Sheikh v Mwangi & another (Commercial Case E728 of 2021)
[2023] KEHC 17837 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17837 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E728 OF 2021

DAS MAJANJA, J

MAY 19, 2023

BETWEEN

MOHAMED HUSSEIN SHEIKH ..... PLAINTIFF

AND

ALLY ISMAIL MWANGI ..... 1ST DEFENDANT

BLACKSTONE TRADING COMPANY LIMITED ..... 2ND DEFENDANT

RULING

Introduction and Background

1. On April 21, 2022, the court found merit in the Defendants' application dated October 19, 2021 and ordered that

> "The dispute between the plaintiff and the Defendants herein, arising from the Agreement dated March 17, 2018 between the parties is hereby referred to arbitration, in accordance with muslim principles before a single renowned arbitrator (Ulamaa), to be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya chapter, within 30 days of this ruling." ("the Ruling").

2. The Defendants have filed the Notice of Motion dated December 17, 2022 under section 80 of the *Civil Procedure Act*, Order 45 rule 1 (1) of the *Civil Procedure Rules* and sections 7, 13(3), 14(3) and 15(1)(a) of the *Arbitration Act* seeking to review and/or set aside the Ruling to dispel the resultant confusion on the constitution of the arbitral tribunal, since the word "ulamaa" is plural and its singular is "alim" as clarified by the letter dated August 4, 2022 from the Kenya Council of Imams and Ulamaa (KCIU) addressed to the parties. Further, that the court sets aside the ruling of the sole arbitrator delivered on November 17, 2022 on the Defendants' challenge dated August 24, 2022 on his jurisdiction and the

court removes the Arbitrator in the matter of arbitration between the parties and that the Chairman of the Chartered Institute of Arbitrators, Kenyan Chapter ("the Institute"), in consultation with KCIU to appoint another renowned arbitrator (alim) or a panel of renowned arbitrators (ulamaa or ulamaas) within the Muslim community of the 1st Defendant and the Plaintiff to conduct arbitration between the parties.

3. The application is supported by the grounds on its face and the supporting affidavit of the 1st Defendant sworn on December 17, 2022. It is opposed by the Plaintiff through his replying affidavit sworn February 20, 2023. The parties have also supplemented the arguments in their pleadings by filing written submissions.

The Application

4. The Defendants aver that the Ruling caused confusion regarding the constitution of the arbitral tribunal arising from the phrase "a single renowned arbitrator (ulamaa)" as the word "ulamaa" is plural and its singular is "alim" as clarified by KCIU, begging the question as to whether the arbitral tribunal should constitute one renowned arbitrator (alim) or more renowned arbitrators (ulamaa or ulamaas). The Defendants attack the arbitral tribunal's ruling dated 1November 7, 2022 ("the interim award"), dismissing the challenge on the Arbitrator that he is not an "ulamaa" and is not known to KCIU more particularly that his name is not in the list of renowned ulamaa previously proposed by the Plaintiff for arbitration.

5. The Defendants complain that the Arbitrator was biased and that by his conduct, he has failed to conduct the proceedings properly and with reasonable dispatch contrary to the Defendants' legitimate expectations and their right to a fair administrative action. They state that they have lost faith in the impartiality, competence and independence of the arbitrator and the continuity of the proceedings will greatly prejudice the Defendants who will suffer irreparable loss if the orders sought are not granted. They contend that the intention of the parties in the arbitration agreement was to have the dispute resolved by a renowned ulamaa (or alim) within their Muslim community under the umbrella of KCIU, three (3) of whom had been proposed by the Plaintiff in his Advocate's letter dated November 25, 2020, and the Defendants' Advocate's letter dated December 17, 2020 written prior to the Plaintiff filing this suit.

6. The Defendants case is that the Arbitrator is not a renowned alim within the Muslim community of the 1st Defendant and the Plaintiff as confirmed by KCIU hence his appointment is not consistent with the arbitration agreement and/or the court's Ruling. That it is therefore in the interest of justice that the court reviews the Ruling to dispel the confusion as the words "ulamaa" and "ulamaas" are key words in the arbitration agreement between the parties as well as the Ruling and should not be disregarded as qualifications necessary for the arbitral tribunal.

The Plaintiff's Reply

7. The Plaintiff states that after delivery of the Ruling, his advocates on record wrote to the Institute. That the Institute acknowledged the correspondence and the Chairman appointed the Arbitrator as the Sole Arbitrator (Ulamaa Muslim Arbitrator) to deal with the dispute in accordance with the Ruling. On June 7, 2022, the Arbitrator wrote back an official letter to the Chairman of Institute informing him of his acceptance regarding the nomination as the Sole Arbitrator in the matter.

