Gibb Africa Limited v Atibu t/a Framari Exclusive Agencies & another (Miscellaneous Application E710 of 2022) [2023] KEHC 20235 (KLR) (Commercial and Tax) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20235 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E710 OF 2022

FG MUGAMBI, J

JULY 14, 2023

BETWEEN

GIBB AFRICA LIMITED ..... APPLICANT

AND

FRANCIS SAMANYA ATIBU T/A FRAMARI EXCLUSIVE AGENCIES ..... 1ST RESPONDENT

HOWARD ASHIUNDU M'MAYI ..... 2ND RESPONDENT

RULING

1. Before the court is an application dated 3rd October 2022. It is brought under sections 12(2)(c), 13(3) and 15(2) of the *Arbitration Act*, Rule 11 of the *Arbitration rules 1997* and rules 51 of the *Civil Procedure Rules 2010*.

2. It seeks the following orders;

    i. Spent

    ii. Spent

    iii. That this Honourable court be pleased to terminate the mandate of the 2nd respondent as the sole arbitrator in relation to the dispute between the applicant and the 1st respondent pursuant to section 14(3) of the *Arbitration Act*.

iv. That this Honourable court be pleased to issue any other or further orders as it may deem appropriate in the circumstances of this case to ensure the protection of due process rights and fair administration of justice.

v. That the 1st and 2nd respondents be ordered to meet the costs of this application and the arbitral proceedings.

3. The application is premised on the grounds on the face of it, supported by an affidavit sworn by Ivy Njuguna on 3rd October 2022 and by the applicant's written submissions dated 29th November 2022.

4. The applicant and the 1st respondent entered into a consultancy agreement dated 12th January 2018. It was a term of the contract that any dispute between the parties would be resolved by arbitration and the arbitrator would be appointed in accordance to the national legislation of Kenya.

5. The 1st respondent declared a dispute under the agreement which gave rise to what the applicant refers to as a series of due process violations, starting with the appointment of the 2nd respondent as sole arbitrator. The applicant alleges that the 1st respondent unilaterally appointed the 2nd respondent as the sole arbitrator and wrote to him asking that he accepts the appointment. It takes issue with the 2nd arbitrator for inviting a mentee from the Institute, without the consent of parties.

6. The applicant avers that upon appointment the arbitrator had agreed to payment based on commission to be calculated on the award but later after enquiry by the applicant's advocates he agreed that payment would be based on the hours spent in the arbitration. The 2nd respondent had also allegedly admitted that he had held meetings with the 1st respondent in the absence of the applicant, where the dispute between the parties was discussed. Counsel took issue with the fact that the 2nd respondent failed to disclose to the applicant the reasons for the meetings.

7. A further point of contention was an application made by the applicant unsuccessfully challenging the jurisdiction of the 2nd respondent. Counsel took issue with the decision by the 2nd respondent to reject its challenge and the refusal to give reasons for the decision. This the applicant terms as grossly unfair together with the decision by the 2nd respondent for the arbitration to be canvassed by way of documents only, a decision that was reached unilaterally by the arbitrator.

8. For these reasons the applicant seeks the intervention of the court in order to safeguard its right to a fair trial. Finally, the applicant also noted that both respondents were represented by one counsel, indicating that they were in constant communication.

9. The 1st respondent opposed the application through a replying affidavit sworn by Francis Samanya Atibu dated 15th November 2022 and written submissions dated 7th March 2023. The 1st respondent accuses the applicant of misleading the court and non-disclosure of material facts.

10. He avers that on 14th June 2022 he wrote to the applicant declaring a dispute to be referred to arbitration, pursuant to the agreement. The applicant did not respond to the letter neither did he propose an arbitrator within the prescribed time. As a result, the 1st respondent wrote again to the applicant on 29th June 2022 with a notice to appoint a sole arbitrator. Once again, the applicant failed to respond to the notice.

