



Riverpoint Development Limited v Baldassari (Miscellaneous Civil Application E689 of 2024) [2025] KEHC 3359 (KLR) (Commercial and Tax) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E689 OF 2024
RC RUTTO, J
MARCH 17, 2025
IN THE MATTER OF THE ARBITRATION ACT, 1995
IN THE MATTER OF AN APPLICATION UNDER SECTION 17 (6) OF THE ARBITRATION
ACT TO DETERMINE THE MATTER OF A CHALLENGE OF THE ARBITRATOR**

BETWEEN

RIVERPOINT DEVELOPMENT LIMITED APPLICANT

AND

GIAMPIERO BALDASSARI RESPONDENT

RULING

1. Before this Court is an Applicants' Notice of Motion application filed under Certificate of Urgency dated 26th August 2024 seeking the following orders, that:
 - a. Spent
 - b. Spent
 - c. This Honourable court be pleased to bar and remove the sole Arbitrator, Lady Justice (Rtd) Mary Ang'awa from hearing and determining the dispute between the parties herein.
 - d. This Honourable Court be pleased to direct that the Arbitral proceedings herein do commence de novo before any Arbitrator other than Lady Justice (Rtd) Mary Ang'awa
 - e. This Honourable court be pleased to give such further orders and/or directions under section 14(7) of the *Arbitration Act* 1995 as it deems fit.
 - f. The costs of the Application be provided for



2. The Application is supported by the Affidavit of Abdelkarim Shalabi sworn on 26th August 2024 in which he deposed that the parties herein entered into a purchase and sale agreement on 19th December 2018 for an apartment on Land Reference Number 330/716. That a dispute ensued over the design, specification and delivery. That the respondent referred the matter for arbitration and the Chartered Institute of Arbitrators-Kenya appointed Lady Justice (Rtd) Mary Ang'awa. That he did not participate in *the constitution* of the arbiter.
3. The Applicant has disputed the appointment of the arbiter on two grounds. First, that she was found unsuitable to continue serving as a judge and as such, the applicant is uncomfortable having her as an arbiter and secondly, that the subject matter of the arbitration revolves around construction and would require an arbiter who is either a quantity surveyor or an architect. It was further contended that the arbitrator does not have a background in complex construction issues.
4. The applicant contended that he raised this objection on competence and jurisdiction but the arbitrator held that she had jurisdiction and refused to recuse herself.
5. In opposition, the Respondent filed a Replying affidavit deposed by Grishon Ng'ang'a Thuo on 19th September 2024 in which he contends that the application before this court was raised before the learned Arbitrator and vide a ruling delivered on 6th August 2024, the same was dismissed and the Arbitrator scheduled 28th August 2024 for the preliminary meeting. The Respondent avers that this application is intended to derail the hearing and determination of the Arbitration. Further, that he has complied with the directions on deposit of legal fees as well as payment of the stenographer charges.
6. The application was canvassed by way of written submissions.

Applicant's submissions

7. The Applicant filed submissions dated 24th August 2024 in which he reiterated the contents of the supporting affidavit. He relied on the cases of *Modern Engineering -versus- Miskin* 15 BLR 82 to support his position on the test for the removal of an arbitrator and that an arbitrator can be removed only if circumstances exist that give rise to justifiable doubt as to his or her impartiality and independence. Further reliance was placed on the cases of *Jasbir Singh Rai 3 Others v Tarlochan Singh Rai and 4 Others*, Petition No. 4 of 2012 [2013] eKLR and *President of the Republic of South Africa and Others v South African Rugby football Union and Others* 1999 (4) SA 147; 1999 (7) BCLR 725 where the issue of perception of fairness, conviction, moral authority to hear a matter, impartiality and the question of participation of a judicial officer was discussed. They urged the court to allow the application.