8. The Plaintiff states that at all times, all the correspondence was copied to the Defendants' Advocates on record. Further, while the Plaintiff wrote to the appointed Arbitrator informing him that he had no objection to his appointment but that no such communication of objection was received from

the Defendants. He contends that the appointed Arbitrator has the necessary experience and all the qualifications specifically required to adjudicate over this matter as he is a member of good standing of the Chartered Institute of Arbitrators both in UK and Kenya and is also an appointed Arbitrator of good standing with IICRA-Dubai as a Certified Islamic Arbitrator and Expert.

9. The Plaintiff avers that Defendants have been frustrated and delayed the arbitration process. The Plaintiff avers the Arbitrator wrote to the parties on June 20, 2022 informing them that he was ready to commence the process subject to section 8 of the *Arbitration Rules 1997* and that he be paid his fee on July 19, 2022 and despite attending the preliminary meeting, the Defendants waited for almost five months to file the jurisdictional challenge in December 2022. The Plaintiff urges the court to dismiss the application and let the matter proceed before the Arbitrator.

Analysis and Determination

10. As stated, the Defendants seek to set aside and/or vary the Ruling of the court dated April 21, 2022, set aside the interim award, remove the Arbitrator and replace him with another renowned arbitrator (alim) or a panel of renowned arbitrators (ulamaa or ulamaas) within the Muslim community of the 1st Defendant and the Defendants to conduct arbitration between the parties. As I understand, the Defendants' application is two-fold. First, they seek a review of the Ruling which enabled the Institute to appoint an arbitrator and second, they seek to challenge the Arbitrator's decision asserting his jurisdiction.

Review of the Ruling

11. The Defendants' prayer for review is grounded under section 80 of the *Civil Procedure Act* and complemented by Order 45 Rule 1 of the *Civil Procedure Rules* which provide as follows:

> 80. Review
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> Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
>
> 1. Application for review of decree or order [Order 45, rule 1.]
>
> (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree

> or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

12. As can be seen from the above, the orders sought are discretionary in nature and the court has power to issue such directions as it deems fit based on the application before it. The Defendants' reasons for review appear to be grounded on the fact that the court erred in using the word 'ulamaa' as opposed to 'alim' with the former being plural and the latter being singular and that this has caused confusion as to how the arbitral tribunal was constituted. I have gone through the arbitration agreement between the parties which provides that

> "Any dispute arising out of this agreement shall be referred to arbitration according to Islamic principle and before a renowned Ulamaa to be agreed upon between the parties. Should the parties not agree on a single arbitrator then the matter shall be referred to a panel of renowned Ulamaas."

13. As the dispositive orders in the Ruling show, the court relied on and reiterated the words of the arbitration agreement. It is evident that the arbitration agreement does not make use of the word 'alim' as has been advanced by the Defendants. I therefore find that there is no error apparent on the face of the record that warrants a review of the Ruling as the court merely reiterated what the arbitration agreement provided. In any case, a reading of the arbitration agreement points to a sole 'ulamaa' in the first instance and panel of 'ulamaas' in the second which ordinarily means that the former was 'one' and the latter was 'many' and therefore, there can be no confusion as to what 'ulamaa' and 'ulamaas' meant in the arbitration agreement. The provision speaks for itself and thus the plea for review fails.

14. Notwithstanding what I have stated, I would still dismiss the application for review of the Ruling as it has been brought after unreasonable and unexplained delay. The Ruling was rendered on April 22, 2022. Taking into account the fact that an arbitrator has already been appointed and the arbitration proceedings commenced, granting the order would be contrary to the very essence of parties resorting to arbitration to resolve disputes which is to avoid delay.

The Challenge

15. The Defendants seek to set aside the interim award on the ground that the Arbitrator appointed by the Institute as the arbitral tribunal is not a renowned ulamaa/alim. The claim is based on a letter dated August 4, 2022 received from the KCIU listing renowned ulamaa in Nairobi. They aver that the Arbitrator does not possess the qualifications agreed to by the parties in the arbitration agreement and/or as ordered by the Court in the Ruling.

16. In its interim award, the arbitral tribunal held that the alim need not be known and certified by the Kenya Council of Imams and Ulamma as the requirement was that the alim/ulamaa only need to be known. Based on his qualifications as a Honorary Fellow with the IICRA (International Islamic Centre for Reconciliation and Arbitration based in UAE and a Certified Islamic Arbitrator and Expert, the Arbitrator held that the clause for a known Ulamaa (Alim) was sufficiently satisfied. The Arbitrator asserted that he was properly appointed by the Institute in accordance with the Ruling.

17. Sections 13(3), 14(3) and 15(2) of the *Arbitration Act* provide grounds upon which an unsuccessful party who has challenged the jurisdiction or conduct of the Arbitrator may apply to the court to decide on the arbitral tribunal's mandate. The said provisions provide 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) .....

(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. [Emphasis mine]

.....

18. The court may uphold a challenge if the Arbitrator, ''does not possess qualifications agreed to by the parties.'' In this case the qualifications for the arbitrator are set out in the agreement between the parties. The arbitrator must be a, ''a renowned Ulamaa to be agreed upon between the parties''. The parties did not agree on the arbitrator hence the Ruling of the court which directed the Chairman of the Institute to make the appointment.

