



**Envirocheck Limited v Sisters of Notre Dame de Namur Registered
Trustees & 2 others (Miscellaneous Application E886 of 2022)
[2023] KEHC 3095 (KLR) (Commercial and Tax) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E886 OF 2022
A MABEYA, J
APRIL 14, 2023
IN THE MATTER OF ARBITRATION ACT NO 4 OF 1995**

BETWEEN

ENVIROCHECK LIMITED APPLICANT

AND

**THE SISTERS OF NOTRE DAME DE NAMUR REGISTERED
TRUSTEES 1ST RESPONDENT**

**THE CHAIRMAN, THE CHARTERED INSTITUTE OF ARBITRATORS
KENYA BRANCH 2ND RESPONDENT**

ENG HENRY NDUGAH ODONGO 3RD RESPONDENT

RULING

1. Before Court is the application dated December 15, 2022 brought under section 14(3) of the *Arbitration Act* No 4 of 1995, Rules 4,5,6,9 and 11 of the *Arbitration Rules,1997*, Order 46 rules 16 and 18 of the *Civil Procedure Rules 2010*, Sections 1A and 1B of the *Civil Procedure Act*.
2. The applicant sought to have the arbitral proceedings before the learned arbitrator set aside and vacated and that the arbitral proceedings do commence denovo as per the arbitration agreement.
3. The application was premised on the grounds on the face of it and on the supporting affidavit sworn by Lawrence Sean Bifwoli. The applicant' case was that the 1st respondent commenced arbitral proceedings without following the procedure laid out by clause 42 of the contract. That the 2nd respondent appointed the 4th respondent as an arbitrator in contravention of the agreement which required the parties to first attempt to settle the dispute amicably. The applicant further faulted the



- applicant for failing to serve the notice of the dispute or request for arbitration and request to submit the dispute for arbitration.
4. It was contended that based on the nature of the dispute, the Chairman of Architectural Association of Kenya ought to have been the appointing authority of the arbitrator as opposed to the Chairman of the Chartered Institute of Arbitrators. That the third respondent was not suitable to arbitrate the dispute since he was an electrical engineer and based on the nature of the dispute, a quantity surveyor would have been most suitable.
 5. The 1st respondent filed a replying affidavit dated January 5, 2023 sworn by Praxides Awino Ida who is a trustee of the 1st respondent. She stated that the 1st respondent contracted the applicant to construct an administration block and classrooms on LR No S/Kabras/Chemuche/1488 in Kakamega County. The project was expected to be completed by March 30, 2021 but the applicant failed to carry out the works to completion despite having received full payment. That the parties convened another meeting and it was agreed that the applicant would be given an additional variation sum of Kshs 10,000,000/- as the last payment.
 6. She averred that the applicant further failed to complete the project which necessitated the 1st respondent to move to court in Kakamega HCCC No 2 of 2022- Sisters of Notre Dame de Namur Registered trustees vs Envirocheck Kenya Limited. That the court directed that the matter be referred to arbitration and an arbitrator be appointed within 60 days of the ruling.
 7. Pursuant thereto, the 1st respondent wrote to the law firm of ZJ Atulo informing them that the 1st respondent would be proceeding to the chartered institute of arbitrators for appointment of arbitrator. Further, the applicant was copied with documents and correspondences sent to the 2nd respondent and in turn the 2nd respondent forwarded all documents to the parties including the applicant and its advocates.
 8. That the 2nd respondent appointed the 3rd respondent as the arbitrator and copied the said letter to both the applicant and its advocate. That it was at the date of the preliminary meeting with the arbitrator that the 1st respondent learnt that the applicant had retained another law firm, M/S Simba and Simba Advocates who then challenged the appointment of the 3rd respondent the arbitrator.
 9. She stated that the applicant was well aware of the process of appointment of the arbitrator as all the correspondences were served upon it and its advocates. That the applicant had not demonstrated that the law firm of M/S ZJ Atulo and Company Advocates had acted without authority from the applicant.
 10. The second respondent filed grounds of opposition dated January 30, 2023. He observed that the matter was sub-judice as the Kakamega civil suit no 2 of 2022 the sisters of Notre Dame De Namur Registered Trustees Environcheck Limited had only been stayed and not dismissed. That the 3rd respondent was appointed in accordance to clause 42.1 of the contract between the parties.
 11. The applicant filed a further affidavit sworn on January 11, 2023 by Lawrence Sean Bifwoli. He contended that the 1st respondent wrote to the applicant informing it that it would be proceeding to request for an arbitrator before giving the applicant a 30 days notice of a dispute as required by the arbitration agreement.
 12. That the letter dated July 29, 2022 did not meet the statutory requirements of a request to appoint an arbitrator within the meaning of clause 5 of the Chartered institute of arbitrators. That the firm of ZJ Atulos instructions were only limited to the Kakamega High Court proceedings and not arbitration proceedings.



