REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CASE NO. E003 OF 2021

SAHAM ASSURANCE COMPANY KENYA LIMITED.....PLAINTIFF

- VERSUS -

GAS & GO PETROLEUM PRODUCTS LIMITED.....1ST DEFENDANT

NYAMBURA MUSYIMI MCArb.....2ND DEFENDANT

RULING

The application dated 5th January, 2021, seeks the following orders

1. The Applicant cab be certified urgent and b heard ex parte in the first instance during the court's vacation/December recess.

2. Pending the hearing and determination of this application, all the proceedings in the arbitration between the Applicant on one part and the 1st Respondent on the other part presently before the 2nd Respondent herein be stayed;

3. The ruling delivered by the Arbitrator and published on the 8th December 2020, be set aside in its entirely and the application dated 5th October 2020 allowed.

4. The Arbitral proceedings commence de novo before an arbitrator, other than Hon Nyambura Musyimi MCIArb, to be appointed by the chair, for the time being, of the Chartered Institute of Arbitrators;

5. Costs of this application be provided for;

The application is supported by the affidavit of Karen Njagi sworn on 31st December, 2021. The Respondent filed a replying affidavit sworn by Nazir Surani. The application was herd through oral submissions.

Mr. Wayira, counsel for the applicant submitted that the application is in form of an appeal against the ruling of the 2nd respondent dated 8/12/2020 which ruling dismissed the applicant's application from the 2nd Respondent's recusal as an arbitration. The application seeks to have the 2nd Respondent's ruling set aside and the proceedings start de noro before a different arbitrator. It is submitted that there is reasonable apprehension of bias by the applicant. The 2nd Respondent refused to respond to e-mails. There is also manifest risk of partiality. The arbitrator, upon being served with the current application indicated that her KRA PIN is on her letter head. The arbitrator started rectifying the issues complained of after the current application was filed yet in her ruling she stated that there was no refusal to communicate.

Counsel contend that the degree of proof required for apprehension of bias is that of a reasonable man. Bias must not be actual. A reasonable apprehension is enough. Once a party raises doubt on the impartiality of an arbitrator he/she should be allowed to go to a different arbitrator. The arbitrator ignored the applicant's submissions and slapped them with costs. Applicant sent several letters to the arbitrator and the same were not responded to parties were using e-emails as the mode of communication with the arbitrator. At one time the arbitrator informed the parties that she had closed her officer but left someone to deal with routine communication.

Mr. Ngolama, counsel for the 1st respondent opposed the application. It is submitted that the application is based on apprehension of bias due to arbitrator is the second one to deal with the dispute. ON 25/6/2020. The arbitrator gave directions to both parties on how documents are to be filed. Documents are to be filed physically but advanced copies are to be served by e-email. All parties complied agreed by consent to reach the arbitrator on phone. Through the provided phone number. There is no proof that the arbitrator ignored the applicant's e-emails so that the respondent can benefit. Also there is no evidence that the arbitrator ignored to respond to the applicant's e-mails but responded to those of the respondent. Counsel further contend that assuming the arbitrator's response to the e-mails was selective, how did it benefit the respondent. Section 14 of the Arbitration Act requires the applicant to prove a relationship between the arbitrators and parties or the subject

matter to prove impartiality. A letter dated 4/3/2020 addressed to the applicant by the arbitrator contains the arbitrator's KRA PIN Number.

The Oxford English Dictionary define bias **as an inclination or prejudice for or against one thing or person**. The Blacks' Law Dictionary,9th Edition defines the word bias in the following manner:

> **"Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."**

The ***Arbitration Act, 1995*** provides for grounds to warrant removal of an arbitrator. Section 13 (3) provides that;

> ***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.***

The Court in the case of ***Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited [2016] eKLR*** observed that the test for bias as set out under Section 13 (3) of the Arbitration Act, 1995 are:-

> **i) the court must find that circumstances exist, and those circumstances are not merely believed to exist; and**
>
> **ii) those circumstances are justifiable were satisfied and held that lack of confidence in an arbitrator brings into question not just the arbitral proceedings, but any decision made in respect thereof.**

In ***Kipkoech Kangongo & 62 others v Board of Governors Sacho High School & 5 others [2015] eKLR***, the Court of Appeal discussed the test applicable and concluded that the test to be applied is that of a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias. Citing English cases, the Court of Appeal concluded that appearance of bias is one which has the possibility of shaking public confidence in the administration of justice. Nonetheless, they insisted that the Applicant must prove the facts which constitute appearance of bias.

The Court of Appeal in ***Republic v David Makali & 3 others [1994] eKLR***, in setting out the objective test for bias stated as follows:

> ***"That being the position as I see it, when the Courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a Court or quasi – judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal."***

In ***Zadock Furniture System Limited and Maridadi Building Contractors Limited v Central Bank of Kenya [2015] eKLR***, the court held that;

> ***"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 is a real likelihood of bias".***

In ***Justice Philip K. Tunoi and Another v Judicial Service Commission and Another*** **[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 "Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The arbitrator has not started hearing the dispute. The complaints relate to preliminary procedures which are purely administrative. There is no contention that the arbitrator is favouring the respondent. This is a second arbitrator. Arbitration is one from of alternative dispute resolution under Article 159 of the constitution. The process must be carried out reasonably and without undue delay. I see no merit in the application. The main issue is the hearing and final determination of the dispute by the arbitrator. There is no bias or threat of bias established by the applicant.

The upshot is that the application dated 5th January, 2021 lack merit and the same is dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE