Uni Industries East Africa Limited v Murray (Miscellaneous Application E517 of 2022) [2023] KEHC 4081 (KLR) (Commercial and Tax) (19 April 2023) (Ruling)

Neutral citation: [2023] KEHC 4081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E517 OF 2022

DO CHEPKWONY, J

APRIL 19, 2023

IN THE MATTER OF: THE ARBITRATION ACT,1995

AND

IN THE MATTER OF: AN APPLICATION UNDER SECTION 14 (3) OF THE ARBITRATION ACT TO DETERMINE A CHALLENGE TO THE ARBITRATOR

BETWEEN

UNI INDUSTRIES EAST AFRICA LIMITED ..... APPLICANT

AND

KYLE TEMPLE MURRAY ..... RESPONDENT

RULING

1. By way of Originating Motion application dated and filed on 12th July, 2022, the Applicant seeks for:
    a. Spent;
    b. Stay of the arbitral proceedings between the Applicant ad the Respondents currently pending before the Honourable Arbitrator, Mr. Phillip K. Murgor, S.C. MCIArb.
    c. Removal of Mr. Phillip K. Murgor S.C. MCIArb. as the Arbitrator in the arbitration between the Applicant and the Respondent.
    d. The Honourable Court be pleased to make such other orders as it may deem fit and just in the circumstances of the application.
    e. The costs of this instant application be provided for.

2. The application is premised on the grounds set out on its face and Supporting Affidavit sworn by Grace Kinyanjui, the Applicant's advocate sworn on 12th July, 2022 wherein the Applicant challenges the Arbitrator's capacity to remain impartial and independent in the adjudication of the arbitration proceedings between the parties herein.

3. According to the Applicant, the Arbitrator dismissed its challenge dated 2nd June, 2022 made under Section 14(2) of the *Arbitration Act* which was based on the substantive ground that there are circumstances that give rise to justifiable doubts as to the Arbitrators impartiality and independence. The Applicant is aggrieved by this ruling and contends that unless the orders sought herein are granted, the Arbitration will proceed to hear the dispute and render a final award when his conduct and actions in a separate Succession Cause no 42 of 2022, at the High Court in Mombasa, *The Estate of Manfred Walter Schmilt (deceased): Jeanne Ngo Yockbag v URs Wettstein, Andreas Wettstein and Sophie Schmilt* (herein after referred to as "the Succession Cause") are likely to subject the appeal to nugatory arbitral proceedings.

4. According to the Applicant:-

   a. The legal advice rendered by the arbitrator as well as the views and position taken by him in the Succession Case are that the Firm of Daly Inamdar Advocates LLP ("the firm") who act for the Applicant in the arbitration, has, through several of its partners, engaged in and continue to engage in fraud; advise its clients to engage in fraud; and provide dishonest legal advice.

   b. Whilst the Arbitrator had as far back as August, 2021 been in correspondence with various partners of the firm – including Grace Kinyanjui, Advocate who has conduct of the arbitration for the Applicant, regarding the issues leading to the Succession Case, he did not indicate his views and opinion regarding the Applicant's Advocates' alleged illegality as now clearly set out in the pleadings drawn by his firm in the Succession Case.

   c. As a matter of law and practice, the Arbitrator ought to have disclosed, prior to accepting his appointment, that the nature of his involvement in the Succession Case was such that he had formed the view and was giving the advice that the Applicant's Advocates had and continue to engage in the said illegality.

   d. The Arbitrator's duty to disclose such circumstances commenced from the time of his appointment and extends to the period of the entire arbitral proceedings. As such, the Arbitrator ought to have made the disclosure of the nature of his involvement in the Succession Case during the following opportunities that were available for him to do so:-

      i. Before or on 22nd November, 2021 when he confirmed that he was not aware of any circumstances that could lead to a conflict of interest, which could affect his independence or impartiality;

      ii. Before or on 1st December, 2021 when he accepted his appointment;

      iii. Before or on 10th December, 2021 when he conducted the Preliminary Meeting of the arbitration;

      iv. Before or on 9th May, 2022 when he filed the Succession Case; and at the very least, before or on 13th May, 2022 when he conducted the first hearing session of the arbitration having filed the Succession Case Four (4) days earlier.

   e. To the extent that the above circumstances were not disclosed to the parties by the Arbitrator, the Applicant and its Advocates were not accorded a fair opportunity to consider the suitability

of the Arbitrator to hear and determine the arbitration between the parties. Had the above circumstances been disclosed to the parties herein, the Applicant and its Advocates would have arrived at a different decision as regards their acceptance of the Arbitrator's appointment and involvement in the arbitration.

f. In light of the above circumstances, the Applicant and its Advocates have lost confidence in the Arbitrator's ability to be impartial and independent considering that the Applicant is represented in the arbitration by a firm and Advocates accused by the Arbitrator of having engaged in, and currently engaging in alleged fraud and provision of dishonest legal advice.

5. The application has been opposed by the Respondent *vide* an affidavit sworn by Kyle Temple Murray on 19th July, 2022, wherein he depones that he is the Claimant in the Arbitration proceedings and states the allegations raised in the application do not meet the high standards of proof of an allegation of bias or likelihood of bias or predispositions or prejudice against the Applicant in the proceedings for the following reasons:-

a. The Arbitral Proceedings are at an advance stage. The parties have already filed their pleadings and attended to a lengthy arbitration hearing on 13th May, 2022 where I testified. All that is remaining is for my advocates to close my case and that I be tendered for cross examination.

b. The parties have paid deposits towards the Arbitrator's fees and legal fees towards the preparation and attendance to the Arbitral Proceedings including the lengthy arbitration hearing. These costs would be irrecoverable if the application is allowed.

c. I am advised by Cecil Kuyo that appointing a new Arbitrator to hear and determine the dispute will require agreement of the parties which could take time. Furthermore, the Arbitrator appointed would require time to familiarize himself with the matter. This will only serve to delay the determination of the dispute between the parties and increase the costs of the Arbitral proceedings.

d. I am further advised by Cecil Kuyo that appointing a new Arbitrator would prejudice both parties as the new Arbitrator would be appointed under fresh terms of an Arbitration Agreement between the parties and with it fresh fee deposit requirements such that the costs incurred by the parties before his appointment would be irrecoverable.

6. On 28th July, 2022, the court directed that parties dispose of the application by way of written submissions. The Applicant filed their written submissions dated 4th August, 2022 while the Respondent filed submissions dated 16th August, 2022.

Analysis and Determination

7. I have considered the application, the affidavit in support thereof and the Replying Affidavit in opposition alongside the submission filed by either party. I find the issues for determination being:-

a. Whether the challenge application was time barred; and if not,

b. Whether the Applicant has met the test for stay of the arbitral proceedings and removal of the Arbitrator therein.

8. In respect of the first issue on whether the challenge was time barred, this is governed by the provisions of Section 14 of the *Arbitration Act*, which sets out the process for instituting a challenge application. Section 14(2) of the said Act provides that:-

14 (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".

9. According to the Respondent, it was the Arbitrators contention in his ruling at Paragraph 45 on Page 85 of the challenge application was time barred as the Applicant's advocates know of the circumstances surrounding the challenge way back in August, 2021. If the Respondent's contention that by their own admission, the Applicant's advocates knew that they were on opposing sides with the Arbitrator in a contentious "Succession Cause" as far back as August, 2021 so that the allegation that they became aware of the issues when "the Succession Cause" was filed is untrue since Hamesh Keith was personally served with a demand letter dated 6th August, 2021 in his capacity as Company Secretary of one of the Companies subject to the Succession Cause. Also, it has been submitted that the issue ought to have been raised during the preliminary meeting as observed in the Arbitrator's ruling at Paragraph 37 of Page 88 of the ruling. In response to this, the Applicant's advocate submitted that they learnt of the allegations made by the Arbitrator on or about 16th May, 2022 and made the challenge or application on 26th May, 2022, which was only ten (10) days after the Applicant's Advocate became aware of the said circumstances.

10. Clearly, it is not in dispute that the Arbitrator is counsel for the Applicant in "the Succession Cause" while the Applicant's counsel in this case is the Respondent's counsel therein. What is in issue is when the Applicant's counsel became aware of the views and opinions which are the reasons and or circumstances for the challenge.

11. I have gone through the pleadings and submissions filed herein and established that although the Arbitrator and the Applicant's Advocates had been in discussion regarding the issues surrounding "the Succession Cause" as far back as August, 2021, it has not been shown that the allegations in respect of the views and opinions about the Applicant's counsel as raised in the pleadings in "the Succession Cause" came up then. The same are evidenced as having arisen in the pleadings drawn at Pages 71, 72, 77, 81, 82 and 83 of the Supporting Affidavit marked as Exhibit GK-1.

12. With regard to the issue of whether the challenge application has met the threshold for the stay of the arbitral proceedings and removal of the Arbitrator, I have considered the parties submissions, and wish to state that Section 14 of the *Arbitration Act* is relevant in the circumstances as it provides on termination of an Arbitrator's mandate. The said provision reads as follows: -

" Challenge procedure.

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.

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.

13. Sections 13(3) and 14(2) and (3) of the Act further stipulates as follows:-

> Section 13(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.
>
> Section 14(2) and (3):-
>
> (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 Sub-section (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.

14. Pursuant to the above provisions, a party in arbitral proceedings may at any stage of the proceedings, provided he has reasonable grounds to believe that there exists circumstance which may give rise to justifiable doubts as to the arbitrator's impartiality and independence apply for his removal within fifteen days of becoming aware of such grounds. However, the first call in challenging the Arbitrator's mandate is the Arbitral Tribunal and if unsuccessful, the challenging party may then apply to the High Court within 30 days of the Arbitral Tribunal's decision for a determination on the matter.

