



**Kenya Power Pension Fund v Aquachem Technologies  
Limited & another (Miscellaneous Application E351 of 2022)  
[2023] KEHC 17280 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E351 OF 2022**

**DAS MAJANJA, J**

**MAY 12, 2023**

**BETWEEN**

**KENYA POWER PENSION FUND ..... APPLICANT**

**AND**

**AQUACHEM TECHNOLOGIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KOBIA MICHUBU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant has moved the court by the Notice of Motion dated May 5, 2023 and invokes sections 13(3) and 14(3) of the *Arbitration Act*, 1995. It seeks an order that the court upholds the challenge filed by the applicant by way of the notice of motion dated December 8, 2021 before the arbitral tribunal and removes the 2<sup>nd</sup> respondent, Kobia Michubu, QS as arbitrator from the proceedings. It also seeks an order that all proceedings be annulled and that the court order commencement of proceedings between the applicant and 1<sup>st</sup> respondent de novo under an arbitrator with requisite qualifications.
2. The application is supported by the applicant's Chief Executive Officer and Trust Secretary, Edwin Ruttoh, sworn on May 5, 2022. The application was not opposed although all the parties had been served. Notwithstanding that the application was not opposed, the applicant is not discharged from its obligation to satisfy the court that it deserves the orders sought. The mere fact that an application is not opposed does not absolve the applicant from proving its case (see *Kirugi and another v Kabiya and 3 others* [1987] KLR 347).
3. Before I deal with the substance of the application, a summary of the facts, which are undisputed is appropriate. The parties entered into an agreement dated December 11, 2020 under which the applicant contracted the 1<sup>st</sup> respondent to do certain remedial works for onsite waste water treatment



plant at one of its properties ("the Contract"). Clause 7.36 on Settlement of Disputes under the General Conditions of Contract provided as follows:

#### 7.36 Settlement of Disputes

7.36.1 In case any dispute or difference shall arise between the Employer or the Project Manager on his behalf and the Contractor, either during the progress or after the completion or termination of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty 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 any of the following professional institutions;

- (a) Architectural Association of Kenya
- (b) Institute of Quantity Surveyors of Kenya
- (c) Association of Consulting Engineers of Kenya
- (d) Chartered Institute of Arbitrators (Kenya Branch)
- (e) Institution of Engineers of Kenya

On request of the applying party. The institution written to first by the aggrieved party shall take precedence over all other institutions.

4. Following a dispute between the parties regarding whether the blower and filter pumps supplied by the 1<sup>st</sup> respondent met the specifications under the Contract, the parties attempted to resolve the matter. The parties held a meeting on August 13, 2023 as memorialized in a letter dated August 16, 2021 from the applicant to the 1<sup>st</sup> respondent. At Clause 3 of the letter, the applicant stated as follows:

Pursuant to Clause 7.43.1 of the contract we intend to resolve any outstanding issue amicably. Therefore, we propose to seek an independent valuation of the equipment, that is, the Pumps and Blower, from the Ministry of Public Works to give us a report which will enable us to make a final decision on the dispute items as listed in Valuation No. 2 above.

5. By a letter dated September 6, 2021, the 1<sup>st</sup> respondent addressed the applicant suggesting that, "we recommend you appoint a practicing professional engineer from the private sector who can inspect together with our appointed Engineer and they compile an independent joint report."
6. It appears that the parties were unable to agree causing the 1<sup>st</sup> respondent to address the President of the Institute of Quantity Surveyors of Kenya requesting it to appoint an arbitrator in terms of Clause 7.36.1(b) of the Contract. The 2<sup>nd</sup> respondent was appointed as arbitrator by the Institute of Quantity Surveyors of Kenya by a letter dated November 16, 2021 which appointment he accepted by his letter dated November 20, 2021. By a letter dated November 22, 2021, the applicants' advocates sought to inquire from the 2<sup>nd</sup> respondent whether he had the necessary qualification to adjudicate the matter as it was a, "technical matter that requires an arbitrator with qualification in mechanical engineering." In his letter dated November 23, 2021, the 2<sup>nd</sup> respondent informed the applicant's Advocates that he was duly appointed by the appointing the authority and that if it became necessary, he would call upon expert advice and give the necessary directions if testing was required. In any case, he stated that matter



of specification of building systems were obvious to a building industry professional. He also pointed out the dispute settlement clause in the contract did not specify the requirement of an arbitrator to be a mechanical engineer. The applicant's Advocates then informed the 2<sup>nd</sup> respondent that the applicant would mount a challenge under section 14(2) of the Arbitration Act on the ground that he did not possess the necessary qualifications as required by section 13(2) of the Arbitration Act.

7. Turning to the arbitral proceedings, the applicant lodged its challenge to the 2<sup>nd</sup> respondent by the notice of motion dated December 8, 2021 as indicated. The applicant and 1<sup>st</sup> respondent made extensive submissions and by a ruling dated April 8, 2022, the 2<sup>nd</sup> respondent dismissed the application. Under section 14(3) of the Arbitration Act, this court has jurisdiction to determine the application where the unsuccessful party applies to the High Court.
8. The application before the court is grounded on section 13(3) of the Arbitration Act which states as follows:

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. [Emphasis mine]
9. The thrust of the applicant's case is that the 2<sup>nd</sup> respondent is not qualified to arbitrate over the matter given the nature of the dispute which requires a mechanical engineer. In resolving this issue the court must have regard to the provision of section 13(3) aforesaid. In line with the general underlying principle respecting party autonomy, the provision requires the arbitrator possess qualifications "agreed" to by the parties. Hence the applicant must demonstrate the arbitrator appointed does not possess the qualifications that the parties have agreed to.
10. In this case, Clause 7.36.1 of the General Conditions to the Contract, which I have set out above, does not prescribe any qualifications for an arbitrator. On the contrary, it provides a menu of professional associations from which an aggrieved party may approach to appoint an arbitrator in the event parties fail to agree on an arbitrator. Further, even prior to reference of the dispute to arbitration, there was nothing in the meetings and correspondence, which I have summarized, that points to an agreement by the parties that they would appoint a mechanical engineer as arbitrator. Initially, the applicant had suggested that it would approach the Ministry of Works while the respondent proposed that engineers from the private sector be appointed. There was no meeting of minds that the arbitrator must be a mechanical engineer.
11. The court's intervention in arbitral proceedings is circumscribed by section 10 of the Arbitration Act which states that, "Except as provided in this Act, no court shall intervene in matters governed by the Act." The Act only allows the court to accept a challenge where it is proved the arbitrator does not possess the agreed qualifications. The applicant has failed to demonstrate either by reference to the Contract or by any other agreement that the parties agreed that the arbitrator so appointed would be a mechanical engineer. Had the parties intended that a mechanical engineer be appointed arbitrator nothing would have been easier than to ossify that intention into the Contract or agree on a specific arbitrator with such qualification.
12. Although the applicant suggests that the process of appointment of the arbitrator was defective, I do not see any violation of Clause 7.36.1 of the General Conditions to the Contract. The Arbitrator was duly appointed by the institutions agreed upon by the parties.
13. I dismiss the application. Since the respondents did not participate in these proceedings, there shall be no order as to costs.



**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Ms Onyango instructed by Kaplan and Stratton Advocates for the applicant.

