REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 85 of 2000

SOBETH DEVELOPERS LTD…..….PLAINTIFF/APPLICANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD……DEFENDANT/RESPONDENT

RULING

Way back on 12th June, 2003, Sobeth Developers Limited, "**the applicant**", filed an application in this court by way of Notice Motion dated the same date through **Messers Gulenywa Jonathan & company Advocates**. The application was made against South Nyanza Sugar Company Limited, "the respondent". Essentially, the applicant sought three prayers to wit; That the arbitration award by **Justice Akiwumi** read on the 15th May, 2003 be set aside, that any other consequential orders arising thereform be stayed, and finally costs of the application. The application was expressed to be brought under order XLV rule 3(1), 15, and 19 of the Civil Procedure rules, sections 35, 37 of the Arbitration Act, section 3A of the Civil Procedure Act and any other enabling provisions of the law.

The grounds urged in support of the application were that the award contravened the provisions of the Arbitration Act, the arbitrator fraudulently concealed to disclose that he was a client and family friend of the defence counsel, a fact which was material to the result of the arbitration proceedings on the basis of bias. Further, the arbitrator misconducted himself by not reading the award and insisting that his full fees of kshs.1,600,000/- be paid upfront before he could deliver the same. The arbitrator actually exhibited actual bias in the manner he handled evidence tendered and finally, that the arbitrator never actually read the award. Instead he handed the same to a thirty party who in turn delivered the same to the applicant's counsel

in the absence of the respondent's counsel who had already been told of the award.

In support of the application, one **Dr. Simeon O. Odete**, a director of the applicant swore an affidavit. That affidavit gives a brief background of the dispute leading to this application. Apparently, the applicant filed in this court several suits to wit, High **Court Civil Case Number 85, 86, 87 88, 89, 94** and **95 of 2000** respectively seeking damages for breach of Outgrowers Cane Agreements. Those suits were however stayed and the dispute was referred to arbitration. The arbitrator agreed upon by the parties was **Mr. Justice A.M. Akiwumi**, a retired former Court of appeal Judge. In the course of the hearing the arbitrator shifted the venue from the high court to **Messrs Oraro & Company Advocates** offices. These are the same offices that counsel for the respondent came from. The applicant was made to understand that the arbitrator had no personal office and therefore had to seek an alternative. However the Arbitrator failed to disclose the fact that he was a client of the said firm of Advocates and that they were long time friends, with the firm and or the lawyer therein a fact which no doubt impacted on his impartiality. This fact was unknown to counsel representing the applicant them in the proceedings. Infact, the appointment of the arbitrator was on the basis proposal by the respondents lawyer, **Mr. Chacha Odera**, an advocate in the very firm of **Messrs Oraro & Company Advocates.** After the award was made, the applicant came to know that the firm of **Messrs Oraro & Company** Advocates had acted for arbitrator and or members of his family in several transactions to wit;

- ***A transfer in favour of the arbitrator and his wife in respect of property on title number L.R.24012.***
- ***Misc. Appl. No. 599 of 1998, Melanie Claire Akiwumi V Medivac Ltd.***
- ***Lastly the son of the Arbitrator, one Christopher Akiwumi did pupillage in the said firm and was the one who was handed the award by the arbitrator to keep until the arbitrator's full fees was paid.***

The arbitrator never disclosed the aforesaid information to the applicant and or its counsel before the start of the arbitration proceedings so as to give it a chance to decide whether it was comfortable with arbitrator despite the aforesaid relationship with the respondent's advocates. Thereafter the arbitrator did not sent it any notice as required with regard to the filing of the award in court. It appears to the applicant that the same was done secretly to deny him the chance to make the instant application timeously or at all. The charges levied by the arbitrator were n any event exorbitant.

