



**Kenya Medical Supplies Authority v Ang’awa & another (Civil Case E822 of 2021)
[2024] KEHC 9933 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E822 OF 2021
JWW MONG’ARE, J
JULY 25, 2024**

BETWEEN

KENYA MEDICAL SUPPLIES AUTHORITY APPLICANT

AND

MARY A. ANG’AWA 1ST RESPONDENT

TIMELESS COURIER SERVICES LIMITED 2ND RESPONDENT

RULING

1. The Applicant and the 2nd Respondent (“the Respondent”) are embroiled in a dispute that was referred to arbitration and is currently before the 1st Respondent (“the Arbitrator”) for determination. The background leading up to the dispute is that the Applicant and the Respondent entered into a contract on 24th September 2016 for courier and transport services of its commodities all over the country for a period of 3 years ending on 31st December 2019. A dispute arose in the performance of the contract as the Respondent claimed that the Applicant had failed to pay it Kshs.14,975,295.00/= for the services and as such, it declared a dispute which was to be resolved by way of arbitration as per the contract.
2. The Arbitrator was appointed on 19th November 2020 as the arbitral tribunal and whereas the Applicant through its advocates initially evinced its intention to participate in the arbitration proceedings, it stated otherwise through its letter of 14th December 2020. The Applicant was of the opinion that the arbitration process was premature as there seemed to be an ongoing audit that would establish the true account between the parties, which would then determine the arbitral sum. Further, that the dispute was subject to criminal investigation by the Director of Criminal Investigations for fraud allegations. On 13th January 2021, during a scheduled meeting of the parties and which the Applicant did not attend, the Arbitrator issued directions through a ruling where she noted that the Applicant’s advocates had earlier intimated that they had no instructions to participate in the



arbitration proceedings. The Arbitrator stated that she would give the Applicant an opportunity to confirm who their advocates are and that in the meantime, the Respondent was to file its claim and serve the same to the Applicant and advocate who remained on record unless otherwise removed within 21 days.

3. On 28th January 2021, the Applicant, through its advocates, wrote to the Arbitrator requesting her to recuse herself from acting in the matter as the Applicant was apprehensive that she would deny it a fair and reasonable opportunity to present its case at the appropriate time. The Applicant stated that the Arbitrator's ruling was misguided that there was a gap in its representation and proceeded to communicate directly to the Applicant advising it to appoint another Advocate within Twenty-One (21) days to which the Applicant took great exception. The Applicant averred that it was entitled to legal representation of its choice and that the Arbitrator's direct communication demonstrated clear bias against the Applicant's choice of representation. The Applicant asserted that it was non-participatory party in the proceedings due to the ongoing criminal investigation at the DCI and EACC and internal audit relating to the subject contract. As such, the Applicant insisted that the Arbitrator that it was apprehensive that the Arbitrator would prejudice its position and thus requested her to recuse herself.
4. On 10th February 2021 the parties attended a meeting for directions where the Arbitrator directed the Applicant to challenge the Arbitrator by filing an application supported by an affidavit which the Applicant declined by stating that it was contrary to the specific provisions of section 14 (1) and (2) of the Arbitration Act (Chapter 49 of the Laws of Kenya) . On 27th May, 2021 the Applicant responded to the Arbitrator's direct invitation for a zoom meeting vide a letter reiterating its intention and reasons for not participating in the arbitration proceedings and directed the Arbitrator to direct her communication to its duly appointed advocates. On 11th June, 2021 the Applicant's advocates wrote to the Arbitrator reiterating the Applicant's position of being a non-participating party in the arbitration proceedings amongst other issues.
5. On 22nd July 2021, the Arbitrator published a ruling("the Ruling") where it made peremptory orders inter alia that the Applicant was to file an application, supported with an affidavit, on the reasons for recusal within 14days of service of the ruling and that if it fails to comply with the peremptory order, the Arbitrator would then invoke provisions of section 26(g) (iii) of the Arbitration Act and if the Applicant fails to appear before the tribunal on invitation, the Tribunal would invoke section 26(c) of the Arbitration Act and further proceed with the matter ex parte without further reference to the Applicant.
6. The Applicant is aggrieved with the Arbitrator's Ruling and has approached the court through the Originating Summons dated 21st September 2021 made pursuant to section 7(1), 15 (1) (a), 15 (2), 14(2), 13 (3) 19 and 20 of the Arbitration Act, Rule 2, 3 (1) and (2) of the Arbitration Rules and Order 36 of the Civil Procedure Rules, 2010 seeking that following orders:
 1. Spent*
 2. That the mandate of the 1st Respondent as the sole Arbitrator in the matter of an arbitration between Timeless Courier Services Limited and Kenya Medical Supplies Authority be terminated by this Honourable Court;
 3. That this Honourable Court be pleased to declare that the 1st Respondent conduct exhibited bias against the Applicant and was contrary to the rules of natural justice.
 4. That this Honourable Court be pleased to declare that the 1st Respondent ought to have made a substantive decision on the Applicant's challenge the Arbitrator.



