peter Mwaura Githua**, (now deceased), who was the husband of the 1<sup>st</sup> respondent held 60% of the shares, the 1<sup>st</sup> respondent, 30% and the claimant 10% shares.

3. The claimant was also an employee of the company, the 2<sup>nd</sup> respondent, the Managing Director and was earning a monthly salary and various benefits.

4. Peter Mwaura Githua died in 2005 and the 1<sup>st</sup> respondent became the Chairman while the claimant remained the Managing Director.
5. There arose misunderstanding between the Chairman and the 1<sup>st</sup> respondent as a result of which the 2<sup>nd</sup> respondent terminated the claimant's engagement as the Managing Director of the company with effect from 30<sup>th</sup> June, 2009.
6. The claimant invoked **Article 31** of the **Company's Articles of Association** which provided for resolution of disputes, disagreements and differences by way of arbitration.
7. By mutual agreement, the advocates for the parties appointed Mr. **Steven Gatembu Kairu** as sole Arbitrator. The claimant raised issues relating to his shares in the company and also about the termination of his services as the Managing Director and various dues that were payable to him.
8. The Arbitrator conducted arbitral proceedings and heard all the parties and their respective advocates. The Arbitrator then prepared a well considered award which he made on 5<sup>th</sup> August, 2011. The same was delivered to the parties on 24<sup>th</sup> August, 2011.
9. The terms of the settlement as stated in the award were as follows:

**“A. That the 2<sup>nd</sup> Respondent do pay to the Claimant Kenya Shillings One Hundred and Fifty Thousand (Kshs.150, 000.00) only being the balance of his salary for the months of October and November 2007.**

**B. That the 2<sup>nd</sup> Respondent do pay to the Claimant the sum of Kenya Shillings Two Million Eight Hundred and Fifty Thousand (Kshs.2,850,000.00) only being salary for the period December 2007 to June 2009.**

**C. The 2<sup>nd</sup> Respondent shall pay to the Claimant the sum of Kenya Shillings One Hundred and Ninety Thousand (Kshs.190, 000.00) only being entertainment allowance for the period December 2007 to June 2009.**

**D. That the 2<sup>nd</sup> Respondent do pay to the Claimant the sum of Kenya Shillings Six Hundred Thousand (Kshs.600, 000.00) only being damages for wrongful revocation of the Claimant's appointment as Managing Director of the 2<sup>nd</sup> Respondent.**

**E. That the 2<sup>nd</sup> Respondent do pay to the Claimant the sum of Kshs. Two Hundred and Thirty Three Thousand Eight Hundred and Twelve Cents (Kshs.233, 812.80) only being reimbursement of expenses.**

**F. That the 2<sup>nd</sup> Respondent do pay to the Claimant the sum of Kenya Shillings Five Hundred and Sixty Thousand (Kshs.560, 000.00) only being the amount unpaid premiums relating to Life and Investment Insurance Policy No. MP00099 up to May 2009.**

**G. That the 2<sup>nd</sup> Respondent do pay to the Claimant the sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150, 000.00) only being the balance of the loan amount advanced to the 2<sup>nd</sup> Respondent.**

**H. That the 1<sup>st</sup> Respondent do pay to the Claimant the sum of Kenya Shillings Three Million Six Hundred and One Thousand Cents Ten (Kshs.3,601,134.10) only being the value of the acquisition of the Claimants 10% shareholding in the 2<sup>nd</sup> Respondent.**

**I. That the Respondents do return to the Claimant the Claimant's titles with respect to**

**Title Number Nairobi/Block 73/386 and Nairobi/Block 110/791 duly discharged.**

**J. The Respondents claims by Counter-Claim against te Claimant for Kshs.5, 216,926.00 or alternatively for Kshs.4, 127,321.00 fails and is dismissed.**

**K. That the 2<sup>nd</sup> Respondent do pay the Claimant's costs of the arbitration to be agreed or failing agreement to be taxed by me if required.**

**L. Payments to the Claimant under this Award shall be made within Sixty (60) days from the date of delivery of this Award and in default the amount awarded will attract interest at the rate of 12% per annum computed from the date of delivery of the Award until payment in full."**

10. The 1<sup>st</sup> respondent was not happy with the said award and she dropped her advocates, **Majanja, Luseno & Company** and engaged **M/S Ochieng, Onyango, Kibet & Ohaga Advocates** who filed the current application.

