REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPL. NO. 126 OF 2018

IN THE MATTER OF ARBITRATION ACT 1995

AND IN THE MATTER OF AN ARBITRATION OVER CONSTRUCTION AND

COMPLETION OF RESIDENTIAL APARTMENTS ON LR. NO. 209/17493

MWAMBAO ROAD PARKLANDS

BETWEEN

VINAYAK BUILDERS LIMITED.....CLAIMANT

VERSUS

S &M PROPERTIES LIMITED.....RESPONDENT

RULING

The Application

1. The application for consideration is the Claimant's Notice of Motion dated the 2nd day of November, 2020 brought under Sections 13(1), (2), (3) & (4) and 14(1), (4) & (5) of the **Arbitration Act, 1995** as amended by Act No. 11 of 2009. The Application seeks the following three main orders **THAT**:

a) (Spent)

b) (Spent)

c) (Spent)

d) (Spent)

e) The Honourable Court be pleased to reverse and/or set aside the ruling of the learned Arbitrator delivered on the 21st day of October, 2020.

f) The Arbitral proceedings commence de novo before an Arbitrator other than QS Onesimus Mwangi Gichuiri. The Parties should agree on the replacement arbitrator, or in the alternative a substitute arbitrator be appointed by the chairman, of the time being, of the Chartered Institute of Arbitrators.

g) This Honourable Court be pleased to order the refund of all fees paid to the learned Arbitrator within 14 days of the Court's Ruling.

2. The application is based on the grounds on the face of it and supported by the Affidavit of one **PREMJI VEKARIA,** the Claimant's/Applicant's Managing Director sworn on even date. The Application was opposed by the Respondent vide the Replying Affidavit

sworn by **SHOBHA MULJI** on the 6th November, 2020. Counsel for the respective parties agreed to canvass the application by written submissions.

Background

3. The dispute between the parties is in the nature of Arbitral proceedings. The application emanates from a construction contract between the parties. The Applicant and the Respondent entered into a contract to erect and complete a block of residential apartments off Mwambao Road on L.R. No. 209/17493 which said contract was dated the 3rd October, 2014.

4.He averred that a dispute arose with regard to the contract when the Respondent's Consultant Architect directed the Claimant/Applicant to remove defective works and reconstruct leading to a declaration of a dispute.

5. The Applicant declared a dispute and the matter was placed for arbitration. Consequently, the Chairman of the Architectural Association of Kenya appointed Emmanuel Odhiambo to be a sole arbitrator and later was terminated with learned Arbitrator Onesimus Mwangi Gichuiri appointed as the replacement by consent of the parties. The Arbitral proceedings have been subject to various applications prior to the instant application which the Honourable Court has made determinations on with regard to the issues raised.

The Applicant's Case

6. The Applicant makes its averments in support of the present application vide the affidavit in support sworn by **PREMJI VEKARIA.** It avers that the decision of the learned Arbitrator **ONESIMUS MWANGI GICHUIRI** of the 21st day of October, 2020 dismissing the Applicant's application dated the 12th day of October, 2020 seeking orders of recusal of the sole arbitrator on grounds of non-disclosure amounted to misconduct.

7. The Applicant further avers that the Learned Arbitrator failed to disclose in the preliminary stages and/or during the Arbitral proceedings of his relationship with the Respondent's Engineer, one ENG. JAMES RAPANDO and the same ordinary circumstances would have raised doubts on the impartiality and/or independence of the learned Arbitrator.

8. The Applicant avers that it came to learn that the Respondent's Project design consultant, M/S WIDRUPS GROUP LIMITED and Arbitrators firm M/S MATHU & GICHUHI ASSOCIATES LIMITED enjoy a close working relationship and were at the time of filing the instant application involved in an ongoing project near Jeffry's Club which said position is undisputed and admitted by the Learned Arbitrator in his ruling against recusal.

9. Further, the Applicant avers that the Learned Arbitrator failed to disclose the said relationship with the Respondent's Engineer and witness in the preliminary meeting or at all during the proceedings.

10. It is the assertion of the Applicant that had the learned Arbitrator disclosed the foregoing relationship, the Applicant would have at the onset rejected his appointment. The Applicant thus holds that the learned Arbitrator failed in his duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence as provided for under Section 13(1) of the Arbitration Act No. 11 of 2009.

11. It is the Applicant's position that in view of the foregoing, it has since lost faith in the impartiality, competence and independent of the Tribunal comprising of the sole Arbitrator and the continuity of proceedings would greatly prejudice the Applicant who stands to suffer irreparably if the orders sought are not granted.

12. The Applicant further avers that the interim award made by the learned Arbitrator on the 4th November, 2019 relied heavily on the opinion of Eng. James Rapando and overlooked the scientific report on record with regard to plaster works that had indicated that the plaster works had passed the laboratory tests.

