



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 126 OF 2018

BETWEEN

VINAYAK BUILDERS LTD.....CLAIMANT/APPLICANT

VERSUS

S & M PROPERTIES LTD.....1ST RESPONDENT

ONESMUS MWANGI GICHUIRI.....2ND RESPONDENT

RULING

1. The ruling herein relates to a notice of motion application dated 20th December 2019, brought under the provisions of; Section 35 of the Arbitration Act, 1995, Rule 3 of the Arbitration Rules 1997 and all other enabling provisions of the law.
2. The Applicant is seeking for orders: -
 - a. That the interim award issued by the Arbitrator and published on the 4th day of November 2019, be set aside in its entirety;
 - b. That the Arbitral proceedings commence de novo before an arbitrator other than Qs Onesimus Mwangi Gichuiiri. The Parties should agree on the replacement arbitrator, or in the alternative, a substitute arbitrator should be appointed by the Chairman, for the time being, of the Chartered Institute of Arbitrators;
 - c. That the Applicant be awarded costs of these proceedings as against the Respondent.
3. The application is premised on the grounds on the face of it and an affidavit of the even date, sworn by the Applicant's managing director; Premiji Vekaria. He deposed briefly that, the parties entered into a contract dated 3rd October 2014, to erect and complete a block of apartments off; Mwambao Road L.R. No. 209/17493 Nairobi, for a sum of Kshs. 90,029,537.54.
4. A dispute arose when the Respondent's Consultant's Architect directed the Applicant to remove defective works and reconstruct. The dispute was referred to arbitration. In an effort to amicably resolve the dispute or to narrow the matter in issue; the parties agreed the Arbitral Tribunal (herein "the Tribunal") visits the site, collect samples from the plasters works and subject it joint tests by a reputable expert.
5. The Applicant avers that, the learned Arbitrator, through subsequent minutes and orders for direction, deviated from the substances of the agreement of the parties on the joint expert report and rendered an interim award on 4th day of November, 2019, dismissing the claim *in toto*, without affording the Applicant a fair hearing on merit.
6. That it is a trite principle of arbitration that, the Arbitrator's jurisdiction is circumscribed by agreement of parties, otherwise known as party autonomy. As such the learned Arbitrator demonstrated patent incompetence and failed in his cardinal duty of ensuring fairness and equality as underwritten by section 19 of the Arbitration Act 1995, by the failure to consider all the matters of fact, evidence and law as presented to him, particularly on the conduct of visits to the locus in quo and established principles on how such evidence is taken and dealt with.
7. Further, the transcripts of the record of the Tribunal will show that the learned Arbitrator was biased, lacked impartiality and was out

rightly hostile to the Applicant, by interjecting its counsel during the highlighting of written submissions on the 18th day of November 2019, thus expressing a predetermined position on matter in issue. That the ruling was therefore a foregone conclusion, and failed the impartiality and fairness tests.

8. That, having failed to dislodge the expert evidence rendered on the mortar test carried out on the plaster works, the learned Arbitrator proceeded to “mischievously” conclude that the plaster works (which had passed the laboratory tests the parties had agreed upon) were nonetheless defective for poor workmanship. The conclusion was not borne out of any evidence laid before the learned Arbitrator, at all and, therefore, draws a strong interference of bias and/or lack of impartiality.

9. The Applicant further avers that, it has lost faith in the impartiality and competence of the Arbitral Tribunal; constituted in the sole Arbitrator; Qs Onesimus Mwangi Gichuiru MCI Arb. In addition, the arbitrator’s bill currently stands at Kshs. 2,621,600.00 a considerable sums of money which the Applicant can ill afford in the absence of fair proceeding.

10. However, the application was opposed through a replying affidavit dated 10th April 2018, sworn by the Respondent’s director; Shobha Mulji, who deposed that, although the application is brought under ssection 35 of the Arbitration Act, none of the grounds relied upon are supported by that section. That, the Applicant is merely lodging complaints against the learned Arbitrator for not deciding in accordance with its wishes and seeks for his removal from conducting the arbitration to conclusion.

11. Further, the Applicant filed a similar application dated 15th March 2018, for the removal of the same learned Arbitrator which was determined in the ruling dated; 17th July 2019, where the court declined to grant any orders and allowed the arbitration to continue. Prior to filing that application, the Applicant had sought for the recusal of the learned Arbitrator in its application filed before the tribunal, which the learned Arbitrator dismissed.

12. Therefore, the current application is the third attempt in which the Applicant is seeking to remove the learned Arbitrator and/or scuttle the arbitral proceedings from being concluded. In the circumstances, the application is not only *res judicata* but also amounts to gross abuse of the court process, frivolous and incompetent.

