



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 1057 OF 2010

WACHIURI WAHOME T/A ADILI COMMUNICATIONS
.....APPLICANT

- VERSUS -

KENYA AUTOMOTIVE REPAIRERS ASSOCIATION
.....RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 26th November 2010 brought under section 12(3) (b) of the Arbitration Act (No 4 of 1995).

2. He prays that the court do appoint an arbitrator in this matter and that such arbitral award “be filed in Court within 90 days of its making for adoption as a Judgment and the Court”. The application is supported by his affidavit sworn on 23rd November, 2010 and the annexures thereto.

The gist of it is that the applicant and respondent entered into a written agreement (annexture “WW1”) dated 9th April, 2008. Paragraph (j) thereof provides that in the event of a dispute between the parties, “the matter will be referred to an arbitrator agreeable to both parties as provided for in the Arbitration Act. Both parties will be bound by the decision of the arbitrator”.

3. On 18th August, 2008, the applicant wrote to the Law Society of Kenya explaining to the Society that a dispute had occurred and asking the society to appoint an arbitrator. The Society did appoint Steven Gatembu a sole arbitrator, who convened the first meeting for 13th November, 2008. In the meantime, the respondents on 9th February, 2009, wrote a letter (annexture “WW 21”) protesting the appointment of the arbitrator as being contrary to the contract between the parties that required an arbitrator agreeable to both parties be, appointed. Again from annexture “WW 24” and ‘WW 25’ it is apparent that the parties have been unable to meet at a neutral venue or agree on a sole arbitrator.

The respondents has entered appearance in these proceedings and appointed the firm of Wakini Kiarie to represent it. But no reply has been filed.

4. It is important to set out the provisions of section 12 of the Arbitration Act that provides;

“(1) No person shall be precluded by reason of that person’s nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement –

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator;

(b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and

(c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”)-

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),

other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to

act as sole arbitrator.

(4) if the party in default does not, within fourteen days after notice under subsection (3) has been given-

(a) make the required appointment; and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

(5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.

(6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.

(7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.

(8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.

(9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

5. I am of the considered opinion that a plain and obvious reading of the above section does not, in the present circumstances, empower the court to appoint an arbitrator for the parties. I say so because the applicant has not followed the steps in arbitration that would anchor the present application. The applicant was required, on notifying the respondent that a dispute has occurred, to propose an arbitrator under clause (j) of the agreement between the parties. If the other side failed to concur in that appointment or make an appointment within 14 days of the notice, then the other party (such as the applicant herein) would appoint a sole arbitrator. Section 12 of the Arbitration Act would then come into play. Under section 12(5) the other party would then be entitled to seek the court’s order to set aside the appointment. The High Court may then grant, for good cause, that prayer. The High Court in that case, on application by either party may then appoint an arbitrator for the parties.

6. It is clear that the applicant did not follow these steps which are so clear at section 12(2), (3), (4), (5) and (6) of the Act as amended by legal notice number 11 of 2009. It is also instructive that arbitral proceedings, by their very nature, should as much as is practicable proceed by mutual agreement of the parties. The court is itself enjoined by Article 159 of the Constitution as read together with Order 46 of the Civil Procedure Rules to give effect and support such settlement.

7. I would in the circumstances dismiss the notice of motion dated 26th November 2010 and advise, *obiter*, that the applicant, who is unrepresented, do comply with the arbitration clause in the agreement and follow the key steps laid out in section 12 of the Arbitration Act aforementioned. For the same reasons, I order that each party shall bear its costs in this application.
Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
Mr. Wachiuri Wahome (in person) for Applicant.
No appearance for Respondent.