



Villa Care Limited v Waiyaki Way Developers Limited (Miscellaneous Application E180 of 2021) [2023] KEHC 2158 (KLR) (Commercial and Tax) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E180 OF 2021**

PN GICHOHI, J

MARCH 23, 2023

BETWEEN

VILLA CARE LIMITED APPLICANT

AND

WAIYAKI WAY DEVELOPERS LIMITED RESPONDENT

RULING

1. The subject of this ruling is a Notice of Motion dated 12th March 2021 and filed by the Applicant through the firm of Thed Munyoki Junior & Co. Advocates and brought under Section 35 of the [Arbitration Act](#) Cap 49 Laws of Kenya. The Applicant seeks orders that;
 1. The Interim Award issued by the by the Arbitrator Dr. Kenneth Wyne Mutuma made and published on 14th December 2020 be set aside in its entirety.
 2. The arbitral proceedings commence de novo before an arbitrator other than Dr. Kenneth Wyne Mutuma and parties agree on replacement of the arbitrator or in the alternative, a substitute arbitrator be appointed by the Chairman , for the time being , of the Chartered Institute of Arbitrators.
 3. The Arbitrator Dr. Kenneth Wyne Mutuma be ordered to refund fees and expenses paid to him by the Applicant in the arbitral proceedings the subject of this application.
 4. The costs of this application be payable by the Respondent.
2. The grounds on the face of the application are that the Arbitrator Dr. Kenneth Wyne Mutuma , has had a working relationship with Mr. Patrick Kisia (QS) for a number of years where they sat in the same committee and this relationship has undermined the Arbitrator's independence and impartiality in the course of the arbitral proceedings .



3. He further states that the said relationship resulted in the undue influence on the part of the Arbitrator to the detriment of the Applicant which led the Applicant to file an application dated 4th May 2020 seeking that the Arbitrator recuses himself from the proceedings but the Arbitrator declined to recuse himself stating that his impartiality and independence had not been compromised.
4. Further, he states that despite that ruling which the Applicant never challenged, the Arbitrator still continued to exhibit partiality in favour of the Respondent including admitting hearsay evidence and extending time for the sessions in favour of the Respondent, failing to record testimonies of the Applicant's witnesses in entirety, relying on extraneous matters not relevant to the proceedings due to the said impartiality.
5. As a consequence, the Applicant states that the Arbitral Award is marred by flaws and was made by a partial Arbitrator and therefore the Applicant should be granted the orders sought.
6. In support of the application is the affidavit sworn on 12th March 2021 by Daniel Ojjo as the Managing Director of the Applicant. He states that despite his impeccable case presented before the arbitrator supported by his statement and documents, the Arbitrator demonstrated bias throughout the arbitral proceedings. That despite concerns raised by the Applicant coupled with protest, the arbitrator brushed them away, proceeded and finally published the Award on 14th December 2020.
7. The application is opposed by a relying affidavit sworn by Virji Meghji Patel on 28th June 2021 as the Managing Director of the Respondent. While urging the court to dismiss the application with costs, he depones that the Application is contrary to the policy of the finality of the Arbitral Awards and further, it is an appeal disguised as an application for setting aside of an arbitral Award which this court cannot entertain.
8. He further depones that the Applicant had a right to appeal against the decision of the Arbitrator to rescue himself but he did not and cannot use the same grounds in the application for setting aside. That the removal and/or substitution of the Arbitrator can only be done before and not after the award. He further depones that the Applicant is seeking that this court evaluates the evidence before the Arbitrator yet this is not an appeal. He depones further, that the Applicant has failed to particularise the grounds upon which he wishes the court to set aside the Arbitral Award.

Submissions

9. In their submissions dated 13th December 2022, counsel for the Applicant frames three issues for determination, that is, whether the court has jurisdiction to hear and determine this case; whether the application meets the conditions for recusal or disqualification of the Arbitrator and whether the Applicant is entitled to the orders sought.
10. On grounds under which an award can be set aside, counsel relies on Section 35 (vi) of the *Arbitration Act* counsel and the case of *Paragon Limited v Sagar Builders Limited & another* [2019] eKLR. He submits that this court has jurisdiction to determine this application.
11. On whether the application meets the condition for recusal, counsel relies on the case of *Paragon Limited* (supra) and the cases cited therein, He submits that due to the impartiality and undue influence, the Arbitrator found that there existed a binding agreement between the parties; that there was breach by the Respondent but went ahead to deny the Applicant damages.
12. In regard to the Respondent's argument that the application is disguised as an appeal yet the Award should be final, counsel submits that the Applicant is not asking the court to determine the merits or otherwise of the case before the Tribunal. That this is a stand-alone application for setting aside of an



award on the grounds that it is vitiated by bias , impartiality and undue influence on the part of the Arbitrator.