11. The 1st respondent confirms that the absence of any response from the applicant prompted him to appoint the 2nd respondent as sole arbitrator by a letter dated 29th June 2022 which was also served on the applicant. It is the 1st respondent's case that the appointment was valid and was in compliance with

the agreement between the parties and the provisions of section 11 and 12 of the *Arbitration Act*. The 1st respondent confirms that the arbitrator accepted the appointment and wrote back to both parties.

12. The 1st respondent stated that there had been no challenge to the appointment of the arbitrator as required by section 12(5) of the *Arbitration Act* and that the applicant was required to lodge his objection to the appointment within 14 days. Having not done so, the 1st respondent terms this as an afterthought which the applicant is not entitled to as he is presumed to have waived the right to object, by dint of section 5 of the *Arbitration Act*.

13. The 1st respondent noted that after accepting the appointment, the 2nd defendant had embarked on hearing the dispute but that the applicant had taken to frustrating the process. This was through noncompliance with the directions and timelines given by the arbitrator as well as non-attendance and obstruction of sessions. It was as a result of counsel's disorderly conduct that the 2nd respondent had directed that the arbitration proceeds by way of documents only. This, the 1st respondent averred, was in conformity with section 20(2) of the *Arbitration Act* that allowed the arbitrator to determine the conduct of the proceedings.

14. With respect to the termination of the arbitration proceedings, the 1st respondent stated that the application was devoid of the legal and evidential threshold required.

Analysis

15. I have carefully considered the pleadings, evidence and rival submissions filed by the parties. In my view, there are two issues for determination, being the validity of the arbitrator's appointment and secondly, the termination of his services as sole arbitrator.

i. Whether the arbitrator's appointment was valid

16. The agreement between the parties is not contested and so is the arbitration clause contained in the agreement. It is not in dispute that the relevant legislation is the *Arbitration Act*. For the avoidance of doubt, Clause 9.1 of the consultancy agreement provides that

> " All disputes arising out of or in connection with this agreement shall be finally settled in accordance with the national legislation of Kenya by one arbitrator appointed in accordance with the said legislation."

17. The realm of arbitration proceedings is premised on the need for disputing parties to be in control of the dispute resolution process. It is for this reason that thecourt's intervention is to be restricted. This is a principle of the law that is well crystalized and is based on the general tone set out in section 10 of the Act which provides that except as provided in this Act, no court shall intervene in matters governed by this Act.

18. Section 12 of the Act provides for the procedure of appointment of an arbitrator or arbitrators and begins at section 12(2) by recognizing the pertinent role of the parties in appointing an arbitrator. I would therefore agree with counsel for the 1st respondent that indeed the appointment of the arbitrator was under the purview of the parties and not the court. In my view, section 12 of the Act as set out presents a residual position, where parties have not agreed upon a procedure of appointing the arbitrator.

19. Similar sentiments were raised by the Court of Appeal in *Dhanjal Investments Limited v Kenindia Assurance Company Limited* [2018] eKLR. The applicant has submitted that an arbitral tribunal must be tripartite. Again, with respect, I decline to accept this position. Not only does section 12(2) provide

that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators (emphasis mine), it also goes on to stipulate the residual procedure in the different circumstances where parties have not defined their own procedure;

(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.

20. Since clause 9.1 of the consultancy agreement had provided for a sole arbitrator, section 12(2)(c) would be applicable assuming that the parties were able to agree on the arbitrator. In order to make sure that an impasse in the appointment of an arbitrator is not an impediment to resolving disputes through arbitration, section 12(3) provides a framework if one party is in default. In the present circumstances, the provisions of section 12(3) are applicable. For the avoidance of doubt, section 12(3) states as follows: -

> (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.

21. From the evidence before the court, the 1st respondent wrote to the applicant on 14th June 2022 notifying the applicant of his intention to invoke the arbitration clause and formally invoke the appointment process under the *Arbitration Act*. The letter refers to an earlier letter of 3rd May 2022 which had gone unanswered. There are a host of other emails sent to the applicant by the 1st respondent to which the applicant does not appear to have responded. I can assume that these emails were received by the applicant because they are attached to its replying affidavit.