19. The Defendants bear the burden of showing the Arbitrator is not qualified. Although they refer to certain correspondence by the KCIU as a basis for stating that the Arbitrator is not qualified, there is nothing in the Agreement that requires that the Arbitrator be approved by KCIU. On the other hand, that Defendants do not deny or dispute that the Arbitrator is renowned in the sense that he is a qualified as an arbitrator and has been certified by an international Islamic body. Based on his qualifications, I hold that the Arbitrator satisfies the qualifications set out in the Agreement.

20. The Defendants averred that the arbitral tribunal exhibited bias in favour of the Plaintiff by giving the parties directions on filing arbitration pleadings and documents, hearing of the arbitration, and giving his arbitration award despite the pendency of the Defendants' jurisdiction challenge, stating that he

could determine the Jurisdiction Challenge at the conclusion of the arbitration proceedings and by stating that "the award will be reasoned and published as expeditiously as possible not later than four months from the date of conclusion of the hearing" despite his knowledge of the pending jurisdiction challenge.

21. The Defendants contend that the Arbitrator's Order No 1 was tantamount to a deliberate and summary dismissal of the Defendants' jurisdiction challenge without giving his ruling and/or written reasons as required by law and in favour of the Plaintiff who had opposed it. Further, that by his October 7, 2022 email, and prior to his ruling, the Arbitrator had suggested to the Plaintiff that the Defendants are not interested in the outcome of their Jurisdiction Challenge, despite the Applicants' prior September 26, 2022 written request for the arbitrator to rule on Jurisdiction Challenge for proper order.

22. In deciding whether an arbitrator is impartial, this court is guided by several pronouncements of our superior court which both parties have cited in detail. In *Philip K. Tunoi & another v Judicial Service Commission & another* NRB Civil Application No 6 of 2016 [2016] eKLR, the Court of Appeal cited with approval the House of Lords' decision in R v Gough [1993] AC 646 which held that 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 stated 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.
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> 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:
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> "... 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."

23. While the Defendants lament that the Arbitrator was biased for suggesting that it could rule on the jurisdictional challenge after the hearing of the arbitration, I note that neither sections 13 nor 14 of the *Arbitration Act* oblige the arbitral tribunal to determine the arbitrator's challenge first before proceeding for the hearing of the claim on its merits. If anything, section 14(8) of the *Arbitration Act* allows the parties to continue with the arbitration proceedings even when an application for challenge is pending before the court. This position is replicated in section 17 which also allows parties to continue with the arbitration when an appeal on a ruling of the arbitral tribunal's jurisdiction is pending before the court. Further, the said section also allows the arbitral tribunal to rule on its jurisdiction either as a preliminary issue or in an arbitration award on the merits.

24. I therefore hold that there is nothing sinister or unusual for the Arbitrator to have stated that he could rule on the challenge either before or after the hearing of the arbitration. I have also gone through the correspondence between the parties between September 26, 2022 when the Defendants requested for a ruling of the challenge and the arbitral tribunal's email of October 7, 2022 where he intimated that the Defendants may not be interested in the arbitration. I have placed the same emails into context and note that the arbitral tribunal's comments were borne out of the lack of financial commitment from the Defendants to enable the arbitration proceed. The Arbitrator had, after the said request for ruling by the Defendants, informed them that they ought to have made some payments in respect of the arbitration proceedings for the proper functioning of the tribunal before any further proceedings. This does not demonstrate any bias against the Defendants as it is expected and the arbitral tribunal is entitled to demand fees and costs for the arbitration from the parties. I cannot fault the arbitral tribunal for concluding that the lack of any financial commitment from the Defendants was indicative of their disinterest in the arbitration.

25. For the above reasons, I do not find any basis to support the Defendants' contention that the arbitral tribunal was biased against them or that it failed to act with reasonable dispatch. The arbitral tribunal's directions and conclusions were ordinary and rational in the circumstances of the proceedings and taking the same circumstances and facts into consideration, I do not find anything cogent to lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the arbitral tribunal was biased against the Defendants or that he was not impartial in the manner he has been handling the proceedings.

26. I therefore find and hold that the Defendants have not established any valid reasons to set aside the interim award published on November 17, 2022 or remove the arbitral tribunal and direct the Chairman of the Chartered Institute of Arbitrators, Kenyan Chapter, in consultation with KCIU to appoint another renowned arbitrator (Alim) or a panel of renowned arbitrators (ulamaa or ulamaas) within the Muslim community of the 1st Defendant and the Plaintiff to conduct arbitration between the parties.

Disposition

27. The Defendants' application dated December 17, 2022 fails and is dismissed with costs to the Plaintiff which are assessed at Kshs 60,000.00.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mohammed instructed by Doli and Associates Advocates for the Plaintiff.

Mr Mochu instructed by Mochu Kahura and Company Advocates for the Defendants.