



**Onyango & another v Harin Builders Limited & another (Miscellaneous Civil Application E074 of 2022) [2023] KEHC 21414 (KLR) (Commercial and Tax) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E074 OF 2022**

**JWW MONG'ARE, J**

**JULY 25, 2023**

**BETWEEN**

**CATHERINE ONYANGO ..... 1<sup>ST</sup> APPLICANT**

**ROSA ONDEGO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HARIN BUILDERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SYLVIA MUENI KASANGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide an Originating Summons (OS) application dated November 25, 2022 and supported by the affidavit of the 1<sup>st</sup> Applicant, Catherine Onyango, the Applicants have moved this court seeking the removal of the 2<sup>nd</sup> Respondent, Sylvia Mueni Kasanga, the sole Arbitrator, on the following grounds;
  - a. That this court be pleased to stay any further proceedings before the sole Arbitrator, Hon Sylvia Mueni Kasanga, in the arbitration proceedings between the parties herein, pending the hearing and determination of this application.
  - b. That this Honourable court be pleased to set aside the Arbitrator, 's interim award dated July 26, 2022.
  - c. That this Honourable court be pleased to issue orders disqualifying and removing Hon Sylvia Mueni Kasanga the sole Arbitrator, in the matter of the arbitration between Harin Builders and Rosa Ongeso and Catherine Onyango.
  - d. That this Honourable court be pleased to order the Respondents herein to meet the Applicant's cost in the impugned arbitral proceedings.



- e. That costs of this application be borne by the Respondent.
2. The application is supported by the grounds set within it and the supporting affidavit of Catherine Onyango. The Application is opposed and the Respondent s have filed a replying affidavit sworn by Harish Ramji Damji on February 7, 2023.
  3. In seeking to have the 2<sup>nd</sup> Respondent disqualified and removed as the sole Arbitrator, the Applicants argue that they have made attempts to have themselves removed from the arbitral proceedings before the 2<sup>nd</sup> Respondent but the said Arbitrator, has declined to entertain the same and indicated that the issue shall be addressed in the final arbitral award, a fact that the Applicants argue, prejudices them as it means they must participate in the arbitral process at their own cost. The Applicants further argue that the Arbitrator, is incompetent, partial and not independent as required by the law and has refused and or ignored to entertain the application seeking her recusal on the said grounds. The Applicant argue that the 2<sup>nd</sup> Respondent has through her conduct demonstrated that she has already predetermined the issues in the arbitral process even before the arbitral process has taken place and in her interim award seeks to rewrite the contract between the parties.
  4. The Applicant further seek that the court quash the interim award issued by the 2<sup>nd</sup> Respondent on July 26, 2022, which they argue was released in contraventions of the grounds set by the 2<sup>nd</sup> Respondent in that the said interim award was only to be released upon payment of her costs but was nevertheless dispatched to the parties on October 26, 2022 where the 2<sup>nd</sup> Respondent refused to allow the application for her recusal and dismissed the said application with costs. The Applicants argue that her actions are contrary to public policy and contravene both the Arbitration Act and the Constitution.
  5. In opposing the application, the 1<sup>st</sup> Respondent filed an affidavit sworn by Harin Ramji Damji, the managing director therein of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent argues that the sole purpose for which this application is to delay and derail the arbitral process and further delay the progress of this matter. The 1<sup>st</sup> Respondent argue that this the mode of operation by which the Applicants have adopted and the same was done when on the appointment of Dr. Kariuki Muigua as sole Arbitrator, on April 12, 2017 forcing him to recuse himself after the Applicants filed a similar Applicant and raising similar grounds. Indeed, it was the said Applicants who wrote to the President of the Architectural Society of Kenya seeking the appointment of the 2<sup>nd</sup> Respondent, Hon Sylvia Mueni Kasanga, as the sole Arbitrator, on February 9, 2018.
  6. Subsequently, the 1<sup>st</sup> Respondent further depones, that the Applicant in their replying affidavit urged the Arbitrator, to find that there existed no contract capable of being arbitrated upon between themselves and the 1<sup>st</sup> Respondent. On June 22, 2018, the Arbitrator, made a determination of the issues before her and found that indeed there existed a JBC contract which contained an arbitration clause and that she was seized of the requisite jurisdiction to hear and determine the same. She then issued an interim award to that effect on June 22, 2018.

#### **Analysis and Determination:-**

7. I have carefully read all the pleadings in this case and considered the submissions and the arguments by both parties to this application. One issue emerges for determination before this court, to wit;

“Whether the Application has met the threshold for removal of the 2<sup>nd</sup> Respondent as sole Arbitrator, on grounds she lacks of impartiality and independence and is hence guilty of misconduct”.