13. The application was canvassed by written submissions which I have considered.
14. The applicant submitted that the appointment of the 3rd respondent arbitrator was done in clear contravention of the provisions of clause 42(1) of the arbitration agreement. Counsel submitted that the parties did not agree on the appointment of the 3rd respondent as the arbitrator and the 2nd respondent ought to have ensured that the parties had complied with the provisions of the arbitration agreement before selecting an arbitrator.
15. It was further submitted that the 1st respondent did not have the power to refer the matter to the Chairman of the Chartered Institute of Arbitrators without giving the applicant a chance to be heard. That the applicant had never been served with a request for appointment of an arbitrator in accordance to Rule 5 of the Chartered Institute of Arbitrators Rules 2020. That the 3rd respondent did not possess the qualifications to arbitrate over the matter since he was not a quality surveyor.
16. The 1st respondent submitted that the applicant did not follow the procedure laid out in section 14 (2) of the *Arbitration Act* in challenging the arbitrator. It was the 1st respondent's submission that there lacked a written statement of the reasons for the challenge to the arbitral tribunal. That the applicant through the firm of M/s ZJ Atulo and Co Advocates had in a letter dated November 24, 2022 accepted the 3rd respondent's appointment. That there was no evidence to demonstrate that the 3rd respondent was incompetent.
17. On his part, the 2nd respondent submitted that the application was premature as the applicant had not complied with the mandatory procedure set out in section 14 of the *Arbitration Act*. That the application offended the doctrine of exhaustion by failing to comply with the requirements of the law. That since the 1st respondent did not share its preferred experience and qualifications of the arbitrator whilst the applicant did not participate in the appointment, the 2nd respondent could not be faulted for the appointment.
18. I have considered the pleadings, the submissions and the case law. The first issue is whether the applicant has made out the case for the orders sought.
19. To begin with, there is no dispute that the contract between the parties had an arbitral agreement. Secondly, the arbitral agreement did not specify the procedure and the qualifications of the arbitrator.
20. Section 12 of the *Arbitration Act* set out the law on appointment of arbitrators. It provides that: -
 - 1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.
 - 2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—
 - a) In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
 - b) In an arbitration with two arbitrators, each party shall appoint one arbitrator; and
 - c) In an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.



- 3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ('the party in default')—
 - a) Has indicated that he is unwilling to do so;
 - b) Fails to do so within the time allowed under the arbitration agreement; or
 - c) Fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
- 4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —
 - a) Make the required appointment; and
 - b) Notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
- 5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.
- 6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
- 7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
- 8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.
- 9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.'

21. The applicant invoked section 14(3) of the *Arbitration Act* which provides: -

- ' 1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
- 2) 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.

- 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.'

22. The applicant has moved the court seeking to set aside the arbitral proceedings before the arbitrator and further have proceedings start denovo. The grounds upon which the application is founded is that the 1st respondent failed to adhere to the provisions of their contract which required the parties to first attempt to amicably settle the dispute and have both parties participate in the appointment of the arbitrator.
23. The 1st respondent on its part contended that the applicant was well aware of the process of selecting an arbitrator but chose not to participate. It was the 1st respondent's case that it sent correspondence to the applicant and its advocate.
24. The question is whether the 1st respondent properly referred the dispute to the arbitral forum. The parties in this case voluntarily executed an agreement with respect to the Construction of the Administration/Classroom Block. The arbitration clause provides thus;

' 42. 1 In case any dispute or difference shall arise between the employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, such dispute shall be notified in writing by either part to the other with a request to submit it to arbitration and to concur in the appointment of the arbitrator within 30 days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an arbitrator, the arbitrator shall be appointed by the chairman or vice chairman of the Architectural of Kenya or by the chairman or vice chairman of the Chartered institute of arbitrators, Kenya Branch on the request of the applying party.'

