REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 276 OF 2018

WEST PARK PROPERTIES LIMITED.....APPLICANT

VERSUS

DINA BUILDERS LIMITED.....1ST RESPONDENT

CHRISTOPHER K. KIHARA.....2ND RESPONDENT

CHAIRMAN, ARCHITECTURAL ASSOCIATION OF KENYA....INTERESTED PARTY

RULING

1. The ruling herein relates to a notice of motion application dated 20th June 2018, brought under the provisions of Article 50(1) of the Constitution of Kenya 2010, Section 14(3), (5), (7) and (8), Section 15(2) of the Arbitration Act, No. 4 of 1995, Order 51 Rule 1 of the Civil Procedure Rules and inherent power of the court.

2. The Applicant is seeking for orders that, the Honourable court stay further proceedings before Qs. Christopher K. Kihara (herein "the 2nd Respondent") in the matter of an Arbitration between Dina Builders Limited and the Applicant and uphold the challenge dated 29th May 2018 and lodged by West Park Properties Limited (herein "the Applicant") on 29th May 2018 before the 2nd Respondent.

3. Further, the court do order for the removal of the 2nd Respondent from the Arbitration proceedings and direct the parties to nominate and agree on the identity of a new Arbitrator in accordance with Article 45 of the agreement between the parties within such period as the court shall specify, failing such agreement, the Honourable court appoint a new Arbitrator to act in place of the 2nd Respondent and for the Reference to commence afresh.

4. That upon removal of the 2nd Respondent, the rulings/orders made by the 2nd Respondent be invalided, and in the alternative the Honourable court set aside the appointment of Qs. Christopher K. Kihara as a sole Arbitrator herein. The costs of the application be provided for.

5. The application is premised on the grounds on the face of it and an affidavit dated 20th June 2018, sworn by Amar Arvind Shah. He averred that the Applicant and the 1st Respondent entered into a contract for erection and completion of one (1) office block in Westlands Nairobi for a sum of Kshs. 292,276,700.00. Subsequently a dispute arose between the parties and according to the clause 45 of the agreement; the dispute was to be referred to Arbitration.

6. However, the Applicant did not concur to the appointment of the Arbitrator, whereupon the 1st Respondent requested the Architectural Association of Kenya (herein "the interested Party") to appoint an Arbitrator. The Interested party through a letter Ref/ARB/SC/Y16/FO1 dated 26th dated 26th July 2016 appointed QS Charles Mwaura as the sole Arbitrator to hear and determine the dispute. That on 9th August 2016, the Arbitrator held the preliminary meeting with the parties but before they could proceed, the Applicant's Counsel served him with a hard copy of a letter dated 5th August 2016, addressed to him and requested him to read it. Apparently, the Arbitrator had not received a copy of this letter, but the Applicant argued that it touched on the challenge of the Arbitral Tribunal. The Arbitrator accepted to consider the contents of the letter and after perusing the same, he discovered that it had made reference to other documents that were not attached to it. He then directed the same be supplied by the Applicant by 12th August 2016. The documents were received by the Arbitrator on that date but the hard copies thereof were received by the 1st Respondent on 26th August 2016.

7. The Arbitrator then directed the 1st Respondent to file a response to the documents produced by 18th August 2016 and the 1st Respondent complied. The documents were in relation to the appointment of the Arbitrator. After considering the documents produced, the Arbitrator

deduced the following facts:-

(a) Default notice was sent by the Architect to the contractor on 25th May 2016 referring to clause 38.0 of the agreement signed between the parties;

(b) The Contractor send an email dated 10th June 2016 sent to the employer implying that they prefer termination of the works if liquidated damages are to be applied;

(c) The employer sent a letter dated 11th June 2016 to the Contractor terminating the contract;

(d) The Contractor send a letter dated 21st June 2016 to the employer giving a default notice on the following;-

(i) Issue of instructions under clause 22;

(ii) Wrongful termination of the Contract on 11th June 2016;

(e) The letter also requested for a meeting to engage for a possible amicable settlement and at the same time requested for the employer's concurrence in the appointment of Mr. Festus Litiku as arbitrator, failure to which a thirty (30) days notice was to issue to the employer for the appointment of an arbitrator by President of Architectural Association of Kenya.

8. The parties to the dispute then filed the following two issues for determination by the Arbitrator:-

(a) Whether the claimant's email dated 10th June 2016 agreeing to have the works terminated had the same meaning as having the contract terminated;

(b) Does the Arbitrator having been appointed under the provisions of Clause 45 and after agreeing to commence the Arbitration process by inviting the parties to a preliminary meeting contravene clause 45 of the conditions of contract under which provision his appointment arose?