15. It is common ground that the applicant herein unsuccessfully challenged the Arbitrator's mandate before the Arbitral Tribunal before approaching this court vide the Application at hand. However,

the challenge on the Arbitrator's mandate is taken on grounds of the Arbitrator's involvement in a contentious Succession Cause wherein some of the pleadings filed therein by the Arbitrator's Law Firm contained numerous serious allegations of fraudulent acts that are alleged to have been committed by the Applicant's Advocates, who continued to advise clients to engage in fraud and provide dishonest legal advice. The Applicant avers that its advocates learnt of the allegations on 16th May, 2022 during the pendency of the Arbitration and on 26th May 2022, *vide* a letter of even date informed the Arbitrator of those grounds which according to the Applicant gave rise to justifiable doubts on his impartiality and independence.

16. Thereafter, the Arbitrator directed the Applicant to file a formal application which the Arbitrator considered and *vide* a ruling on 8th July, 2022 declined to recuse himself and dismissed the application for not meeting the threshold for his removal. This aggrieved the Applicant who has filed the instant application under Section 14(3) of the *Arbitration Act*. The only issue for determination by the court is whether in light of the circumstances raised by the Applicant, the Arbitration fitness to conduct the Arbitration between the parties is in doubt with regard to his impartiality and independence.

17. In case of *Modern Engineering v Miskin* 15 BLR 82, Lord Denning stated:-

> " The proper test to apply when considering whether to order removal was to ask whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion ... The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if the arbitrator is allowed to continue with this arbitration at least one of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a Judge or an Arbitrator saying "I have not had any fair hearing."

18. I as well associate myself with the sentiments of Gikonyo J in the case of *Zadock Furnitures Limited & another v Central Bank of Kenya* [2015]eKLR, where the learned Judge held:-

> " The grounds for removal of 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* and the Arbitrator recognized that fact. 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." (Emphasis Mine).

19. Similarly, Majanja J in the case of *West Park Limited v Villa Care Limited & another* [2020]eKLR, observed that: -

> " ... the test adopted by the Act is stringent. It is intended to weed out frivolous allegations not founded on facts. The application must be based on the circumstances that exist and those circumstances must be justifiable. This test is in consonance with the prevailing legal

formulation for the test for recusal of judicial officers emerging from our superior court where the courts have held that the test is not subjective based on the feelings or belief of the parties aggrieved but of a reasonable person with knowledge of the facts in issue."

20. Taking cue from the above cited authorities, I reiterate that the test in a challenge application in Arbitral proceedings is objective in that the court has to ask itself whether a reasonable person with knowledge of the facts in issue while looking at the grounds adduced by the Applicant will have an impression that circumstances exist that give rise to justifiable doubts as to the Arbitrator's impartiality and independence. As earlier pointed out, that the grounds advanced by the Applicant is that the Arbitrator expressed a view in a Succession Cause which is before a different forum and involving entirely different parties from the ones in the arbitral proceedings, that the Applicant's firm of advocates have through its several partners advised and continue to engage in fraud, advice their clients to engage in fraud and provide dishonest legal advice which have caused the Applicant and its advocates to lose confidence in the Arbitrator's ability to be impartial and independent.

21. I have considered the affidavit in which the said allegations were purportedly made. It is worth-noting that the said affidavit is sworn by Manfred Walter Schmitt and not Mr. Phillip K. Murgor, S. C. MCIArb, the presiding over the arbitral proceedings between the Applicant and another. In my view those were expressions of the deponent in that affidavit in support of his case and not the advocate who drafted the affidavit, was merely an agent acting on the instructions of Manfred Walter Schmitt.

22. Secondly, the affidavit is expressed to have been drafted by the Firm of Murgor & Murgor where the Arbitrator is the Managing Director. Therefore, it cannot be said that the allegations were express views and Judgment of the Arbitrator in regard to how the Applicant's advocates manage their clients. Nonetheless, those allegations were made in a cause of action involving other parties other than the parties to the arbitration, hence no conflict of interest is likely to arise.

23. In my view, the grounds adduced by the Applicant are not stringent enough to the unsubstantiated allegations of partiality or bias. Something more is required to be established if a reasonable person is to read bias, prejudice or partiality in the circumstances. Therefore, I find no justifiable doubts have been raised to justify doubts as to the Arbitrator's impartiality and independence in the arbitration proceedings in respect of the Applicant.

24. From the foregoing, the Applicant's Originating Summons dated 12th July, 2022 lacks merit and is hereby dismissed in its entirety with costs to the Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF APRIL 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Kinyanjui counsel for Applicant

Mr. Cecil Kuyo for the Respondent

Court Assistant – Martin/Sakina