11. The 1<sup>st</sup> respondent contended, *inter alia*, that:

**the arbitral proceedings arose out of a labour dispute and it is only the Industrial Court, pursuant to Labour Institutions Act, 2007 which has jurisdiction to hear and determine such a dispute. The award was made without jurisdiction and is null and void, she added.**

12. The 1<sup>st</sup> respondent faulted the Arbitrator for failing to determine the dispute in accordance with the law, for ignoring relevant evidence adduced by parties, for failing to treat each party with equality and for his assessment of the dues payable to the claimant.

13. The 1<sup>st</sup> respondent swore an affidavit in support of her application wherein she expounded her claims.

14. The claimant filed a notice of preliminary objection and a replying affidavit. The preliminary objection consists of several grounds which may be summarized as hereunder:

**(a) The application is incompetent because it was filed under a fresh cause, Misc. Civil Application No. 926 of 2011 instead of Misc. Application No. 462 of 2008 in which the matter was commenced.**

**(b) Subsequent to the filing of the award by the claimant's advocates on 14<sup>th</sup> October, 2011 further proceedings have since taken place including the reading of the award by this court's Deputy Registrar.**

**(c) The commencement of this fresh application while the existing cause is still in place is contrary to the provisions of Rule 4 (2) of the Arbitration Rules, 1997; consequently the application is incompetent.**

15. In the replying affidavit, the claimant stated that the grounds under which the High Court can set aside an arbitration award are only those listed at **Section 35 (2) of the Arbitration Act, 1995**, (hereinafter referred to as "**the Act**"), and a party who invokes that section ought to expressly state the specific provision under which an order is being sought.

16. The 1<sup>st</sup> claimant further stated that:

**(i) the issue of jurisdiction ought to have been raised before the arbitrator himself and within the time expressly provided for by the Act. See Sections 5 and 17 (2), (3) and (6).**

**(ii) the reference to arbitration herein arose from consent orders recorded in court in Misc. Civil Application No. 462 of 2008 and at no time did the 1<sup>st</sup> respondent raise any issue or**

**challenge on jurisdiction and have never sought to set aside the consent order.**

**(iii) the dispute that was referred to arbitration was not a mere labour dispute as the matters in issue included the claimant's shareholding in the company and his relationship with the remaining shareholder.**

17. The claimant stated that the arbitration was conducted professionally and the award matched the evidence adduced by the parties.

18. It was agreed by consent that counsel file their respective submissions and briefly highlight the same, which they did. I have carefully considered the affidavits, the submissions as well as the authorities cited by both parties.

19. I will first deal with the issues raised in the preliminary objection. **Rule 4 (2) of the Arbitration Rules, 1997** provides that:

**“All applications subsequent to filing an award shall be by summons in the cause in which the award has been filed .....**”

20. It is not in dispute that the award was filed and read in **Misc. Application Number 462 of 2008**. This application should therefore have been filed in that miscellaneous cause and not in a separate cause. It is therefore not correct, as **Mr. Oduol** contended, that after recording the consent to refer the matter to arbitration the proceedings in Misc. Application Number 462 of 2008 came to an end.

21. That notwithstanding, it would be unconstitutional for this court to shut out the 1<sup>st</sup> respondent's application on such a technicality. **Article 159 (2) (d) of the Constitution of Kenya, 2010** requires the court to administer justice without undue regard to technicalities. I will therefore overlook that procedural impropriety and proceed to deal with the substantive matter. After all, the two files are before the court and no prejudice will be occasioned to the claimant by the court's decision to give due consideration to the constitutional provision aforesaid over statutory provisions.

22. I now turn to the issue of jurisdiction of the arbitrator to hear and determine the dispute that was presented before him.