For the forgoing reasons, the applicant felt that the arbitrator was biased. The bias aforesaid was exhibited by the fact that the arbitrator dismissed claims even where there was no counterclaim and where the respndent had even conceded that the cane had actually been planted but not harvested as required in terms of the agreement. Further, the arbitrator exhibited bias when in the award he beheld that there was no breach of agreement yet entered judgment for the respondent on the counterclaims. If indeed there was no breach, then no party should have been penalized. Finally he deponed that if there was no breach, it means that all parties reminded in their original positions and yet he was being called upon to meet the counterclaims when he was the one who suffered loss due to the cane not being harvested in terms of the agreement.

The respondent through a replying affidavit sworn by **H. Chacha Odera**, learned counsel countered the accusations of the applicant aforesaid. He deponed in pertinent paragraphs it was not true that the **KISII HCCC.NOS. 85, 86,87,88,89,94** and **95 of 2000** respectively were filed by the said **Dr. Odede,** in his name. The said suits were however referred to Arbitration after the respondent had filed an application under section 6 of the Arbitration Act and consent to that effect was later entered into. Thereafter the applicant's counsel requested him to suggest names of a possible arbitrator. He proposed retired Justices **Akiwumi** and **Torgbor.** He also suggested **Mr. Kimani Kiragu**, a partner in the firm of **Hamilton, Harrison & Mathews Advocates**. The applicant's counsel and him then settled on **Mr. Akiwumi**. That at the preliminary meeting called by the arbitrator he had disclosed his previous dealings with the firm of **Oraro & Company Advocates**, that his son, **Christopher Akiwumi** had worked in the same firm several years ago and that the counsel for the respondent had infact acted for his daughter in-law a claim against Medivac Ltd. Despite these disclosures the applicant intimated that he had no problem with the dispute being arbitrated upon by **Mr. Akiwumi**. The applicant further owned up that he had known **Mr. Akiwumi** previously and an organization he worked for in the 1980's had accommodated him upon his arrival in Kenya. Initially the proceedings were conducted in the arbitrator's chambers in the Court of Appeal which upon his retirement had been availed to him for purposes of winding up his business. At the expiry of the terminal leave, **Mr. Akiwumi** advised that alternative premises would have to be identified. The options he gave available were that either to hire premises for that purpose, or use of the applicant or respondent's counsel's offices. Applicant's counsel intimated that she did not have suitable and sufficient office space whereupon respondent's counsel offered the use of his firm's library cum boardroom. During the subsequent hearings, the applicant did not express any reservations with respect to the use of the facility. He further deponed that counsel appearing for both parties executed a referral to arbitration agreement in which the arbitrator's fees was spelt out and at no time did the applicant ever complain of exorbitant costs. Finally, counsel deponed that the application had not been filed in good faith and was purely calculated by the applicant to avoid meeting his obligations under the award.

The application came up for interpartes hearing before me on the 19th April, 2010. **Mr. Oduk** learned counsel argued the application on behalf of the applicant whereas the respondent was represented by **Mr. Makori,** learned counsel as well. In his oral submissions **Mr. Oduk** stated that the thrust of the application was that the arbitrator failed to disclose to the parties and in particular the applicant that he was unduly familiar with the advocates appearing for the respondent. Those advocates had offered pupilage facilities to his son, **Mr. Christopher Akiwumi** and later offered him a job in the firm. The firm had also

acted for him and his wife in a property transaction. Finally the same firm had acted for his daughter in law, **Melanie Akiwumi** in a case involving **Medivac Ltd**. He submitted that the Arbitrator ought to have disclosed and have it on record that he was familiar with the advocates acting for the respondent and seek the applicant's input and or approval. Accordingly section 13 of the Arbitration Act was not complied with. Failure to make the disclosure amounted to misconduct and therefore bias cannot be discounted. Though the arbitrator had found that the contract had been frustrated he nonetheless went ahead to find for the respondent on the counterclaim. Finally, counsel submitted that order 45 of the Civil Procedure Rules allowed this sort of application.