Respondent's submissions

8. The Respondent filed submissions dated 14th October 2024 and submitted on three issues.
9. First, whether the Application meets the threshold for stay of Arbitral proceedings, while relying on the case of *Kenya Wildlife Service vs James Mutembei* (2019) e KLR, it was submitted that the orders can only be granted if it is proven beyond reasonable doubt that the case cannot proceed on its merits. That no factual or legal basis had been provided why the case should not proceed. In addition, there was no evidence of any impropriety or legal incapacity on her part nor that the proceedings were frivolous or vexatious.
10. Secondly, as to whether the Applicant had provided sufficient grounds for the recusal and removal of the arbitrator. While citing section 13(3) of the *Arbitration Act*, it was submitted that Clause L of the sale agreement provided that in the event parties were unable to choose an arbitrator then one would be



chosen by the chairperson of the Chartered Institute of Arbitrators (Kenyan Branch). That the Clause further provided that the dispute shall be referred to a single arbitrator being an advocate of the High Court of Kenya with over 15 years' experience.

11. The Respondent also submitted that efforts to choose a mutually agreed upon arbitrator were futile as there was no response from the Applicant thus their inaction in selection of the Arbitrator was an indication that it did not want to participate in the selection process and as such they resorted to Clause L of the sale agreement.
12. The Respondent denied that the Arbitrator was biased and relied on the cases of Chania Gardens Limited vs Gilbi Construction Limited and another [2015] eKLR and Philip K Tunoi and another vs Judicial Service Commission and another to urge that the applicant has not demonstrated any real danger of bias arising from Lady Justice Ang'awa's conduct in arbitration.
13. In addition, it was submitted that Lady Justice (Rtd) Mary Ang'awa was appointed in compliance with the sale agreement, she is an advocate of the High Court of Kenya and with over 15 years experience thus was qualified. That the claim for construction background experience was not contemplated in the agreement. That the dispute was on the interpretation of a sale agreement and did not require an expert. To buttress this point, reliance was placed on the case of Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] Eklr.
14. Third, they urged that the costs of the suit should be borne by the Applicant as costs follow the event. Reliance was placed on the case of Jasbir Singh Rai (supra).

Analysis and Determination

15. I have considered the application before the court and find that the main issue for determination is whether this court should bar and remove the sole Arbitrator, Lady Justice (Rtd) Mary Ang'awa from hearing and determining the dispute between the parties herein.
16. Firstly, Section 10 of the *Arbitration Act* (the Act) clearly stipulates that no court can intervene in matters governed by the Act except as expressly provided by the Act.
17. Further, Section 13 of the Act provides that a party who wishes to challenge the appointment of an arbitrator has recourse under Section 14 of the *Arbitration Act* which stipulates as follows:
 - i. Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
 - ii. Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for 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.
18. In addition, Section 14 (3) to (8) of the Act provides as follows;
 - “(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within thirty days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.



- (4) 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 application.
 - (5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.
 - (6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.
 - (7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.
 - (8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.
19. In this case, it is not in contention that parties entered into an agreement, a dispute arose, and was referred to arbitration as per their agreement. It is also not contested that the parties were unable to agree on an arbitrator and one was chosen for them by the Chairperson Chartered institute of Arbitrators in accordance with the terms of Clause L of the Sale Agreement.
 20. That the Applicant being dissatisfied by the appointment of the arbiter appointment made an application dated 24.05.2024 for her recusal. The application was heard and dismissed.
 21. Appreciating the need to uphold party autonomy in arbitration proceedings, I note that the [Arbitration Act](#) under section 12 empowers the parties to appoint an arbitrator. This includes determining the qualifications and procedure of such appointment. Looking at the documentation before the court, specifically Clause L of the sale agreement, it provides as follows:

“in the event of any dispute arising between the parties hereto or between either of the parties (and if not resolved by mutual agreement as set out above), such dispute shall be referred to arbitration by a single arbitrator chosen by mutual agreement of the parties. If the parties fail to mutually agreed on an arbitrator within seven days of proposing an arbitrator to each other, then the dispute shall be referred to a single arbitrator (being an advocate of the High Court of Kenya of not led than Fifteen (15) years standing in practice appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) and the provision of the [Arbitration Act](#) (as amended) shall apply to dispute resolution.”
 22. From the record, the respondent’s position is that vide letters dated 25th October 2023; 12th January 2024 and 5th February 2024 they made efforts to reach out to the Applicant herein to be included in the selection of the arbitrator. Unfortunately, there was no response and as such the provisions of Clause L crystallised. Consequently, the respondent proceeded to request the appointment of an arbitrator from the Chairman of the Chartered Institute of Arbitrators. The arbitrator was appointed vide a letter dated 3rd May 2024. This position was not refuted and / or contested by the Applicant whose only issue is that they are not content and comfortable with the appointment of Hon. Lady Justice Mary Ang’awa (Rtd).