9. The Arbitrator considered the pleadings and arguments by the parties and delivered a ruling dated 5th September 2016 in the following terms;-

"(a) *clause 45.5 of the contract signed between the parties explicitly states "in any event, no arbitration shall commence earlier than ninety (90) days after the service of the notice of a dispute or difference;*

(b) the notice of default was served to the employer on 21st June 2016 hence no arbitration should have commenced before 19th September 2016;

(c) having regard to the above facts, I, Charles J. Mwaura wishes to withdraw from my office as Arbitrator to the matters in dispute;

(d) in accordance with clause 15(1)(b) of the Arbitration Act (Chapter 49) Revised Edition 2012 (2010), my mandate as an Arbitrator is hereby terminated."

9. Following the withdrawal of the Arbitrator, the 1st Respondent wrote a letter dated 26th October 2016, to the Interested party to appoint a replacement of the Arbitrator QS. Mwaura in terms of Section 16(1) of the Arbitration Act 1995. However, before the Arbitrator was appointed, the Applicant also wrote to the Interested party, a letter dated 27th October 2016 objecting to the appointment of a replacement of the Arbitrator on the grounds that:-

(a) *There was no dispute or difference that has been declared by Steg Consultants acting for Dina Builders Ltd;*

(b) The West Park Properties Limited had not been notified of any dispute or differences with Dina Builders Ltd as required by Article 45(1) of the agreement between the parties dated 28th June 2016;

(c) Dina Builders Ltd had not made any attempt in the first instance to amicably settle such dispute it may have with or without the assistance of third parties contrary to the mandatory requirement under Article 45(4) of the agreement;

(d) According to West Park Properties Limited reading of Article 45(1) of the agreement, if any dispute cannot be amicably settled between the parties to the agreement, it ought to be referred to the arbitration and final decision of a person to be agreed upon between the parties. That no attempt had been made to pursue this route;

(e) it is only when the parties fail to agree on the person to be appointed as an arbitrator to hear and determine the dispute that the Arbitrator is appointed by the Chairman of Architectural Association of Kenya on behalf of the parties.

10. However the 2nd Respondent was appointed and the Applicant argues that the Interested party appointed the 2nd Respondent herein, in total disregard of the input and the letter dated 27th October 2016, it wrote advising the interested party that it was premature to appoint an

Arbitrator, as the parties to the dispute were supposed to commence the Arbitration process afresh including an attempt to resolve the dispute amicably before appointment of a replacement of the Arbitrator. However, the interested party did not respond to the letter objecting to the appointment of the replacement of the Arbitrator and proceeded to appoint the 2nd Respondent QS. Christopher Kihara vide a letter dated 7th November 2016.

11. As a result on 29th November 2016, the Applicant filed a notice of objection under Section 5(1) of the Arbitration Act 1995 and requested that the same be heard as a preliminary issue to be determined at the earliest basically as to whether the claimant had complied with the Arbitration agreement between the parties. The Applicant relied on the same grounds he had listed in the letter written to the interested party on the 27th October 2016 objecting to the appointment of an Arbitrator to replace QS Charles Mwaura. The Applicant further argued that Section 16 of the Arbitration Act upon which the Claimant had relied on to seek for replacement of the Arbitrator does not provide for the same but makes provision for a substitute Arbitrator to be appointed in accordance with the procedure applicable to the appointment of an Arbitrator to be replaced.

12. On 30th November 2016, the 2nd Respondent held the first preliminary meeting which was attended by both parties and in which the parties agreed by consent inter alia that they would attempt amicable settlement at any stage of the reference. Consequently, the Arbitration proceedings were stood over to afford opportunity to the parties to negotiate their dispute and report to the tribunal on 28th February 2017 at 2.30pm. The Applicant's notice of preliminary objection was stood over. It suffices to note that on 22nd June 2017 the Applicant filed a statement of defence running into 59 paragraphs and seeking for an accumulative five (5) prayers as therein stated.

13. Further evidence from the email dated 7th May 2018 from the 2nd Respondent to the parties indicates that, the 2nd Respondent held a meeting with the parties following a request by the claimants vide an email dated 20th April 2018, to seek the Arbitrator's wisdom (on some issues and agree on dates). Mr. M. Njomo represented the Applicant at this meeting and M.P. Kisia appeared for the claimant. It is evident that Njomo raised the issue of preliminary notice of objection filed on 29th November 2016 which touched on the jurisdiction of the Arbitral Tribunal. After hearing both parties, directions were given that, the parties will file their respective responses and submissions on the same and the Arbitrator will give its ruling on 23rd May 2018 at 3.00pm. The matter was fixed for the following day on 28th May 2018 starting from 9.00am.