In response, **Mr. Makori** submitted that all the averments contained in the supporting affidavit were countered by the averments in the replying affidavit sworn by **H. Chacha Odera**. The award was brought before **Wambilyanga J.** on 15 May, 2003 for adoption. This application was filed on 12th June, 2003. The annextures to the application were brought to the attention of the court after the award had been read. They were thus an afterthought. He further submitted that there was no order for consolidation of the suits. Yet the instant application deals with the suits as though they were consolidated. The test for bias had not been met. For this submission, counsel relied on the case of ***Locabail(UK) Ltd V. Bayfield Properties Ltd & another(200) IALL E.R.65.***

From the onset I wish to state that the award read by **Wambilyanga.J** on 15th May, 2003 encompassed all the seven suits filed by the applicant being; 85 of 2000, 86 of 2000, 87 of 2000, 88 of 2000, 89 of 2000, 94 of 2000 and 95 of 2000. At least that is my understanding of the consent order recorded before **Wambilyanga.J** by the parties on that date. It was in these terms:- ***"..The files named by Mr. Chacha Odero are consolidated for the pupose of reading and executing the award"***. The court cases read by **Chacha Odero** were infact all the cases referred to hereinabove. Accordingly the respondent cannot be heard to claim that there was no order for consolidation of the suits. All the suits aforesaid were consolidated.

What then is the issue(s) for determination in this application. To my mind they are basically two; whether the arbitrator misconducted himself in the manner he presided over the arbitration proceedings and therefore the award ought to be set aside on that basis and secondly, costs.

From the pleadings, it would appear that the applicant entered into seven outgrowers cane agreements with the respondent. The agreements required the applicant to plant on the parcels of land stated in those agreements sugarcane from seed cane supplied by the respondent that would be harvested later by the respondent and the proceeds thereof after such deductions as agreed between the parties would be paid to the applicant. According to the applicant it was a term of the agreement express or implied by the respondent that the agreements would remain in force for a period of five years or until one plant crop and two ratoon crops of were harvested whichever period that would be less. In total breach of the said agreements, the respondent failed to harvest the cane either in time or at all and or harvested only portions thereof leaving the rest of the sugar cane to go to waste. The applicant therefore filed the seven suits seeking general damages for breach of those agreements, the value of the cane lost as a result of the breach aforesaid, costs and interest.

On being served with the summons to enter appearance, the respondent through **Messers Oraro & Company Advocates** duly entered an appearance on 7th September, 2000. Contemprehensly with the filing of the appearance, the respondent filed an application under section 6 of the Arbitration Act seeking that the suits be stayed and the dispute between the two parties be referred to arbitration. Apparently those agreement had an arbitration clause to the effect that any dispute or question which may arise at any time between the parties regarding the construction the agreement or the rights or liabilities of the parties shall be referred to the decision of a single arbitrator to be agreed on by the parties. The application was scheduled for hearing on 22nd January, 2001. However on 27th September, 2000 parties filed a consent letter to the effect that the application be allowed in terms that:-

- ***The dispute be referred to Arbitration.***
- ***Parties be allowed to choose one arbitrator as per section 12 of the outgrowers cane agreement and to commence the arbitration in a reasonable time.***
- ***Costs of the application be in the cause.***

It is on this basis that retired **Justice Akiwumi** was settled upon and came to be involved in this dispute as the Sole Arbitrator. In other words the parties herein agreed to refer the disputes involved in the seven suits to **Justice Akiwumi** as Sole arbitrator in accordance with the arbitration Act.

The arbitrator having carefully heard the parties and considered the evidence tendered came to the conclusion in a rather lengthy and windy award that:-

- ***The applicant was not entitled to damages for breach of contract in respect of the seven agreements and for the value of care lost as a result of such breach from the respondent.***
- ***The applicant was to pay the respondent within thirty days of the award, the following sums by way of the respondents counterclaim set out in paragraphs 88, 90, 94, 96 and 97 of the award, that is to say,***

Kshs.524,474/65, 175,090/75, 98,631/20, 48 158/45 and 9, 995/75 plus interest on each of them as from the date when the counterclaims were filed namely, 7th May, 2001 until payment is made in full.

