



REPUBLIC OF KENYA



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Zakhem International Construction Limited & another v Oilfields Engineering and Supplies Limited & another; Ecobank Kenya Limited & 3 others (Interested Parties) (Commercial Arbitration Cause E042 & E036 of 2021 (Consolidated)) [2024] KEHC 3051 (KLR) (Commercial and Tax) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3051 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E042 & E036 OF 2021 (CONSOLIDATED)
FG MUGAMBI, J
MARCH 13, 2024

BETWEEN
ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED APPLICANT
AND
OILFIELDS ENGINEERING AND SUPPLIES LIMITED RESPONDENT
AS CONSOLIDATED WITH
COMMERCIAL ARBITRATION CAUSE E036 OF 2021

BETWEEN
OILFIELDS ENGINEERING AND SUPPLIES LIMITED APPLICANT
AND
ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED RESPONDENT
AND
ECOBANK KENYA LIMITED INTERESTED PARTY
ECOBANK NIGERIA LIMITED INTERESTED PARTY
AZICON LIMITED INTERESTED PARTY
LJA ASSOCIATES ADVOCATES INTERESTED PARTY



RULING

Brief Facts

1. Before the Court is a Notice of Motion application dated 1st February 2024 brought under Article 10(2)(b), 159 and 160 of the Constitution of Kenya 2010, sections 1A, 1B and 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya and the Judicial Service Code of Conduct and Ethics Regulations 2020.
2. The application seeks the recusal of this Court from presiding over this matter and that the same be transferred to the Presiding Judge Commercial and Tax Division for re-allocation. The application is supported by the grounds on the face of it as well as the supporting affidavit and further affidavit sworn by Ibrahim Zakheem, the respondent's Managing Director on 1st February 2024 and 28th February 2024 respectively.
3. The principal contention advanced by the applicant is premised upon the allegation of manifest bias demonstrated by the Court in the conduct of the proceedings, as a result of which the applicant had lost confidence the Court's impartiality. It is the applicant's position that the Court harbored a personal interest in the matter which had clouded its independence.
4. Of reference are the proceedings of 9th October 2023 where the Court set down two applications that is the application for setting aside the arbitral award and the application for enforcement of the award (the consolidated applications) for hearing. The applicant contends that the respondent filed an application dated 18th October 2023 seeking to have the hearing date vacated and the application was given a mention date for 24th October 2023 for directions. On the mention date the applicant avers that the court vacated the hearing date of 18th December 2023 and set the date for 2nd November 2023.
5. The applicants confirm that at the time, they had lodged an appeal at the Court of Appeal seeking stay of execution and stay of proceedings and that both the respondent and the Court colluded to bring the hearing date forward in order to render the appeal nugatory. It is on these grounds that the applicant concluded that the Court had displayed open bias, partiality and favoritism.
6. The respondent opposed the application by way of grounds of opposition dated 1st February 2024 and by a replying affidavit dated 14th February 2024 sworn by the director of the respondent John Huba Waka.
7. It was the respondent's contention that the applicant had not proved any ground for recusal. The respondent noted that in any case, if the applicants were dissatisfied with the orders of the Court the applicant was free to seek a review or appeal against the said orders. The respondent deposed that it made a choice to elect the law firm of Odero and Partners Advocates to act for them in this matter and several others where Mr. Okubasu was appointed as the Lead Counsel.
8. Further, the respondent averred that the said advocate had never had any formal interactions with the Judge and that he had joined the faculty of Law at Moi University after she had left. The respondent confirmed that it had never been represented or sought consultancy services from the firm of GM Gamma Advocates LLP or sought the Court's advice as a consultant in arbitration. The respondent contended that the applicant was hell bound to ensure that the matter should not proceed to conclusion. These unsubstantiated allegations will be responded to before the appropriate forum.



9. The 4th Interested party also filed its response to the application vide a replying affidavit dated 27th February 2024 sworn by James Gitau Singh, a partner at the Firm. Counsel deposed that in order to make good use of the judicial time the matter before this Court should be placed before the Presiding Judge Commercial and Tax Division for reallocation so as to ensure that different Courts did not issue conflicting orders.
10. The application was canvassed by way of written submissions. The applicant, respondent and the 4th interested party filed written submissions dated 5th March 2024 and 8th March 2024 respectively. The respondents and the 1st and 2nd interested parties filed Notices to Cross Examine the deponent of the applicant's supporting affidavit, Ibrahim Zakheem dated 2nd February 2024 and 23rd February 2024 respectively.
11. The applications were allowed but the cross examination did not take place as the respondent withdrew its notice and, in any case, the said deponent was said to be out of the country on the date scheduled for cross examination.