5. That this Honourable Court be pleased to declare that the 1st Respondent adopted a procedure that failed to afford the Applicant a fair and reasonable opportunity to present its case.
 6. That the fees due and/or payable to the 1st Respondent be determined by this Honourable Court;
 7. That the Respondents do pay the costs of this application.
7. The application is supported by the grounds set out on its face and the affidavits sworn by the Applicant's Chief Executive Officers Edward Njoroge and Terry Ramadhani sworn on 21st September 2021 and 7th December 2022. It is opposed by the Respondent through the replying affidavit of its director, Eunice Karingo Koome sworn on 7th March 2023 and Grounds of Opposition dated 10th March 2023. The parties have also filed written submissions to supplement their arguments. The Arbitrator informed the court that she would not participate in this proceedings but will abide by the court's decision.
 8. As stated, the Applicant's application is based on the grounds that I have already highlighted above that the Arbitrator is biased towards it for failing to make a decision on its challenge against the Arbitrator despite the application before her being sufficient in substance and form. The Applicant avers that the Arbitrator's conduct has clogged up the arbitration proceedings with procedural technicalities at the expense of the Applicant's substantive application, further eroding the Applicant's confidence in the Arbitrator's ability to conduct the arbitration proceedings in accordance with the law and set out procedure. In light of the aforementioned grounds, the Applicant states that it has lost total confidence in the Arbitrator's ability to fairly conduct the arbitration process without bias against it.
 9. On its part, the Respondent contends that the application is not brought in good faith and is merely a strategy to delay the hearing and determination of the arbitration and that recusal is a serious matter which ought not to be made on flimsy nor nonexistent grounds and that the present application is based on flimsy and baseless allegations. That acceding to recusal applications with ease would defeat the purpose of parties in going to arbitration which is just and prompt determination of disputes and that the application for recusal is based on non-issues and is not based on reasonable grounds but mere speculation and convoluted personal opinion. The Respondent advances that major and material parts of the affidavit in support of the application contains opinions rather than facts contrary to Order 19 Rule 3 of the Civil Procedure Rules, that the propriety of the Arbitrator should not be lightly questioned and that the allegations and grounds for recusal do not meet the standard requirement test for recusal. For these reasons, the Respondent prays that the application should be dismissed with costs.

Analysis and Determination

10. As per its submissions, the Applicant is calling upon the court to determine whether the Respondent was biased and unfair towards it. It is common ground that the Arbitration Act provides that an arbitral tribunal may be challenged in respect of its mandate on the grounds of inter alia justifiable doubts as to their impartiality and independence and failing to conduct the proceedings properly and with reasonable dispatch. An unsuccessful party to this challenge before the arbitral tribunal may also apply to the court to decide on the arbitral tribunal's mandate. sections 13(3), 14(3) and 15(2) of the Arbitration Act are appropriate as to the aforementioned grounds of challenge, challenge procedure and termination of an arbitral tribunal's mandate as follows:

13. Grounds for challenge

(1)



- (2)
- (3) 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 qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.
- (4)

14. Challenge procedure

- (1)
- (2)
- (3) If a challenge under 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.

15. Failure or impossibility to act

- (1) The mandate of an arbitrator shall terminate if—
 - (a) he is unable to perform the functions of his office or for any other reason fails to conduct the proceedings properly and with reasonable dispatch; or
 - (b)
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- (2) If there is any dispute concerning any of the grounds referred to in subsection (1)(a), a party may apply to the High Court to decide on the termination of the mandate.
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11. 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.”