13. It is the Applicant's contention that the relationship between the learned Arbitrator, Eng. James Rapando and the Respondent offend the provisions of Rule 3 (a) of Part 1 of the General Standards Regarding Impartiality, Independence and Disclosure; International Bar Association Guidelines on Conflict of Interest in International Arbitration 2014, which requires an arbitrator to disclose facts and/or circumstances that may in the eyes of the parties give rise to doubts as to the Arbitrator's impartiality or independence. The parties are to decide whether or not the disclosed circumstances by the Arbitrator would give rise to justifiable doubts of the Arbitrator's impartiality or independence.

The Respondent's Case

14. The Respondent vehemently opposed the application vide the Replying Affidavit of **SHOBA MULJI**, the Respondent's Managing Director on grounds that the same was made purely in bad faith and with the aim of frustrating the arbitration process to its logical conclusion.

15. The Respondent averred that time after another, the Applicant had been lodging application after another against the Arbitrator for not deciding according to the Applicant's wishes and sought the removal of the Arbitrator from concluding the process.

16. It is the Respondent's case that the instant Application is similar to the applications dated 15th day of March, 2018 in which the Honourable Court declined to grant the prayers sought vide the ruling of the 17th July, 2019 and the application dated the 20th December, 2019 which met the same fate vide the ruling of the 14th day of September, 2020.

17. The Respondent avers that the instant application being the third by the Applicant is not only ***res judicata*** but also amounts to gross abuse of the Court process, frivolous and incompetent.

18. Further, the Respondent posits that the parties having intended to resolve any dispute arising from the contract via arbitration, it is paramount that their intentions be upheld.

19. The Respondent has strongly denied there being a relationship between the Arbitrator and Eng. James Rapando and the latter is involved in the proceedings as a witness who the Applicant duly cross-examined upon testifying. Further, there has been no partiality demonstrated as a result of the said allegation of existence of a relationship and instead the Applicant has dwelt on the merit of the dispute which it has the room to challenge upon a Final award.

20. The Respondent avers that the Applicant is employing tactics to tire the Respondent, and the arbitrator so as to scuttle the arbitration process. Additionally, parties had already expended and invested so much time and enormous expenses had been incurred in the proceedings thus abandoning the progress and starting afresh would make a circus of the said process and efforts by parties.

21. The Respondent further avers that the actions of the Applicant amounts to forum shopping.

SUBMISSIONS

Applicant's Submissions

22. The Applicant's claim is further supported by its submissions dated the 4th May, 2021.

23. The Applicant submits that its current application is distinguishable from the Applications of 15th March, 2018 and 20th December, 2019. The Applicant posits that the Application dated the 15th day of March, 2018 was based on the grounds that the Arbitrator had abandoned his role as an umpire and descended into the arena of the litigants. The Application dated the 20th day of day of December, 2019 was consequent to the interim award by the learned Arbitrator contrary to the awarding of a partial award as provided by the law and the same attracted different consequences under the law.

24. It is the Applicant's submission that the current Application deals with the relationship between the Arbitrator and Eng. James Rapando which the learned Arbitrator failed to disclose at the onset and/or during the proceedings.

25. The Applicant submits that the instant issue it is raising came up after the aforementioned applications and avers the same was brought immediately after the Tribunal's ruling and under certificate of urgency thus did not delay and/or frustrate the proceedings.

26. The Applicant has cited the case of ***Sobeth Developers Limited v South Nyanza Sugar Company (2010)e KLR*** where the Court pronounced itself on the issue of perception of bias and how the same can lead to doubt of the sincerity and impartibility of the arbitrator by a lay person.

27. The case of ***Halliburton Company v Chubb Insurance Limited (2010)*** was cited by the Applicant to emphasize on the duty of an arbitrator to disclose.

28. The Applicant also relied on the decisions in ***Kalpana H. Rawal v Judicial Service Commission & 2 Others (2016) eKLR , R v Gough (1993) AC 646 , Attorney General of Kenya v Prof. Peter Anyang Nyon'go & 10 Others EACJ App. No. 5 of 2007*** and ***The President of the Republic of South Africa v The South African Rugby Football Union & Others*** in establishing the threshold for recusal of a judge and proposed that the same does apply to the recusal of an arbitrator.

Respondent's Submissions

29. The Respondent in support of its reply to the Application and in response to the submissions by the Applicant filed its written submissions dated the 24th day of May, 2021 in which it submits on Three (3) main issues;

a) Whether the present matter is *res judicata* as set out in Section 7 of the Civil Procedure Act, 2010.

b) Whether the arbitral proceedings pending before the sole Arbitrator should be terminated and the arbitration commence de novo.

c) Whether the sole arbitrator was entitled and/or justified to make a ruling date 21st October, 2020.