13. He relies on the case of *Exclusive Estates Limited v Telkom Kenya Limited & another & Afraco Limited (Interested Party Applicant)* [2021] eKLR where the court examined the award to establish clear occasions of bias on the part of the Arbitrator. He submits that the court is being invited to make a finding on the evidence of partiality or bias either express or implied on the part of the Arbitrator based on the relationship of the counsel for the Respondent which might have interfered with the impartiality of the Arbitrator. Lastly, he submits that the Applicant is entitled to the orders sought.
14. On their part, the Respondent filed their submissions dated 7th November 2022 through the firm of N. K. Mugo & Co. Advocates who in turn frames issues for determination as to ;
 1. Whether the interim award can be set aside.
 2. Whether this court can terminate the mandate of an arbitrator and order a substitute.
15. On the first issue, counsel submits that it is now settled law that such allegation under Section 35 (vi) must be supported by cogent evidence before a court can make such an order and that mere inferences does not suffice. On this issue, counsel relies on the case of *National Cereals & Produce Board v Erad Supplies & General Contracts Limited* [2014] eKLR .
16. Further , counsel submits that if the award is tainted by fraud, bribery , undue influence or corruption the instances of bias, undue influence or corruption and High Court exercises it original jurisdiction then the pleadings ought to contain the particulars of fraud, bribery , undue influence or corruption but the Applicant herein has failed to set out those particulars in this application.
17. On whether the court can terminate the mandate of the Arbitrator and order substitution, counsel submits that it is now settled law that a court has no power to intervene in arbitration process except as provided by under the Act. Counsel therefore submits that termination of the mandate of an arbitrator is specifically be provided for under Sec. 16 of the *Arbitration Act* but the section has not been invoked in the Application before this court.
18. Further, counsel submits that the Applicant waived his right to appeal the decision of the Arbitrator dismissing his application for recusal. He also did not apply for termination of the mandate under Section 15 (2) of the Act.
19. While relying on the case of *Kenya Pipeline Company Limited v Kenya Oil Company Limited & another* [2015] eKLR, counsel submits that there is no evidence that the Arbitrator was served and made a party to this application yet it is now settled law that whenever there is challenge on an Arbitrator on the ground of impartiality or independence , the Arbitrator is entitled to appear and be heard before the court makes a determination. Lastly, counsel urges the court to find that the circumstances of this do not warrant termination at all.

Determination

20. Having heard the parties herein through their affidavits and submissions on this application, I note that the issues for determination can be condensed into only two, that is;
 1. Whether the interim award can be set aside.
 2. Whether this court can terminate the mandate of an arbitrator and order a substitute and hearing the arbitration de novo .



21. The setting aside of the Arbitral award is provided for under Section 35 of the *Arbitration Act* as follows:-
1. Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
 2. An arbitral award may be set aside by the High Court only if—
 - a. the party making the application furnishes proof—
 - (i) ...; or
 - (ii) ...; or
 - (iii) ...; or
 - (iv) ... ; or
 - (v) ...; or (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption; [Emphasis added]
22. It is clear that it is the duty of the Applicant to furnish proof of the allegations made in an application for setting aside. To start with it important to note the requirement for disclosure by Arbitrator under Sec. 13 (1) of the Act which provides:
- “When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.”
23. The hard copy of the signed and certified copy of the Award dated 14th December 2020 has been availed to this Court in compliance with orders issued earlier , as what could be accessed online was an undated and unsigned document attached as an exhibit to the Applicant’s affidavit.
24. It is not disputed that the Arbitrator did make disclosure in the course of the arbitral proceedings that he sat in the same committee with the representative of the Respondent one Patrick Kisia. A challenge to the Arbitrator is provided for under Section 13 (3) of the Act as follows:
- “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.”[Emphasis added]
25. The Applicant sought that the Arbitrator recuses himself from the arbitral proceedings. In his ruling on that application, the Arbitrator held that his impartiality and independence had not been compromised in his handling of the arbitral proceedings.
26. The Applicant further admits that he continued to participate in the proceedings even as he was convinced that “the Arbitrator’s impartiality and independence was missing throughout the proceedings and that despite the Applicant protesting the same during proceedings, the Applicant’s protests were brushed off as a merely procedural and the Arbitrator allowed proceedings to go on.”
27. Having been convinced that the arbitrator would not be independent thus the Applicant raising the issue through an application which was dismissed, the Applicant ought to have approached the High Court to determine the matter under Sec. 14 (3) and in which case, the Arbitrator is entitled under Section 14 (4) of the Act, to appear and be heard before high Court determines that application.



However, Applicant chose not to do so and instead, he waited for the Arbitration proceedings to go on and the publishing of the Award.

28. Nevertheless, he has approached this court under Sec. 35 (2) (vi). In the case of *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* [2014] eKLR, the Court of Appeal had this to say on that issue:

“In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider such evidence.”

