



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 178 OF 2011

**PERMA STRUCTURAL ENGINEERING
COMPANY.....PLAINTIFF**

-VERSUS-

**RIFT VALLEY WATER SERVICES
LIMITED.....DEFENDANT**

RULING

1. This Ruling relates to the plaintiff/applicant's Notice of Motion dated 16/05/2012 wherein the applicant is seeking the following orders:-
 - a) That the arbitrator Mr. Okongo Omogeni be ordered to disqualify himself from acting in this matter.
 - b) That the Chairman of the Law Society of Kenya be ordered to appoint another arbitrator.

BACKGROUND

2. The Plaintiff herein filed a suit on 12th July 2011 against the Defendant for breach and wrongful termination of the contract entered into by the parties. The defendant had contracted the plaintiff to improve the Ol Kalou Water Project and the plaintiff claims to have performed the contract as instructed but the defendant has not paid the plaintiff for the works done and thereafter, it terminated the contract unfairly. The plaintiff now seeks Kshs. 115,953,100/= together with interest at the prevailing commercial rates of 12% per annum from 3rd November, 2010 till payment in full.
3. The Defendant entered Appearance on 28th July, 2011 and thereafter filed its Defence and Counterclaim on 15th August 2011. The Defendant alleges that it is the plaintiff who acted in breach of the said contract as a result of which it terminated the same. It now claims general damages of Kshs. 200,000/= per week from 24th February 2010 to 3rd November 2011 when it terminated the contract.
4. On 7th October 2011, the defendant filed an application by way of a Chamber Summons seeking to have the matter referred to arbitration as provided for in the contract. The application was allowed on 27/02/2012 and the following consent recorded before Hon. W. Ouko, J:-
 - a) that the matter be referred to arbitration,
 - b) that the parties to agree on an arbitrator within 30 days,
 - c) that if the parties fail to agree, an arbitrator to be appointed by the Chairman of the Law Society of Kenya within 30 days of the parties not agreeing,

- d) that the arbitrator do file his award within 60 days of his appointment,
 - e) that the matter be mentioned after 120 days.
5. The parties herein failed to agree on an arbitrator and Mr. Okongo Omogeni was appointed by the Chairman of the Law Society of Kenya.
6. The Applicant has filed the present application challenging the impartiality and independence of the arbitrator.
7. The defendant has opposed the plaintiff's application by the Replying Affidavit sworn on 29th June 2012 by Japheth Mutai.
8. The issues for determination are as follows:
- a) Does the plaintiff have valid grounds to challenge the arbitrator?
 - b) Does the plaintiff have capacity to file and prosecute the present application?
 - c) Does this court have jurisdiction to hear this application?

A. THE APPLICANT'S CASE

9. The applicant has alleged that on 30th March 2012, he together with one Vincent Ingos went to Nairobi Royal Golf Club wherein they found the Chief Executive Officer, the Chairman, Mr. Ojienda Advocate for the Respondent and a fourth party who was unknown to them.
10. During the 1st arbitration meeting on 13th April 2012, the applicant herein recognized the arbitrator as the 4th person who was meeting with the officers of the Respondent herein.
11. The plaintiff therefore wrote to his Advocates on 9/05/2012 and instructed them to request the arbitrator to disqualify himself due to the above stated reasons. The plaintiff's counsel in compliance, wrote to the arbitrator on 10/05/2012 requesting him to recuse himself and they forwarded a copy of the plaintiff's letter.

B. THE RESPONDENT'S CASE

12. Respondent herein alleges that the present application is an abuse of the court process as it is calculated to delay the determination of this matter. It has also denied that there was ever such a meeting as alleged and further states that there is no documentary evidence that has been presented to prove the meeting ever occurred.
13. He has further submitted that the arbitration process has been concluded and the arbitrator has already informed them that the award is ready. He has annexed to the Replying Affidavit a letter dated 31/05/2012 from the arbitrator.
14. Section 13 (3) of the Arbitration Act provides that:-
- “an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess the qualifications agreed upon by the parties”**
15. The parties may agree on the procedure for challenging the arbitrator but where they fail to agree, section 14 (2) provides as follows:-

“failing an agreement under subsection 1, a party who intends to challenge the arbitrator shall,

within 15 days after becoming aware of the composition of the arbitral tribunal or of the circumstances referred to in section 13 (3) , send a written statement of the reasons of the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”

16. In this case, the Plaintiff/Applicant says that he witnessed the arbitrator and various representatives from the defendant’s company in a meeting in circumstances which led him to believe justifiably, that they were discussing matters relating to the present case. It appears to me that the circumstances under which that meeting was being carried out would cause a reasonable person to question the impartiality of the arbitrator.