30. On whether the application is *res judicata,* the Respondent's submission is that the present application as filed raises issues that had been directly and substantially between same parties been dealt with by the Honourable Court and ought to be dismissed with costs as litigation must come to an end.

31. The Respondent with respect to the issue of *res judicata* has cited *Christopher Orina t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others* in which the court held that parties should not introduce new causes of action to seek the same remedy in court. Further, it cited the case of *Uhuru Highway Development Limited v CBK & 2 Others (1996) eKLR* where the court cautioned advocates who file similar applications to the ones dismissed and noted the need to have them called upon to show

cause why they should not be made personally liable for the costs. Additionally, the Respondent cited *Nathaniel Ngure Kihiu v Housing Finance (2018) Eklr, Nguruman Limited v Shompole Group Ranch & Another (2014)* as well as *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited (2017) eKLR* to buttress the same position.

32. In view of the foregoing, the Respondent submits that the instant application is *res judicata.*

33. On whether to terminate the arbitral proceedings and commence *de novo,* the Respondent submits that there is an existing interim award of the 4th day of November, 2019 which has not been set aside thus the proceedings cannot commence *de novo* having progressed to an interim award and setting the same aside must make strict adherence to the provisions of Section 35 of the Arbitration Act and proof of grounds be provided.

34. The Respondent submits that the Applicant already having lost in the bid to set aside the said award, in the event that the Honourable Court orders that the proceedings commence *de novo,* the Honourable Court will be purporting to setting aside an interim award without adhering to the provisions of Sections 10 and 35 of the of the Arbitration Act.

35. The Respondent cited *Kenya Shell Limited v Kobil Petroleum Limited (2006) 2 EA 132 (CAK)* and *Christ for All Nations v Apollo Insurance Company Limited (2002) 2 EA 366 (CCK)* in which the courts addressed the issue of non-interference with arbitral proceedings and finality of arbitration awards.

36. On whether there is any proof that the arbitral tribunal is partial, the Respondent has submitted that the Applicant claims the learned arbitrator is partial but has not backed the allegations with evidence to prove the bias and doesn't meet the conditions as set down in *Bremer v Ets Soules (1985)I Lloyd's L.R. 160* and *Chania Gardens Limited v Gilbi Construction Company Limited & Another(2015) Eklr* with regards to removal of an arbitrator.

37. The Respondent further cited the case of *Zadock Furniture System Limited and Maridadi Building Construction Limited v Central Bank of Kenya (2015) eLKR* where the court held:

> ***"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 was real likelihood of bias."***

38. Additionally, the Respondent on its submissions with respect to partiality cited the case of *PT Central Investindo vs Franciscus Wongso & Others & Another Matter [2014] SGHC 190* where the court held that:

> ***"the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is to then ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it. The court looks at the impression which would be given to other people. Even if he (arbitrator) was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand"***

Analysis and Determination

39. I have carefully considered the Applicant's application, the affidavit in support, the Replying Affidavit in response to the Application and the rival submissions. I find that only Two issues appear to arise for determination of this court:

> ***i. Whether the present matter is res judicata as set out in Section 7 of the Civil Procedure Act, 2010.***
>
> ***ii. Whether there was non-discloure by the learned Arbitrator of any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.***

Whether the present matter is res judicata as set out in Section 7 of the Civil Procedure Act, 2010.

40. The doctrine of *res judicata* has been extensively dealt with by the courts and is provided for under Section 7 of the Civil Procedure Act, 2010 that:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***
>
> ***Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
>
> ***Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

41. The Black's law Dictionary defines *res Judicata* as;

"An issue that has been definitely settled by judicial decision…the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…"

42. In the case of ***Christopher Kenyariri V Salama Beach (2017) eKLR***, The court clearly stated ***"... the following elements must be satisfied...in conjuctive terms;***

a. The suit or issue was directly and substantially in issue in the former suit

b. Former suit between same parties or parties under whom they or any of them claim

c. Those parties are litigating under the same title

d. The issue was heard and finally determined.

e. The court was competent to try the subsequent suit in which the suit is raised."

43. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR,**

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

44. The Applicant states that its current application is distinguishable from the Applications of 15th March, 2018 and 20th December, 2019. The Applicant posits that the Application dated the 15th day of March, 2018 was based on the grounds that the Arbitrator had abandoned his role as an umpire and descended into the arena of the litigants. The Application dated the 20th day of day of December, 2019 was consequent to the interim award by the Learned Arbitrator contrary to the awarding of a partial award as provided by the law and the same attracted different consequences under the law. The Respondent on the contrary avers that the said applications are similar thus the instant Application is barred by the doctrine *res judicata.*

45. I have considered both Applications and the present application and I am of the view that the issues raised in the present application being the ruling of the Learned Arbitrator was is a sole member of the Tribunal to dismiss the Application by the Applicant to have the Arbitrator recuse himself for reasons that he had failed to disclose information at the onset and during the proceedings with regard to his relationship with Engineer James Rapando who was a vital witness in the proceedings and was engaged in a project with the Arbitrator and/or his business entity an averment which the Learned Arbitrator acknowledged in the ruling of the 21st day of October, 2020.

46. The issue of existence of any circumstances likely to give rise to justifiable doubts as to the impartiality or independence of the Arbitrator is yet to be directly and substantially heard and determined and for the foregoing reasons I conclude that the present suit is not *res judicata.*

Whether there was non-discloure by the Learned Arbitrator of any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

47. The Application is brought under Sections 13 and 14 of the Arbitration Act as amended by Act No. 11 of 2009. Section 13 provides as follows:

"13. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

(2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.

(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) 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."

48. Further, Section 14 of the Arbitration Act provides for the procedure for challenging an arbitrator as follows:

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

b) 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.

c) 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.

d) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

e) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

f) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

g) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

h) ***While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful."***

49. I agree with the case of ***Sobeth Developers Ltd V South Nyanza Sugar Co. Ltd [2010] eKLR*** cited by the Applicant where the Honourable Court held that:

"Section 13 of the Arbitration Act provides inter alia that a person approached in connection with possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The arbitrator carries that duty throughout the proceedings. In other words from the time of his appointment up to the end of the arbitration proceedings, the arbitrator is required without delay to disclose any such circumstances to parties unless the parties have already been informed of them by him. The applicant herein is saying that the arbitrator failed to disclose to it through the arbitral proceedings that he and his family were unduly known to the advocates of the respondent and to his firm. That failure of disclosure amounted to misconduct. Of course and as already stated elsewhere, the respondent claims to have made such material disclosure."

50. The Court went ahead to state:

"The law required of him from the date of appointment and throughout the arbitration proceedings to disclose any circumstances likely to give rise to doubts as to his impartiality and independence ….That failure on the part of the arbitrator obviously led to the perception on the part of the applicant rightly or wrongly so that the award was biased against him, one sided and stewed in favour of the respondent. The question of bias is really a matter of perception. The arbitrator may have been true to the calling of his office. However, to a common man on the streets, given the above scenario he is more likely to doubt the sincerity and or impartiality of such an arbitrator."

51. I find that from the pleadings by the parties it is uncontested that the Applicant duly challenged the Learned Arbitrator and gave its reasons and/or grounds for being of the opinion that the Arbitrator failing to disclose the circumstance which would have led to justifiable doubt(s) of his impartiality or independence by either parties failed to abide by the provisions of the law and failed to uphold his legal obligation as an Arbitrator.

52. I am of the opinion that the failure to disclose the information with respect to knowing and/or engaging Engineer James Rapando on other projects prior to the onset of the Arbitration of proceedings, at the onset of the proceedings and/or during the said proceedings was a

misconduct on the part of the Learned Arbitrator warranting his removal. As stated clearly in the case of of **Sobeth Developers Ltd V South Nyanza Sugar Co. Ltd (supra),** impartiality is a question of perception. It matters not that the Arbitrator may have conducted himself lawfully, but the fact that for non-material disclosure, a question of impartiality arises that lends to a justifiable cause for him to recuse himself. The follows the well-known adage that *'justice must only be done but be seen to be done.'* In the present case, the Arbitrator hit himself on the head by failing to disclose his relationship with Engineer Rapando. On this, the Applicant's cry for justice is not in vain and the application must succeed.

Deposition

53. For all the foregoing reasons, I am satisfied that the Application dated the 2nd day of November, 2020 is merited and I make the following orders –

a) The Application is allowed in terms of prayers 5 and 6 in that:

i. I hereby set aside the ruling of the learned Arbitrator delivered on the 21st day of October, 2020.

ii. The Arbitral proceedings commence de novo before an Arbitrator other than QS Onesimus Mwangi Gichuiri. The Parties should agree on the replacement arbitrator within 30 days; in the alternative a substitute arbitrator be appointed by the chairman, of the time being, of the Chartered Institute of Arbitrators.

b) I decline to issue an order for refund of fees already paid to the Arbitrator.

c) As the conduct of the Learned Arbitrator sparred the institution of this Application, each party shall bear its own costs of the Application

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss Ngeresa for the Claimant/Applicant.*

2. *Nyaanga Mughisa for the Respondent(absent).*