13. The Respondent averred that, the parties by their own deed and under their hands and seals, voluntarily and freely, agreed that , in the event that any dispute arose between them in the execution of the contract they would themselves to an arbitration process under the provisions of the Arbitration Act. It is thus paramount to uphold, respect and maintain the parties’ intentions.

14. That the learned Arbitrator’s interim award on the issue of condemned works, upheld the decision of the Architect to condemn masonry and plaster walls, He stated therein; “this is an interim a ward only related to condemned works and the Claimant can now proceed to prosecute the balance of his claim leading to the Respondent to prosecute his defence and counterclaim.” Therefore, it is not true as deposed by; Premji Vekaria; in paragraph 7 of the supporting affidavit that, the claim was dismissed in toto or without hearing the Applicant.

15. Further, the parties’ agreement on the site visit, gave the Arbitral Tribunal the latitude to decide whether it shall require any evidence including samples, photographs etc. To that, extent the site visit was considered an extremely important part of the proceedings and remained undisturbed for over one year despite the escalating cost of construction. The site visit was documented and communicated by way of the Order for Directions No. 3 dated 10th January 2017, issued by the learned Arbitrator.

16. That pursuant to section 20(3) of the Arbitration Act, an arbitral Tribunal possesses the power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or submission in respect of any matter has been fairly and adequately put or made.

17. That the learned Arbitrator has not demonstrated incompetence in the manner he has handled the arbitration so far. To the contrary, he has been fair, even handed and extremely competent in dealing with the dispute. The whole application and the language used is intended to antagonize and intimidate the learned Arbitrator into giving in and recuse himself from the proceedings.

18. The Respondent argued that, the parties have already expended and invested so much time and incurred enormous expenses in these proceedings and it will be a circus and against arbitration principles to re-commence the same before another Arbitrator just because the learned Arbitrator made an unfavourable decision against the Applicant, and given that the appointment of first Arbitrator QS Emmanuel Odhiambo, was terminated. The Applicant is openly and actively forum shopping.

19. Further the Arbitration Act insulates arbitral proceedings from interference on fanciful grounds and limits recourse to the High Court. Section 32A of the Arbitration Act; specifically provides that, an arbitration award is final and binding on the parties and the same cannot be interfered with except in accordance with the provisions of; Section 35 of the Arbitration Act. Hence the application herein amounts to obfuscation of the Arbitration Act.

20. That respecting and recognizing arbitral awards is an important aspect public policy and the courts have identified the public policy in Kenya as being against an interventionist approach and accepted that the court’s role in arbitration is supportive rather than restrictive.

21. The application was disposed of through filing of submissions. The Applicant in a nutshell, argued that the learned Arbitrator misconducted himself. The court was referred to the definition of misconduct as defined in the Black’s Law Dictionary (2nd Edition) as follows:

“Any unlawful conduct on the part of a person concerned in the administration of justice which is prejudicial to the rights of parties or to the right determination of the cause...The term is also used to express a dereliction from duty, injurious to another, on the part of one employed in a professional capacity”.

22. Similarly, decision of the Court of Appeal in; Nyangau v Nyakwara (1985) eKLR, adopting the decision in Williams v Wallis & Cox [1914] 2 KB 478, wherein Lush J, stated that: -

“Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, “misconduct” in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside”

23. The Applicant submitted that, the learned Arbitrator having ignored submissions on the law, the award made is *per in curiam* and should be set aside *in limine*. That the Arbitrator, breached the Applicant’s right to a fair hearing as guaranteed under Article 50 of the Constitution of Kenya 2010. The Applicant maintained that, the learned Arbitrator was biased and lacks impartiality.

24. The Applicant referred to the cases of; Metropolitan Properties Co. Ltd v. Lannon (1968) 3 All ER 304, and Turner (East Asia) v Builder Federal (Hong Kong) and Josef Gartner & Co. [1988] 42 BLR, to argue an Arbitrator must always act judicially, with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words must always be measured and circumspect.

25. Further, even if the 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.

26. However, the Respondent filed response submission stating that: -

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court”

27. Reference was made to the cases of; Uhuru Highway Development Limited v Central Bank of Kenya & 2 others (1996) eKLR and Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR where the court stated that,

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specter 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”

28. Further reference was made to the case of; Kenya Commercial Bank Limited v Benjoh Amalgamated Limited (2017) eKLR where the Court of Appeal stated:

“The doctrine of Res Judicata, is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon”

29. The Respondent argued that, the learned Arbitrator acted within the law. The statutory provisions of Sections 14(8) of the Arbitration Act were lied on. The provisions states that: -

“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 award shall be void if the application is successful.”

30. Similarly, the provisions of Section 32(6) of the Act were relied which states: -

“An arbitral tribunal may, at any time, make a partial award by which some, but not all, of the issues between the parties are determined, and the provisions of this Act applying to awards of an arbitral tribunal shall, except in so far as a contrary intention appears, apply in respect of such partial award.”