8. I note from the proceedings that the dispute herein relates to a JBC contract which contained an arbitral clause and that by consent of the parties the arbitral process was first commenced before Dr. Kariuki Muigua, also a sole Arbitrator, who subsequently withdrew from the proceedings upon request to do so by the Applicants herein. Subsequently, the parties wrote to the President of the Architectural Society of Kenya, seeking the appointment of an Arbitrator, in line with the JBC contract alluded to hereinbefore, and the 2<sup>nd</sup> Respondent was appointed, as a sole Arbitrator, in this matter.

9. The *Arbitration Act*, 1995, under section 13 and 14 set down the parameters for which an Arbitrator, may be removed and the procedure for the removal from arbitral proceedings. In the proceedings before this court, the Applicants have cited several reasons as to why they wish to have the sole Arbitrator, removed. Key among them is the perceived failure by the Arbitrator, to find that they are not privy to the JBC contractor and her decision in refusing to enjoin the project architect, one professor Omenya as a party to the arbitral proceedings. The court notes that in the interim award, the Arbitrator, did indicate that she will give her reasoned findings in the final award. Section 13(3) of the *Arbitration Act*, 1995, sets out the grounds upon which an Arbitrator, may be removed. The said section provides 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.”

10. I have read carefully and analyzed the supporting affidavit of the Applicants in this case. I note the averments put forth in the said affidavit that has led the Applicants to move the court for the removal of the sole Arbitrator, herein. From an evaluation of the same, the Applicants appear dissatisfied with the findings of the Arbitrator, in the interim award of June 22, 2018. They have taken issue with the decision by the Arbitrator, to reserve for determination the issues raised as to privity of contract and the perceived failure by the Arbitrator, to determine an application placed before her for her recusal.

11. I have not seen provided in the said application, material to support the legal requirements set out under section 13 of the *Arbitration Act* cited above, nor have I seen any evidence produced to demonstrate what are these circumstances that have led the parties to seek the removal of the sole Arbitrator in these proceedings. It is trite law that he who alleges must prove. As stated by the court in the case of *Chania Gardens Limited v Gilibi Construction Company Limited & another* [2005] eKLR, Justice Gikonyo observed that:-

“It is not enough to merely state that the Arbitrator, is incapable of acting impartially in the arbitration. Cogent evidence is required to prove the misconduct and invariably, the specific instances or matter consisting the misconduct must be placed before the court. This will show the distinction between misconduct and mere perception.”

It is therefore my view that the Applicants have not provided cogent evidence with specific instances of misconduct to support the grounds for removal of the sole Arbitrator in these proceedings.

12. Section 13(4) of the *Act* further provides the second ground upon which a party can seek the removal of an Arbitrator as follows;” A party may challenge an Arbitrator, appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.” The above section requires a party to demonstrate by way evidential material any new



circumstances that they have become aware since the appointment of the said Arbitrator, that impede her execution of the role of a decision maker in the matter before her.

13. The argument put forth by the Applicants is that the Arbitrator has failed to, in the first instance, determine if the Applicants are privy to the JBC contract subject matter of the arbitral proceedings. The Applicants contend that it is the project architect, One Professor Omenya, and not the Applicants, who executed the JBC contract and that therefore he is the right party to these proceedings. In her interim award, the Arbitrator reserved the decision on the said issue for the final award and declined to enjoin the said project architect to the proceedings. Like all legal proceedings, an arbiter, be it a judge or an Arbitrator, is called to interpret the documents placed before them in the way they understand the law and upon weighting the evidential material put forward by the parties.
14. It is a serious allegation to accuse an Arbitrator, as lacking in impartiality and independence since these are the core tenets of a decision maker as envisioned in the Bangalore Principles of Judicial Conduct, to which judges and others in judicial decision-making position such as Arbitrators, are called to abide by. The Bangalore Principles are international standards set out to guide judicial conduct world over and have in depth defined what Judicial independence and Impartiality are. The said Bangalore Principles state as follows;

“Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

- 1.1. A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
- 1.2. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.
- 1.3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.
- 1.4. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently.
- 1.5. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.
- 1.6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.”



15. The Bangalore principles further explain what it means to state that an arbiter in a case lacks impartiality in decision making process.

“Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

- 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.
- 2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.
- 2.3 A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.
- 2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.
- 2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:
  - (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
  - (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or
  - (c) The judge, or a member of the judge’s family, has an economic interest in the outcome of the matter in controversy; provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.”

16. It is therefore in my view, not enough for a party to allege that an Arbitrator, or a judge is not independent of lacks impartiality in the way the handle a matter before them. These are very serious allegations and must be established by sufficient evidence. To remove an Arbitrator, as the court herein is being asked to do, is a serious undertaking and must be done with cogent and sufficient evidence as demonstrated above. In my view, the applicants have not established good grounds to be granted the orders they seek from this court. I find and hold that the Applicants have not met the threshold set by the law for the removal of the sole Arbitrator in the arbitral proceedings before her. The application before me lacks merit and I shall dismiss the same with costs to the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

**In the Presence of:-**



1. Ms. Akinyi for the Applicants.
2. Mr. Asino Kwaka for the 1<sup>st</sup> Respondent.
3. Sylvia- Court Assistant