14. It does appear that before the ruling was delivered, the parties engaged into correspondence as evidenced by a letter dated 9th May 2018 from QS. Kisia on behalf of the claimant and an email of the same date from Richard Kamotho on behalf of the Respondent. I did note that from the said email, the Respondent indicated that they were dissatisfied with order number (d) in which the Arbitrator had indicated that he would give his ruling on 23rd May 2018 and order number (e) where the hearing was to commence the following day. The Respondents were of the view that the hearing needed to be deferred pending the determination of the preliminary objection and that they were apprehensive that the preliminary objection would definitely be dismissed if the hearing was to proceed.

15. On 11th May 2018, the 2nd Respondent wrote to the parties in response to their letters and indicated that the hearing on the 24th May 2018 would either be on the preliminary objection should the Respondents application succeed or the hearing of the substantive suit should the application fail. The documents provided indicate that on 21st May 2018 the Tribunal commenced its proceedings at 3.30pm where the parties were heard on the submissions on the preliminary objection and the Tribunal adjourned its proceedings to the 24th May 2018. On 23rd May 2018, the 2nd Respondent delivered its ruling on the Respondent's preliminary objection dated 29th November 2016 and held that the Respondent's application to prosecute the preliminary objection had no merit and disallowed it.

16. Apparently after the ruling, the Applicant's Counsel applied for adjournment of the hearing of the suit which was scheduled to take place the following day on the 24th May 2018 on the grounds of unavailability of witnesses. At the same time, the Applicant sought to establish whether its notice of motion dated 23rd May 2016 seeking for the 2nd Respondent to provide the extent of the peremptory order would be heard and ruling delivered before hearing of the main suit. That application dated 23rd May 2016 was opposed by the claimants on the ground that the Arbitrator was functus officio by dint of Section 32(6) and 32(A) of the Arbitration Act 1995. The Arbitrator upheld the objection.

17. Subsequently, the Applicant filed another notice of motion application dated 24th May 2018, praying for orders inter alia that the hearing scheduled takes place on 24th May 2018 be adjourned and the Honourable arbitrator be pleased to strike the claimant's witness statement No. 2 dated 16th October 2017 and filed on 17th October 2017. The parties continued to exchange correspondence. However, the record indicates that hearing of the main suit commenced on 24th May 2018. The coram of that date indicates that, the Learned Counsel Richard Kamotho appeared for the Respondent in the proceedings and the QS. Kisia appeared for the Claimant.

18. On 28th May 2018, the 2nd Respondent wrote to the parties and from the reading of the email, it is indicated that the Applicant's application for adjournment of the hearing scheduled for 24th May 2018, was disallowed by the Tribunal the previous evening. It is also evident that, before the hearing commenced, the Applicant's Counsel Mr. Kamotho informed the Tribunal that there was an application to be filed to adjourn the hearing on the ground that, he had a flue. It does appear that the Counsel was only given one hour to see a doctor. It is also evident that the parties were engaged in what the 2nd Respondent referred to "serious counter arguments" as to whether the hearing should proceed or not and a middle ground was arrived at that, the matter be adjourned to 30th May 2018 on condition the Applicant paid for the costs of that date.

19. On 29th May 2018, the Applicant filed written statement of the reasons for challenge to the Arbitral Tribunal seeking to have the 2nd Respondent to withdraw from office as an Arbitrator in this matter. Be that as it were, the record indicates that on 30th May 2018, the proceedings commenced with the parties represented by their respective representatives as on 24th May 2018.

20. However, it does appear that on the same date, at 10.43am, the 2nd Respondent send an email to the representatives of the parties in

response to the Applicant's written statement for him to withdraw from the proceedings in which he stated as follows:-

> *"I acknowledge receipt of the Respondent's written statement and I dare say the Respondent is entitled to take whatever action he deems fit. But as the arbitrator, I do not accept that there is any substance in the Respondent's accusations. I therefore do not intend to stay the proceedings under Section 24(3)AA 1996 whilst the Respondent made any or his application to the court. The Claimant has disagreed with the challenge. In the alternative, the Reference to continue since the hearing is for today, as agreed by the parties and the Respondent will be ignoring my direction at his peril."*

20. The claimant's representative QS Kisia in response to this email addressed the 2nd Respondent complaining inter alia that the Respondent was inclined to suffocate the arbitration and that it was frustrating for the Applicant to file applications at every sitting in an attempt to interfere with the expeditious disposal of the dispute. He termed the Applicant's written statement for withdrawal of the 2nd Respondent as frivolous and that it does not amount to an application.

21. The Applicant applied to have the Arbitrator recuse himself on the grounds of bias. However, the claimant's Counsel responded to the allegation by arguing that the Tribunal should be accorded the dignity it requires.