23. Upon the appointment of the Arbitrator, the Applicant unsuccessfully challenged her appointment as the Arbitrator heard and dismissed the application proceeding to hold a preliminary meeting attended by both parties was held on 28.08.2024.
24. The Applicant is still dissatisfied and has moved to challenge the appointment before Court. The basis of this application as expressed by the applicant is the discomfort with the arbitrator citing her unsuitability to hold the position of the Judge of the High Court. In addition, the applicant states that the dispute revolves around complex construction questions on drawings, design size, fixtures which needs an arbitrator with back ground in architect or engineering which the arbitrator does not possess.
25. In *Chania Gardens Limited v Gilbi Construction Company Limited & another* ML HC Misc. Cause No. 482 of 2014 [2015] eKLR the court held as follows in respect of a challenge on the ground of bias:

“The grounds for removal of an arbitrator are set out in section 13(3) of the *Arbitration Act*, but the one which is relevant to this application is...only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence... The words “only if” and “justifiable doubts” are important in a decision under section 13(3) of the *Arbitration Act*. The words suggest the test is stringent and objective in two respects: a) the court must find that circumstances exist, and those circumstances are not merely believed to exist; and b) those circumstances are justifiable; this goes beyond saying that a party has lost confidence in the arbitrator’s impartiality into more cogent proof of actual bias or prejudice. The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there was real likelihood of bias. But, of course, justifiable doubts as to the impartiality and independence of the arbitrator do not include peripheral or imagined or fanciful issues or mere belief by the Applicant.”
26. Guided by the above finding, it is incumbent upon the Applicant to demonstrate concerns beyond what had been set out in the arbitration agreement. I do find that in this instance, the Applicant have not provided any evidence demonstrating impartiality or bias on the part of the arbitrator. A motion for recusal must be based on concerns directly related to the arbitrator’s conduct or the subject matter at hand, rather than extraneous issues. Removal from office is not a blanket bar to any other competencies and qualifications that one has unless specifically provided. Allegations of impartiality must be specific and well founded, the concerns raised need to be reasonable and not speculative or based on unfounded apprehensions.
27. I also acknowledge the applicant assertions that the dispute involves technical issues and requires an arbitrator with a background in architect or engineering which the appointed arbitrator lacks. However, this claim contradicts the provisions of Clause L of the agreement which specifies that an arbitrator should be an advocate of the High Court of Kenya of not less than Fifteen (15) years standing in practice appointed by the Chairman for the time being of the Chartered Institute of Arbitrators.
28. In entering into the agreement, the parties were fully conscious of the nature of the contract and having not specifically provided for an arbitrator with specific qualifications such as quantity surveyor, architect, or construction experience. Thus, since the parties previously agreed on these conditions, they cannot now argue otherwise.
29. Moreover, had the applicant opted to participate in the selection of the sole arbitrator, it would have had the opportunity to agree and/or raise the concerns now being alluded to by the applicant.



Having failed to do so, the parties mandated the Chartered Institute of Arbitrators to unreservedly appoint an arbitrator. Once that was triggered, it was for the Chartered Institute of Arbitrators to consider the arbitration agreement and appoint a suitable arbitrator amongst its ranks. That is how the appointment of Hon Lady Justice (Rtd) Mary Ang'awa was made. This court notes that the Applicant has not identified any specific act or conduct of bias in relation to this matter by the arbitrator so as to erode the confidence of the parties or that the Arbitrator was appointed beyond the scope of what the Chartered Institute was to consider.

30. The Court is mindful that the Arbitrator is empowered under section 17 of the *Arbitration Act* to rule on her own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Having considered that the arbitrator made her ruling in this regard, I am not persuaded to interfere with her ruling.
31. The upshot of the above is that this application lacks merit and the same is dismissed with costs.
32. Orders Accordingly.

DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF MARCH, 2025.

In the presence of;

Sam Court Assistant