29. This is not an appeal where this court is required to evaluate the evidence as was stated by Ochieng J in *Apa Insurance Co. Ltd v Chrysanthus Barnabas Okemo* [2005] eKLR while considering an application to set aside an arbitral award under section 35 of the Act, thus;

“In looking at this issue, I must remind myself that it is not for me to re-evaluate the evidence, as if it were an appeal. This is certainly not an appeal from the decision by the arbitrator. My role is to ascertain if the applicant had made out a case to warrant the setting aside of the arbitral award.”

30. Whereas the Applicant may have had perception that the Arbitrator was partial, perception and inference are not sufficient. He has not furnished evidence or proof that the award made by the Arbitrator compromised due to the relationship that was earlier disclosed. Further, failure by the Arbitrator to award him awarded damages for breach of contract and failure to record testimonies of the Applicant’s witnesses are not issues for consideration in an application for setting aside under Section 35 (2) of the Act.

31. By seeking that “the arbitral proceedings commence de novo an arbitrator other than Dr. Kenneth Wyne Mutuma and parties agree on replacement of the arbitrator or in the alternative, a substantive arbitrator be appointed by the Chairman, for the time being, of the Chartered Institute of Arbitrators”, the Applicant is basically seeking termination and substitution of the Arbitrator under Sec. 16 of the Act . The said Section provides;

- (1) Where the mandate of an arbitrator is terminated under section 14 or 15, a substitute arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.
- (2) Unless otherwise agreed by the parties—
 - (a) where a sole arbitrator or the Chairman of the arbitral tribunal is replaced, any hearing previously held shall be held afresh; and
 - (b) where an arbitrator, other than a sole arbitrator or the Chairman of the arbitral tribunal is replaced, any hearings previously held may be held afresh at the discretion of the arbitral tribunal.
- (3) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalidated solely because there has been a change in the composition of the arbitral tribunal.



(4) The Authority of an arbitrator is personal and ceases on his death.”

32. This prayer is being sought after the publishing of the Award. The material the Applicant has placed before this court ought to have been put in an application to High Court for determination as soon as the Arbitrator dismissed the Applicant’s Application for recusal but not at this stage.
33. The case of *Paragon Limited v Sagar Builders Limited & another* [2019] eKLR cited by the Applicant is not relevant to the circumstances of the matter before this court. In that case, High Court had been moved by way of an Originating Summons under Section 14 (3) and 17 (6) of the *Arbitration Act* unlike in this case where the Applicant was challenging the Arbitrator’s ruling on dismissal of the Applicant’s application. Even though the Originating Summons also dealt with the issue of lack of impartiality on the part of the Arbitrator, and who was a party in that Originating Summons, the proceeding before the Arbitrator were still on going. The Court still found that there was no proof of partiality and non- independence of the Arbitrator.
34. In the case of *Exclusive Estates Limited v Telkom Kenya Limited & another & Afraco Limited (Interested Party Applicant)* [2021]eKLR also relied on by the Applicant , there were two applications for setting aside the arbitral award where the Court stated;
- “In my considered view, most of the grounds raised by Telkom and Afraco do not constitute misconduct of the Arbitrator. They relate to the Arbitrator’s interpretation and analysis of the evidence tabled before her. Indeed, it is not this court’s role to micromanage the Arbitration process. For that reason, the court will only consider the allegations of misconduct which will have a direct impact on the court’s finding namely:
- A. Rewriting the Contract
 - b. Unjust Enrichment
 - c. Bias”
35. After analysis , G.W.Ngenye-Macharia J held;
- a. The 1st Defendant’s (Telkom) Notice of Motion dated 1st November, 2019 and the Interested Party’s (Afraco) Notice of Motion Application dated 31st October, 2019 are hereby allowed in that the Arbitral Award published on 16th September, 2019 by the Arbitrator Ms. Zehrabanu Janmohamed Advocate is hereby set aside.
 - b. Conversely, the request for enforcement of the Award is dismissed.
 - c. The Parties are now at liberty to proceed with the suit.
 - d. Costs of the two applications shall be borne by the Plaintiff.
36. The law under which the said applications for setting aside were brought was different. Also different were the circumstances and issues for consideration by High Court. Telkom’s application had been brought under Section 3A and 59 of the *Civil Procedure Act*, Order 46 Rule 16 (3) of the *Civil Procedure Rules* while Afraco’s application is brought under Article 10, 159 and 165 of *the Constitution* of Kenya 2010, Order 46 Rule 16 of the Civil Procedure Rules, 2010. Therefore, that case is not relevant to the matter before this court.
37. In the upshot, this court finds no merit in the application dated 12th March 2021. The same is dismissed with costs to the Respondent.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 23RD DAY OF MARCH, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Munyoki for Applicant

N/A for Respondent

Kevin Isindu, Court Assistant