Analysis

12. I have carefully considered the pleadings, submissions and evidence presented by the parties. Rule 5 of the Judicial Service Code of Conduct and Ethics as established under section 5(1) of the Public Officers Ethics Act, 2003 requires that a Judicial Officer should disqualify themselves where their impartiality is questioned and enumerates instances where this may happen.
13. Central to the issues of contention is this Court's directions of 24th October 2023, which brought forward the hearing date of the four (4) applications in this matter from 18th December 2023 to 2nd November 2023. The record shows that on the said 24th October 2023, the matter came up for mention for directions. An extract of the proceedings reads as follows:

“Besides these 4 applications, it is now emerging that there are other matters that are intertwined with this matter and which may be affected by an outcome in these proceedings, that is E322 of 2019 and E292/2019 also with very far reaching commercial effects on the parties. It is now fast emerging that the matters before court involve a colossal amount of money and it does not serve the interest of the parties or of the public for the matter to be delayed, noting that there are now more transactions emerging as related to this.

Being alive to all these emerging issues I hereby order as follows:

- i. That the previous directions issued on 9th October, 2023 regarding the hearing of the applications herein be and are hereby vacated.
 - ii. That in the interest of justice and for the benefit of the court all these parties shall be heard on their applications by way of highlighting of submissions.
 - iii. For the avoidance of doubt, this is the application of 4th September, 2023, application of 29th October, 2021 and that of 13th October, 2021.
 - iv. Hearing on 2nd November, 2023 at 2:30pm in open court No. 40 whereupon court will issue further directions on ruling for the applications.
 - v. Technically this disposes of the application dated 18th October, 2023.”
14. Section 1A of the *Civil Procedure Act* is instructive on the duty of this Court, in the exercise of its powers under the Act, or the interpretation of any of its provisions, to give effect to the overriding



objective specified in subsection 1A (1) which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Of importance to note is that the Act bestows a corresponding responsibility to advocates to assist the Court in this role.

15. These provisions are an embodiment of article 159 of the *Constitution* of Kenya 2010. The role of the Court is to ensure substantive justice and it is for this reason that the latitude in section 100 of the *Civil Procedure Act* is allowed, to facilitate the just and expeditious delivery of justice.
16. It is my view that the action taken by the Court was in fidelity to the law. The Court explained the rationale for the review of its directions. The circumstances at the time the directions were issued on 9th October 2023 and 24th October 2023 were quite different. On the realization that there was particular urgency to hear the now more expansive applications within the same and other related files, the Court made the decision to bring forward the matters.
17. The concern raised by the applicant that the reason for bringing forward the hearing was to scuttle the hearing before the Court of Appeal is unsubstantiated. The Court took note of the objection and was deliberate in its directions to allow the hearing before the Court of Appeal to proceed and gave a date for submissions to proceed on a date after that hearing. An extract of the Court record reads as follows:

“I have noted the sentiments by counsel for Zakhem in response to the application of 18th October, 2023, which is the only party opposed to the application mainly on the grounds that the same is an attempt to pre-empt the hearing in the CA in CACA E436/2023 which is scheduled for 30/10/23.”
18. For the avoidance of doubt there were no stay of proceedings orders in place as yet, as the same were the subject of the hearing at the Court of Appeal. The Court directed the hearing of all the applications to proceed on 2nd November 2023. When parties appeared on 2nd November 2023 the applicant informed the Court that they had stay of proceedings orders from the Court of Appeal pending ruling on 15th December 2023. A mention date was taken on 18th December 2023 by consent, to allow time for the ruling by the Court of Appeal to be delivered.
19. On 18th December 2023 the applicants informed the Court that the stay of proceedings orders had been lifted and that the proceedings could continue. The interested parties, who were 4 by this time, were admitted to the proceedings in order to expedite the hearing of the matter and ordered to file their pleadings. The Court scheduled 25th January 2024 for hearing of the applications by the interested parties. Again, the matter did not proceed as scheduled.
20. At this point, it became apparent that there was need to manage the case more efficiently as evidenced by the directions of the Court on that date. An extract of the record indicates that the Court had to give fresh directions for hearing, and again the Court explained the rationale for this as follows:

“Pursuant to the directions of this court issued on 18/12/2023 this court directed that parties affected by the orders issued on 31st August, 2023 be joined as interested parties. So far there are 4 IPs, who have filed their applications in addition to the application for setting aside and enforcement, filed in 2021. The situation has changed substantively and the matter is yet to be heard. The court needs to manage the time that this matter is taking to be concluded.