22. On 29th June 2022 the 1st respondent again wrote to the applicant giving notice of his intention to invoke sections 12(3) and (4) by appointing a sole arbitrator. The letter refers to an earlier correspondence dated 14th June which had elicited no response. The letter also notified the applicant that in case there was no indication from the applicant that it had appointed its arbitrator within 14 days, the 1st respondent would appoint his arbitrator as sole arbitrator.

23. Vide the letter dated 14th July 2022, the 1st respondent asked the 2nd respondent to confirm his availability to take up the role and offered payment on a commission basis. The arbitrator wrote back on 18th July accepting the appointment and confirming that there was no conflict of interest on his part and he also raised the issue of having a mentee from the institute present. I note that these two letters were not copied to the applicant, and that is perhaps the reason as to why the applicant took issue with the presence of a mentee at the session, allegedly without consent of parties.

24. While it would have been prudent for the correspondence between the 1st respondent and the 2nd respondent to be copied to the applicant, I am not satisfied that even if this was not done, that it was reason to insinuate bias. I find that the claims by the applicant regarding the unilateral appointment of the arbitrator by the 1st respondent and the various meetings alleged to have been held between the 1st and 2nd respondents to be unsubstantiated.

25. It is clear that the applicant made a deliberate decision to stay out of the appointment of the arbitrator and the 1st respondent did what it had to do. It is wrong for the applicant to come in to attempt to scuffle the process after failing to respond to calls by the 1st respondent. The 1st respondent had not set out to appoint an arbitrator unilaterally as stated by the applicant, and my finding is that the applicant has not proved that there was a defect in the process of appointing the arbitrator.

ii. Whether there are any grounds for removal of the arbitrator

26. Section 13(3) of the *Arbitration Act* provides for the challenge of the arbitrator and stipulates 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.

27. Section 14 provides for the procedure of challenging the arbitrator. This is again a residual provision where parties have not provided for the procedure of challenging an arbitrator like in the present case. It states as follows: -

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

28. Gikonyo J., in *Zadock Furnitures Limited and another v Central Bank of Kenya* HC Misc. Application No 193 of 2014 [2015] eKLR stated thus regarding the threshold for the challenge of an arbitral tribunal: -

> 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

29. I note from the record that the application challenging the arbitrator was filed out of time. No reasons have been given by the applicant for filing the application late. Even then, looking at the substance of the application, the applicant was aggrieved after the arbitrator disallowed its objection on jurisdiction without reasons. It is also aggrieved by the decision to conduct a document only arbitration without his consent. The applicant termed this as due process violation which would impede its right to a fair trial and finally that the 1st respondent had earlier discussions with the 2nd respondent relating to the dispute.

30. In *Justice Philip K. Tunoi and another v Judicial Service Commission and another* NRB CA Civil Appeal No 6 of 2016 [2016] eKLR, Court of Appeal adopted the decision in *Porter v Magill* [2002] 1 All ER 465 where the court held that the test for apparent bias is

> "[W]hether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

31. The same position was taken by the Supreme Court (per Ibrahim J.) in Jasbir Rai and 3 Others v Tarlochan Singh Raid and 4 Others SCOK Petition No 4 of 2012 [2013] eKLR that,

> "The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable."

32. In the present case, the applicant has not demonstrated that the arbitrator was unable to discharge his duties or that there had been prior communication between the respondents over the dispute which was the subject matter of the arbitration. The reasons given by the 2nd respondent for the mode of procedure are also justified. The communication sent by the arbitrator to the parties corroborates the submission by the 1st respondent describing the edgy atmosphere when the parties appeared before the arbitrator. The arbitrator's communication reminded parties of the need to remain cordial. I see no reason to interfere with the discretion of the arbitrator. I am not convinced that the ruling of the arbitrator disallowing the applicant's objection on jurisdiction without reasons is proof of bias.

Determination and orders

33. In conclusion, I do not find any circumstance that would give rise to the justifiable doubts of the arbitrator's impartiality. The application lacks merit and is hereby dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14th DAY OF JULY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.