



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 161 OF 2018 (OS)

IN THE MATTER OF AN APPLICATION BY TRUSTEES, TOURISM PROMOTION SERVICES STAFF PENSION SCHEME FOR AN ORDER OF APPOINTMENT OF ARBITRATOR

AND

IN THE MATTER OF THE ARBITRATION ACT (NO. 4 OF 1995)

AND

IN THE MATTER OF THE ARBITRATION RULES, 1997

BETWEEN

THE TRUSTEES, TOURISM PROMOTION SERVICES

STAFF PENSION SCHEME.....APPLICANT

AND

GENAFRICA ASSET MANAGERS.....RESPONDENT

J U D G M E N T

1. The Trustees, Tourism Promotion Services Staff Pension Scheme (hereinafter the Trustees) filed this Originating Summons dated 13th April 2018. By that Summons they seek the following two orders:

(a) The Honourable Court be pleased to appoint a sole Arbitrator to adjudicate the dispute declared by the Applicant on or around 5th March 2018 pursuant to Clause 16 of the Investment Management Agreement dated 16th December 1998 between the parties:

(b) The Honourable Court be pleased to order that this matter proceed to arbitration pursuant to clause 16 of the Investment Management Agreement between the parties.

2. The Trustees, as its title suggests is vested with portfolio of assets in respect to staff pension scheme. It entered into an investment management agreements dated 6th December 1998 with Genafrica Asset Manager (Asset Manager) in respect to the investment of the funds of The Trustees.

3. The Trustees through the affidavit, of their Chairman stated that they declared a dispute, by their letter dated 5th March 2018. This dispute relates to funds invested by the Asset Manager. That the said dispute to date remains unresolved.

4. The Investment Management Agreement by clause 16 provides for any difference between The Trustees and the Asset Manager to be referred to arbitration. That clause provides:

“Should any difference arise between the parties touching the meaning of this Agreement or as to the rights obligations or liability of any party to this Agreement the same shall be referred to arbitration in accordance with the Arbitration Act Chapter 49 of the Laws of Kenya as amended from time to time.”

5. The Trustees by their letters dated 5th and 21st March 2018 proposed the appointment of either Justice (Retired) Aaron Ringer; or Justice (Retired) Jonathan Havelock as Arbitrators. The Asset Manager failed to respond to both letters.

6. It is clear that the above quoted arbitration clause does not provide the number of the Arbitrators to be appointed or on how such appointment is to be made.

7. The Asset Manager, through the affidavit of Patrick Kariuki Njoroge, its Chief Operating Officer, stated that the appointment of Arbitrator their number and procedure of this appointment should be freely determined by the parties. That The Trustees had failed to respond to the Asset Manager's proposal for the appointment of two Arbitrators with an industry expert as an umpire. On that ground the Asset Manger requested the Court to decline the appointment of Arbitrator as requested by The Trustees.

ANALYSIS AND DETERMINATION

8. In my view, this is a matter that ought not to have been filed because there is Legislative direction on how parties should proceed. Parties, by their Investment Management Agreement did not provide how many Arbitrators would be appointed to arbitrate on a dispute that may arise.

9. By Section 11 of the Arbitration Act, Cap 49, there is statutory guidance on the number of Arbitrators. That Section provides:

“Section 11(1) The Parties are free to determine the number of Arbitrators.

(2) Failing such determination, the number of Arbitrators shall be one.”

10. Further Section 12 (4) of Cap 49 provides, where there is default on one party, what the other party should do. That section is in the following terms:

Section 12(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.

11. With those provisions being available that is why I stated that this Originating Summon was not necessary to make. That being the case, the costs although should follow the event, but in this case because the Asset Manager has unreasonably failed to respond to the correspondence of The Trustee, it is not entitled to costs.

12. In the end the Originating Summons is hereby dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... COUNSEL FOR THE APPLICANT

.....COUNSEL FOR THE RESPONDENT