31. However, the Applicant filed supplementary submissions and argued that, the defence of res judicata is misplaced both legally and factually in that, the earlier application determined by the court on the 17th July 2019, concerned the removal of the Arbitrator on account of misconduct and exceeding his jurisdiction. The application was an appeal against the learned Arbitrator’s ruling on his recusal filed on 18th September 2017. The appeal invoked this Honourable court’s jurisdiction under section 14 (3) of the Arbitration Act, 1995.

32. However, the current application regards the setting aside of an arbitral award and principally made under section 34 of the Arbitration Act, 1995. The award sought to be set aside is the interim award delivered by the Arbitrator on 4th November 2019, four (4) months after the ruling of the court on the recusal appeal made in July 2019. The matters raised in the current application have nothing to do with the earlier recusal application but on subsequent proceedings in the arbitration. *Res Judicata* does not apply.

33. That, Section 34 of the Arbitration Act, 1995 grants a party the right to challenge an Arbitral Award, final or interim, as defined in

section 32C of the Act. The grounds for setting aside an Arbitral award are different from those for recusal.

34. I have considered the arguments advanced herein and I find that the first issue to determine is whether, this application is res judicata or not. The parties and in particular the Respondent has submitted heavily on the same with the Applicant responding accordingly. I shall take note of the legal principles relied on.

35. In that regard it suffices to note that, by an application dated 15th March 2018, the Applicant herein sought for orders that: -

- a. All the proceedings in the arbitration between the Applicant and on one part and the 1st Respondent on the other part presently before the 2nd Respondent herein is stayed pending the hearing and determination of the application;
- b. That the appointment of the said 2nd Respondent be terminated and/or substituted;
- c. The 2nd Respondent be ordered to refund all fees and/or expenses already paid to him by the Applicant and to pay the parties their reasonable expenses incurred during the arbitral process

36. The main grounds relied on in that application were inter alia, the proceeding before the learned Arbitrator were irredeemably tainted and should be declared null and void and be expunged from record. In the supporting affidavit to the subject application, the Applicant argued that, the learned Arbitrator has harboured “great prejudice, bias and partiality” against it as is borne out of the record of proceedings. That, the Applicant was not accorded a fair opportunity to present its case.

37. The grounds relied on herein are not different at all. The allegations against the learned Arbitrator are the same; bias, impartiality, and incompetence. Therefore, as much as the first application was challenging the ruling rendered by the learned Arbitrator on his recusal and the current application is challenging the interim award, the bottom line remain, the Applicant is generally aggrieved by the manner in which the learned Arbitrator has conducted the arbitral process. In fact, the averments in the affidavits in support of both application mirror each other. To that extend the substance of the matter is res Judicata.

38. Furthermore, the prayer herein seeking that, the learned Arbitrator be replaced and/or substituted is similar to the prayer in the earlier application seeking that; he be substituted or his mandate be terminated. I dealt with that issue at paragraphs 37 to 42 of the ruling delivered on 15th July 2019, and I adopt the findings thereunder. That deals with the alternative prayer herein under prayer 5. In the same vein the finding of the court at paragraphs 43, 45 and 46 dispenses with prayer (5) herein seeking that the proceedings start de novo before a different Arbitrator.

39. Be that as it were, considering the application on merit. I note that, the application is brought under the provisions of section 35 of the Arbitration Act. That section deals with the setting aside of a final arbitral award. Therefore, the submissions by the Respondent that the grounds under that section are not properly invoked are well founded.

40. Even if the court were to uphold substantive justice, the question that arises is whether the learned Arbitrator has by rendering the interim award exhaustively determined the whole dispute at an interlocutory stage thus depriving the Applicant the right to be heard.

41. I have considered the subject interim award and I find that, the learned Arbitrator states at paragraph 05.08 that; “this is an interim award only related to condemned works and the Claimant can now proceed to prosecute the balance of his claim leading to the Respondent to prosecute his defence and counter claim” Therefore, the learned Arbitrator did not determine the entire dispute. The statement of claim clearly indicates that there are other claims not dealt with.

42. Therefore, the question remains should the court set aside the interim award? I find the answer in the negative, this is informed mainly by the finding of the court in the ruling of 15th July 2019, in particular on the need of expeditious disposal of matters before the court and the fact that the Applicant still has the opportunity to challenge the final award and be heard on the issue raised herein. It will not be in the interest of justice to allow the application herein. I therefore dismiss it with orders that the costs shall abide the outcome of arbitration

43. It is so ordered.

Dated, delivered and signed on this 14th day of September, 2020

GRACE L NZIOKA

JUDGE

In the presence of:

Ms. Ngumo holding brief for Mr. Myaanga for the Respondent

No appearance for the Applicant

Robert -----Court Assistant