23. The 1<sup>st</sup> respondent contends that the Industrial Court had exclusive jurisdiction to hear and determine the dispute in issue and for that submission placed reliance on the provisions of **Section 12 (1) of the Labour Institutions Act, 2007** which states:

**“The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee.”**

24. However, the relationship between the respondents and the claimant was beyond that of an employer and an employee. The claimant's case was that he co-founded the company with his late brother, Peter Mwaura Githua, and that the 1<sup>st</sup> respondent came into the management of the company after the demise of her husband and began to scheme on how to remove him from the company.

25. He contended that his removal was improper in law and sought payment of his terminal dues. But more important, as regards the issue of jurisdiction, the claimant argued that if the 1<sup>st</sup> respondent wished to remove him from the company, the company needed to purchase his shares at a fair market rate. That is clearly not an issue that could have been dealt with by the Industrial Court.

26. The firms of **Geoffe & Associates** and **Wachira Irungu & Associates** were by consent appointed as Auditors to conduct a forensic audit and valuation of the company with a view to establishing, among

other things, the share value of the company and determine the value of the claimant's 10% shareholding.

27. The agreed issues for determination by the arbitrator are also beyond the jurisdiction of the Industrial Court. The advocates for the parties were clear about that and decided to refer this matter to arbitration in terms of **Article 31** of the **Company's Articles of Association**.

28. I agree with Mr. Oduol that the issue of jurisdiction can be raised at any time, even if it was not raised at the arbitral proceedings and if indeed a court is satisfied that parties purported to confer jurisdiction upon an arbitrator when by law he had no such jurisdiction the award can be set aside. See **KENINDIA ASSURANCE CO. LTD. vs. OTIENDE (1989) 2 KAR 162.**

29. However, in this case, the advocates for the parties were in agreement, and rightly so, that the dispute between the parties was not just an employer-employee disagreement and that is why they consented to appointment of an arbitrator and proceeded to draw the terms of reference and the agreed issues for determination. In **KIHUNI v GAKUNGA & ANOTHER [1986] KLR 572**, the Court of Appeal held that:

**“A party cannot be heard to challenge issues referred to arbitration especially in a case such as this where the parties and their respective advocates drew the issues. The parties are deemed to know the real questions between them. The arbitrators will consider evidence on issues which are referred to them.”**

30. In the circumstances, the 1<sup>st</sup> respondent is estopped from arguing that the arbitrator had no jurisdiction. See **KOBIL PETROLEUM v PATRICK D. WABIDONGE, Civil Appeal No. 36 of 2004.**

31. I find and hold that the arbitrator had jurisdiction to hear and determine the dispute in terms of the agreement by the parties.

32. Turning to the provisions of **Section 35** of the **Arbitration Act, 1995, subsection 2** thereof states:

**“An arbitral award may be set aside by the High Court only if –**

**(a) the party making the application furnishes proof-**

**(i) that a party to the arbitration agreement was under some incapacity; or**

**(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**

**(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**

**(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or**

**(v) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;**

**(b) the High Court finds that –**

**(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**

**(ii) the award is conflict with the public policy of Kenya.”**

33. In an application to set aside an arbitral award under **Section 35**, a party should cite the specific provision and/or subsection under which the application is brought. That was not done by the 1<sup>st</sup> respondent.

34. Looking at the grounds upon which the 1<sup>st</sup> respondent based her application to set aside the arbitral award, it is apparent that the gravamen of the application was want of jurisdiction which I have already dealt with hereinabove. None of the other grounds cited were established by the 1<sup>st</sup> respondent. I may also add that some of the grounds do not fall under **Section 35** of the **Act**.

35. This court is not satisfied that the subject matter of the dispute was not capable of settlement by arbitration and neither is it of the view that the award is in conflict with the public policy of Kenya.

36. Having carefully perused the award, I am satisfied that the arbitrator took into account all the pleadings and evidence, including the forensic audit report, submitted to him and treated both parties equally. It is improper to accuse an arbitrator of bias without sufficient evidence to back up such an allegation.

37. All in all, I find no merit in the 1<sup>st</sup> respondent's application and dismiss it with costs to the claimant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JUNE, 2012.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**

Muriithi – Court Clerk

Mr. Abitha for Mr. Oduol for the Applicant

Mr. Wananda for the Respondent