§ ***Each party was ordered to bear its own costs.***

The applicant was obviously aggrieved by the turn of events, hence the instant application. The gravemen of the applicant's complaint is that the arbitrator did not disclose to it and its counsel with regarding his undue familiarity with the lawyer acting for the respondent as well as his firm. The lawyer and his firm had previously acted for the arbitrator and members of his family in some transactions which could have clouded or clogged his impartiality. That it was incumbent upon the arbitrator to disclose that he was unduly familiar with the said advocates and procure an assurance from the applicant that it was comfortable with the position. Having failed to do so amounted to misconduct on the part of the Arbitrator and therefore bias could not be discounted or wholly eliminated.

The response of the respondent is that the arbitrator made all the disclosures and the applicant was not averse to the arbitrator continuing with his task despite the disclosures.

Between the two versions which one should I go along with? It would appear to me that parties are essentially agreed that if there was non-disclosure of the aforesaid facts and or information and the arbitrator proceeded to conduct the proceedings then no doubt, that would amount to misconduct on the part of the arbitrator. So I have to determine or not the arbitrator made the disclosure aforesaid before the commencement of the proceedings. My determination on this one issue in my view will be sufficient to dispose of the entire application. I need not consider other issues raised by the applicant in the application, supporting affidavit as well as oral submissions.

This application is pursuant to the provisions of order XLV rule 3(1), 15, 19 of the civil procedure Act as well as sections 35 and 37 of the Arbitration Act. This being an arbitration under the order of court, order XLV of the civil procedure rules applies. Rule 3(1) aforesaid refers to the order for arbitration by court. Rule 15 deals with grounds of setting aside an arbitrator's award. Essentially there are two grounds; corruption and misconduct of the arbitrator and secondly, either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled and deceived the arbitrator. The applicant's complaint would seem to fall within the first ground. However rule 19 deals with the procedure of moving the court in application of this nature.

With regard to sections 35 and 37 of the Arbitration Act, section 35 provides for the application for setting aside of the arbitral award and section 37 thereof deals with grounds for refusal of recognition or enforcement of the award. Having

considered the provisions of the law aforesaid, I am satisfied that the instant application is properly before court.

Section 13 of the Arbitration Act provides interlia that a person approached in connection with possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The arbitrator carries that duty throughout the proceedings. In other words from the time of his appointment up to the end of the arbitration proceedings, the arbitrator is required without delay to disclose any such circumstances to parties unless the parties have already been informed of them by him. The applicant herein is saying that the arbitrator failed to disclose to it throught the arbitral proceedings that he and his family were unduly known to the advocates of the respondent and to his firm. That failure of disclosure amounted to misconduct. Ofcourse and as already stated elsewhere, the respondent claims to have made such material disclosure.