25. Under the arbitral clause, both the applicant and the 1st respondent were at liberty to appoint an arbitrator. In the event the parties failed to agree on the appointment, the contract gave them two options on the appointing authority, that is, either the Chairman or Vice-Chairman of the Architectural Association of Kenya or the Chairman or Vice-Chairman of the Chartered Institute of Arbitrators.
26. In the present case, the 1st respondent filed a suit against the applicant in Kakamega High Court Civil Case No 2 of 2022- Sisters of Notre Dame de Namur Registered trustees versus Envirocheck Kenya Limited. The court in its ruling dated June 14, 2022 refused to strike out the suit and observed thus;

' I also consider that to stuck(sic) out the suit, as sought by the defendant will not resolve the dispute between the parties. On that basis and for the sake of proportionate and substantive justice. I do direct that the dispute, as pleaded be referred to arbitration in terms of clause 43 of the Contract.



Let the arbitrator be appointed within 60 days from today and parties to attend court on October 5, 2022 to report on the progress made. I order that costs of the preliminary objection be in the cause.'

27. Notably, the applicant's main contention is failure to adhere to the arbitral clause 42.1 of the contract with regard to giving notice of the dispute. In my view, the notice had the effect of informing the applicant that a dispute had arisen between the parties and the process of appointing the arbitrator be resorted to. Based on the circumstances of the case, it is my finding that the parties had already passed that stage. The suit in Kakamega had been filed as a result of the differences between the parties and the court ordered that an arbitrator be appointed. It would then be immaterial to issue a notice of the dispute.
28. The other area of concern by the applicant is the allegation that it was not a party to the process of appointing the arbitration. The court was informed that the letters were sent to the applicant's advocate who was not representing the applicant in the arbitral proceedings but rather the civil case.
29. I have considered the record. In its letter dated July 14, 2022, the 1st respondent communicated to the applicant of its intent to request the Chartered Institute of Arbitrators to appoint an arbitrator. The said letter was received by the Firm of ZJ Atolo, Advocates. The 2nd respondent thereafter responded to the letter and copied the same to the applicant together with his advocate. The 1st respondent's advocate sent an email dated September 12, 2022 which included the correspondences with respect to the dispute in question. The letter of appointment of the arbitrator by the 2nd respondent and the letter for accepting the appointment to the 3rd respondent was all copied to all the parties.
30. From the foregoing, it is apparent that the firm of ZJ Atolo and Company Advocates had been served with all the correspondences. The applicant had appointed them to act on its behalf in the Kakamega suit by which the process of appointing the arbitrator was ordered. The 1st and 2nd respondent were entitled to communicate with the said advocates as acting for the applicant in the dispute.
31. Based on the notice for the appointment of advocates dated May 9, 2022, the firm of ZJ Atolo and Company, Advocates had been appointed by the applicant to act for them and the address of service for the case was the law firms physical address. There is no evidence on record to show that the representation of the applicant had changed. I also note that the case Kakamega High Court Civil Case No 2 of 2022- Sisters of Notre Dame de Namur Registered trustees versus Envirocheck Kenya Limited was still active as the suit had not been dismissed by the court. I am of the view that this application ought to have been filed before that court.
32. That notwithstanding, I find that the arbitrator's appointment was lawful and regular. The applicant had full notice of the fact that the 1st respondent had initiated the process of selecting the arbitrator and did not have any basis of claiming that it was not part of the selection process. In the premises, I find that the arbitrator was properly selected. There is no basis to set aside or vacate the arbitral proceedings or to have them commence denovo.
33. Further, I find that the application is fatally defective. The attempted challenge does not fit the requirements under section 14 of the *Arbitration Act*. The challenge should have commenced by a statement to be lodged with the arbitrator for his decision.
34. In any event, the application is an attempt to overturn the ruling in the Kakamega suit. That Court permitted that an arbitrator be appointed and the process seem to have been fully followed by the 1st respondent and the 2nd respondent who acted professionally in the appointment of the 3rd respondent.



35. As regards the qualifications of the 3rd respondent, that is but an afterthought. The contract did not specify the qualifications of the arbitrator and I hold that the 3rd respondent is qualified and competent to adjudicate the dispute.

36. In the upshot, I find no merit in the application and the same is dismissed with costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 14th day of April, 2023.

A. MABEYA, FCIArb

JUDGE

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