12. In deciding whether an arbitrator is impartial, this court is guided by several pronouncements of our superior court. The Applicant has rightly cited the decision in *Philip K. Tunoi & another v Judicial Service Commission & another* NRB Civil Application No. 6 of 2016 [2016] eKLR where the Court of Appeal cited with approval the House of Lords' decision in *R v. Gough* [1993] AC 646 which held that the test to be applied in all cases of apparent bias was the same, namely, whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand. It thus that:
41. 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 balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.
42. In *Taylor v. Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:
- “... we believe the modest adjustment in *R V. Gough* is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland.”
- “The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”
13. The Applicant submits that the Arbitrator exhibited bias when she failed to delve into the merits of the challenge placed before her which ought to have been considered as provided for under section 14(2) of the *Arbitration Act*. As stated in the introductory part, after the Applicant wrote the letter of 28th January 2021 seeking the Arbitrator's recusal, the Arbitrator directed the Applicant to file a formal application detailing reasons for the recusal as the Respondent stated that the said letter was not clear to it and hence it was not able to reply to the same. In the Ruling, the Arbitrator noted that the Applicant failed to file a formal application on recusal, failed to file its statement of defence and also refused to appeal before the Tribunal when invited. That the absence of a detailed formal application setting out grounds for recusal meant that the Respondent was not able to respond to the application and as such, the Arbitrator was not able to make a determination on the application for recusal. Going through the record, I am inclined to agree with the Arbitrator that she could not make any determination on the application in the absence of the Respondent's response. It would seem that the Applicant sought the recusal of the Arbitrator and expected the Arbitrator to make a determination without a response from the Respondent. This would have been prejudicial to the Respondent and an infringement of its right to a fair hearing under Article 50 of the *Constitution* and the natural rules of justice which stipulate that a person is to be accorded a fair opportunity to be heard. This would also be affront to section 19 of the *Arbitration Act* which requires an arbitral tribunal to treat all parties equally and that each party be given a fair and reasonable opportunity to present their case. Up to this point, I see no real or apparent bias on the part of the Arbitrator against the Applicant when she directed the Applicant to file a formal application so as the Respondent could be given an opportunity to lodge a reasonable response.
14. I have also gone through the chronology of events from the time the Arbitrator was appointed on 19th November 2020 up to the date of the Ruling on 22nd July 2021. I note that the Arbitrator has in almost



all occasions given the parties equal opportunities to participate in the proceedings even though the Applicant had expressed its unwillingness to participate in the same. When the Applicant's advocate informed the Arbitrator that she was unable to proceed with the matter for want of instructions, the Arbitrator gave the Applicant an opportunity to appoint another advocate for the matter to proceed. She also gave the Applicant more than one chance to file a formal application for recusal which implies that the Arbitrator was ready and willing to hear the Applicant on its application for recusal. The Applicant cannot claim that it does not want to participate in the arbitration proceedings but at the same time seek the recusal of the Arbitrator without a formal application that could be responded to by the Respondent and the Arbitrator then makes a decision on the same. The Applicant can only have itself to blame for not filing the said application as directed by the Arbitrator and it cannot claim that the Arbitrator was biased and unfair for issuing this direction, which as I have found, was reasonable.

15. In the foregoing, I find no justifiable reasons and circumstances to conclude that the Arbitrator was biased against the Applicant. It should not also be lost that under section 20(2) of the Arbitration Act, the Arbitrator "...may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases." This means that the Arbitrator has discretion to determine how the arbitration proceedings will be conducted and this court cannot purport to direct her as to how to conduct the same. For these reasons, I find no basis to support the Applicant's contention that the Arbitrator is biased, partial and unfair against it and I do not find anything cogent reason to lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the Arbitrator was biased against the Applicant or that she is not impartial in the manner she has been handling the proceedings. Therefore, I am persuaded that there are no valid reasons to set aside the Ruling made on 22nd July 2021 or terminate the Arbitrator's mandate in the arbitration proceedings between the parties.

Conclusion and Disposition

16. The Applicant's application dated 21st September 2021 thus fails and is hereby dismissed with costs to the 1st Respondent

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Kiprono for the Applicant.

Mr. Mungu for the 2nd Defendant.

mos - Court Assistant