The arbitrator has been a judge of both the high Court and court of appeal of long standing. He rose through the ranks to the court appeal from whence he retired. He was thus a senior judicial officer. One would thus expect of him that he would strictly comply with the mandatory requirements of the law given his past and vast judicial background and training. The law required of him from the date of appointment and throughout the arbitration proceedings to disclose any circumstances likely to give rise to doubts as to his impartiality and independence. The applicant claims that the counsel who appeared for the respondent before the arbitrator had acted for her a daughter in law, Melaie Claire Akiwumi in a case in which she successfully sued **Medivac Limited**. This was ***HCCC.NO. 599 of 1998, Melanie Claire Akivumi V Medivac Ltd***. The firm of Oraro & Company Advocates in which the respondent's counsel practiced had previously acted for the arbitrator and his wife as well regarding a conveyance in respect of land parcel 3734/928 and certificate of title No. L.R. 24012. Finally it was claimed that the same firm had offered pupilage to the Arbitrator's son, **Christopher Akiwumi** and late employed him as an advocate. The respondent did not challenge or deny these allegations. Infact it conceded that much. However the case for the respondent is that the arbitrator made the disclosure to the applicant. The applicant ofcourse denies that fact. How then I my supposed to tell who between the two parties is on the side of the truth. I would imagine that if indeed the arbitrator was true to his word and calling then, the record of the proceedings will show and speak for itself. Having been a judicial officer of longstanding he knows better that a written word withstands the test of time and perhaps challenge. That documentary evidence is more likely to be believed than the word of month. One would therefore expect in strict compliance with the requirements of law that, the arbitration proceedings and indeed the award would show that indeed the arbitrator did inform the applicant of his previous or even present encounters with the counsel for the respondent and his firm. Much as the respondent has claimed that indeed the arbitrator made such a disclosure, there is no way of confirming that fact. It would have been very easy for the retired judge to have simply made a note in the record of the alleged disclosure. In the absence of such record, I am inclined to belief that the applicant's contention that the arbitrator concealed the fact that he was a client present or in the past to the counsel for the respondent as well as his firm has a ring of truth. That failure on the part of the arbitrator obviously led to the perception on the part of the applicant rightly or wrongly so that the award was biased against him, one sided and stewed in favour of the respondent.

The question of bias is really a matter of perception. The arbitrator may have been true to the calling of his office. However to a common man on the streets, given the above scenario he is more likely to doubt the sincerity and or impartiality of such an arbitrator. In the case of **Locabail(supra)**, it was held that "**where it is alleged that there is real danger or possibility of bias on the part of a judicial decision-maker, that danger will be eliminated and the possibility dispelled if it is shown that the judge was unaware of the matter relied upon as appearing to undermine his impartiality…"** This is not the case here. The arbitrator well aware of his close affinity to the counsel appearing for the respondent and his firm failed to disclose that fact to the applicant. It was further held in the same case that ***"…In contrast, a real danger of a bias may well be thought to arise if there is personal friendship or animosity between the judge and any member of the public involved in the case, if the judge is closely acquainted with any member of the public involved in the case…".*** In this case it cannot be denied that the arbitrator had a close relationship with the advocate for respondent and his firm. It is possible that a personal friendship may have arisen leading to a perception that the arbitrator would be more than inclined to the rule in favour of such counsel's client. Finally it was held in the same decision that ***"….Where, following appropriate disclosure by the trial Judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot subsequently complain that the matter disclosed gives rise to a real danger of bias…"***. In this case the applicant has categorically stated that there was no disclosure at all, appropriate or otherwise. If indeed there was such disclosure as the respondent would want this court to believe, could it not have been much easier for the arbitrator to at least swear an affidavit to that effect. His failure to do so lends further credence to the applicant's assertion that no such disclosure was ever made.

I have looked at the Notice of Preliminary Objection dated and filed in court on 23rd October, 2003. It claims that the application is time barred, that the provisions of the civil procedure rules did not apply, that the application was fatally defective having been brought by way of a Notice of motion instead of chamber summons and finally that the application as presented is bad in law as there was no order for consolidation of the suits. Save for the last ground aforesaid, no submissions by counsel for the respondent were made in fortification of the said grounds in the notice of Preliminary objection. Elsewhere in this ruling I have already dealt with the issue of consolidation or lack of it of the other suits. In absence of submissions on the grounds aforesaid am unable to deal with them.

For all the foregoing reasons I am satisfied that the application is merited. Accordingly I allow it in terms of prayers (a) and (b) on the face of the application. As the acts of omission and commission that sparred this application were committed by the arbitrator, I think it will be unwise to condemn any party with costs. Accordingly each party shall bear its own costs of this application.

RULING DATED, SIGNED and DELIVERED at **KISII** this 14th May, 2010.

ASIKE-MAKHANDIA

JUDGE.