I would have declined the leave that parties have sought to put in further documents but either way since I am out of jurisdiction and not able to hear you clearly due to network challenges, I hereby direct as follows:



- i. Leave is granted to Mr Luseono, Mr Taliti and Mr Gitau to put in their RA and SA and serve within the next 2 days.
- ii. Any submissions to be filed shall be limited to 5 pages and filed within the next 5 days.
- iii. In order to manage this case, the court will hear all the applications together, that is the 1st IP, 2nd IP, 3rd IP, 4th IP as well as the application for setting aside and enforcement, consider the applications by the interested parties and then the principle applications by Zakhem and Oilfields and deliver a composite ruling. This reviews the previous directions. It is not tenable to get submissions from the IP's, sit to write a ruling then later come to hear submissions from the principle applications.
- iv. Hearing will proceed on 2nd February at 11am physically. There shall be no further adjournment and hearing will proceed whether or not parties will have complied with today's directions. Documents filed outside the timelines will not be considered.
- v. It is so ordered.”

21. The question that begs is whether the Court in varying its directions demonstrated bias and partiality. In the case of *Attorney General of Kenya v Professor Anyang' Nyong'o & 10 Others*, EACJ Application No. 5 of 2007 the Court expressed the test for bias as follows:

“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this ‘do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially? Needless to say-

A litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable, but also fair minded and informed about all the circumstances of the case.”

22. This position was upheld in the case of *Philip K. Tunoi & Another v Judicial Service Commission & Another*, (2016) eKLR, where the Court of Appeal stated:

“In determining the existence or otherwise of bias, the test to be applied is that of a fair minded and informed observer who will adopt a balance approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or suspicious in determining whether or not there is real possibility of bias.”

23. This Court explained that its rationale for rescinding the previous directions was to expedite the resolution of the case, which had become encumbered with a multitude of mentions and applications. Acknowledging the applicant's concerns regarding the imminent decision by the Court of Appeal in Civil Appeal Application No. 436 of 2023, the Court, in its judicious discretion, further determined it prudent to schedule the hearing of the applications a date after the anticipated ruling by the Court of Appeal.



24. The respondents have drawn the Court's attention to paragraph 14 of the said decision rendered by the Court of Appeal, wherein the appellate court dismissed the allegations of bias attributed to this Court by the applicant, stating that:
- “It remains unproven to our satisfaction that the learned judge expressed remarks suggestive of a predisposition towards either party with regard to the merits or demerits of the principal applications.”
25. Furthermore, this Court remains convinced that no prejudice would have been occasioned in accelerating the proceedings upon recognizing the languid pace at which the matter was progressing. On the contrary, aligning this with the spirit of Article 159 of the *Constitution*, the Court expresses perplexity at the reaction for an action which was taken with the view to expediting the matter.
26. While a litigant has the right to apply for the recusal of a judicial officers where there is a reasonable apprehension that they will not decide a case impartially, the success or failure of a litigant is not a justified ground for condemnation of a Court (See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, CCT16/98B).
27. This Court remains acutely aware of the central issue at hand, which is founded on arbitration. The parties opted for arbitration as their dispute resolution mechanism owing to its capacity for expedited resolution. This Court has a duty to facilitate that process, noting that this matter had taken more than three (3) years to resolve, an issue that the applicant itself and other parties had lamented about.

Determination

28. In the premises, the Court finds that the applicant has not demonstrated any evidence of perceived bias or a foundation upon which a reasonable observer could infer the likelihood of actual bias on the Court. Consequently, I find no merit in the application. It is dismissed but with no orders to costs.
29. Be that as it may, in order to reaffirm to all the parties that this Court harbors no vested interest in the outcome of this matter, I hereby direct that that this matter be mentioned before the Presiding Judge, Commercial and Tax Division, at the earliest possible date for re-allocation to another Judge.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