17. Being aggrieved, he instructed his advocates on record M/s C.M.Muoki & Company to request the arbitrator to step down by letter dated 9/05/2012 and the reasons for his request were enumerated therein. His counsel acting on these instructions requested the arbitrator to withdraw from acting by letter dated 10/05/2012 and the arbitrator has acknowledged receipt of the same by stamping on it.

18. The arbitrator has not not withdrawn from acting in the matter nor has he delivered a ruling on the challenge by the applicant as required by law. The arbitrator on 11/05/2012 directed the plaintiff to put in a formal application challenging him and made reference to a letter dated 23/04/2012 which has not been presented before this court. It is again clear to me that the letter dated 9/05/2012 by the Plaintiff amounts to a written statement as contemplated under section 14 (2) of the Arbitration Act. The arbitrator has not made any reference to the same.

19. Procedurally, I am of the opinion that the issue of his impartiality ought to have been heard and determined before the matter could proceed for hearing.

c. JURISDICTION OF THE COURT

20. The defendant’s counsel has submitted that upon the matter being referred to the arbitrator by the order issued on 27/02/2012, this court became *functus officio* and the same therefore lacks jurisdiction to hear the present application. He stated that if the plaintiff wished to challenge the arbitrator he ought to have done so before the arbitral tribunal as required by sections 13 and 14 of the Arbitration Act.

21. He further submitted that though the court did not stay the present proceedings, there was an automatic stay presumed by the Arbitration Act. He also stated that the application is not proper before court as the tribunal had already made an award and the parties had been notified.

22. The plaintiff’s counsel in reply stated that this court does have jurisdiction over this matter and cited section 165 (6) of the Constitution which vests the High Court with supervisory jurisdiction over all bodies acting in a judicial or quasi judicial capacity and the same cannot be taken away even by the agreement of the parties. He also stated that the plaintiff was not aware of any award that had been made nor had he been served with a notification by the arbitrator that the same was ready for collection.

23. Section 10 of the Arbitration Act provides that **“except as provided for in this Act, no court shall interfere in matters governed by this Act.”**

24. Whereas I do agree with the submission of the counsel for the defendant that once the matter was referred to arbitration there was an automatic stay of the proceedings before the High Court section 14 (3) provides that:-

“if a challenge under the agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.”

25. The plaintiff herein did submit a statement before the tribunal challenging the arbitrator but there is no evidence that the same was ever considered and there has not been submitted before this court a ruling

that was delivered on the same.

26. The plaintiff construed that failure of the of the arbitrator to rule on the challenge as a rejection of the same. Subsection (4) further provides that -

“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 question.”

27. There is no evidence that the arbitrator was served with the present application as there is no affidavit of service on record. The court cannot therefore determine the question of his capacity to arbitrate before giving him a chance to be heard.

D. CAPACITY OF THE PLAINTIFF/ APPLICANT TO SUE

28. The defendant’s Counsel has submitted that the plaintiff lacks capacity to prosecute the present application and the entire suit having been wound up on 8/11/2011 by Hon. Mr. Justice E. Ogolla. A copy of the order has been annexed to the replying affidavit and marked as “**JM2**”. The defendant’s counsel further submitted that the contract subject matter hereof had been entered into between the defendant and the company that was wound up on 8/11/2011 and referred to the agreement annexed to the replying affidavit and marked as “**JM4**”. he has also referred to the plaint wherein the plaintiff has described itself as a limited liability company and to the witness statement sworn by Joseph Mutua who describes himself as a manager of the plaintiff company and therefore the plaintiff herein has in fact been wound up.

29. The plaintiff’s counsel on the other hand submitted that the company that was wound up is an entirely different entity from the plaintiff herein.

30. The company that was wound up as per the order dated 8/11/2011 is **PERMA STRUCTURAL ENGINEERING COMPANY LIMITED**. The suit herein has been filed by **PERMA STRUCTURAL ENGINEERING COMPANY** and this is the same entity with whom the defendant entered into the contract the subject matter of this suit.

31. The issue for determination is whether **PERMA STRUCTURAL ENGINEERING COMPANY LIMITED** and **PERMA STRUCTURAL ENGINEERING COMPANY** is one and the same entity. It is of course clear that they are different entities one being a limited liability company and the other a firm an entirely different entity, and which under Order 30 rule 1 of the Civil Procedure Rules 2010, can only sue in the name of two or more members of the firm, and not merely the firm name. The question of capacity of the plaintiff is well taken.the plaintiff therefore has capacity to sue.

D. CONCLUSION

32. the court makes the following findings -

- a) the court has jurisdiction to hear the application
- b) as the arbitrator was not served, he cannot be condemned unheard. That would be contrary to the rules of natural justice.
- c) The plaintiff has no capacity to present and prosecute the suit unless the plaint is first amended.

For those reasons the application dated 16th May 2011 is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Nakuru this 27th day of July, 2012

M.J. ANYARA EMUKULE

JUDGE