22. Be that as it were, the parties' representatives then agreed that the Respondents statements for withdrawal of the Arbitrator from the office be filed and served by 11th June 2018. The claimant filed and served a reply by 18th June 2018. The matter was highlighted on 22nd June 2018 at 2.30pm.

23. Apparently that was not done. The Applicant then moved to court and filed this subject application on 20th June 2018 before the dates that had been given in the direction by the Tribunal. In a nutshell, the grounds upon which the Applicant seeks for orders herein are that;

(a) *the 2nd Respondent lacks impartiality and independence; and*

(b) capacity to hearing and determine the matter as his skill and competence is not known;

(c) he has shown open bias, hatred and ill will against the Applicant;

(d) he has failed to give the Applicant an opportunity to present its case;

(e) he has used a language without dignity in the determination of the matter; and

(f) that the procedure adapted in his appointment was in breach of the contract dated 28th June 2014.

24. All these grounds have been refuted by the Respondent. I have considered the arguments of the parties and shall now consider the prayers in the application. The first prayer seeking for stay of further proceedings before the 2nd Respondent has been overtaken by events in view of the fact that it was being sought for pending the hearing and determination of this application. The second prayer seeks that the court uphold the challenge filed on 29th May 2018 before the 2nd Respondent and remove the 2nd Respondent.

25. First and foremost, it is clear that the Applicant moved to court before fully complying with the directors given by the Arbitrator. That the subject matter be heard before the Arbitrator in his office on 22nd June 2018. It is therefore not clear why the Applicant did not allow the 2nd Respondent to pronounce himself on the issue before moving the court. Secondly, from the document filed (at page 295 of the Applicant's documents), what was filed before the Tribunal is referred to as written statement of the reasons for the challenge to the Arbitral Tribunal and seeks to have the Honourable Arbitrator Mr. Christopher K. Kihara withdraw from office under Section 14(2) of the Arbitration Act No. 4 of 1995.

26. The provisions of that section states that a written statement of the reasons for the challenge shall be sent to the Arbitral Tribunal and unless the Arbitrator who is being challenged withdraws from the office, or the party agrees to the challenge, the arbitral tribunal shall decide on the challenge. It therefore follows that the Arbitral Tribunal has jurisdiction to deal with the challenge first and therefore the Applicant should have allowed the Tribunal to first deal with the challenge first. Indeed, from the directions given, the Arbitrator clearly gave the parties a liberty to apply. It does therefore appear that the Applicant moved to the court prematurely.

27. This position is supported by the provisions of Section 14(3) whereby if the party raising a challenge under Section 14(2) is not successful, the party may within thirty (30) days after receiving notice of the decision rejecting the challenge, apply to the High court to determine the matter. I note the application is brought under Section 14(3) but there is no evidence herein that the Applicant complied with the provisions of Section 14(2) before invoking the provisions of Section 14(3).

28. Be that as it were, the Applicant is also relying on the provisions of Section 15(2) where a party may apply to the High court to decide on the termination of the mandate of the Arbitrator, where such mandate is terminated on the ground that the Arbitrator is unable to perform the functions of his office for or for any other reasons fails to conduct the proceedings properly and with reasonable dispatch or withdraws from his office or the parties agree in writing to the termination of his mandate. These provisions presupposes that there is failure by the Arbitrator or impossibility by the Arbitrator to act.

29. Considering the grounds relied on in this application and taking into account that the matter is still ongoing, the only ground that the Applicant can be relying on is the inability of the 2nd Respondent to conduct the proceedings properly and with reasonable dispatch. This ground is not evidently supported by the material placed before the court. Therefore I find that the prayer seeking for the court to uphold the

challenge dated 29th May 2019 is premature and unsupported and I decline to grant it.

30. I now move to the prayer seeking for the removal of the 2nd Respondent. The provisions that govern the removal or challenge of an Arbitrator are provided for under Section 13 of the Arbitration Act. Sub section (3) and (4) sates as follows:-

> *"(3) an arbitrator may be challenged only if circumstances exist that give rise to justifiable rights as to his impartiality and independence or if he does not possess qualifications agreed to by the parties;*
>
> *(4) a party may challenge an arbitrator appointed by him or in whose appointment that party has participated only for reasons which he became aware of after the appointment."*

31. Further, the provisions of Section 14 of the Arbitration Act requires that a party who wishes to challenge Arbitration, shall within fifteen (15) days after becoming aware of the composition of the tribunal or after becoming aware of any circumstances referred to in Section 13, sent the reasons for the challenge to the Arbitral tribunal. The provisions give the power to the Arbitral Tribunal to decide on the challenge. Similarly Section 16 of the Arbitration Act states that, where the mandate of the Arbitrator is terminated under Section 14 and 15 of the Arbitration Act, a substituted Arbitrator shall be appointed in accordance with the procedure that was applicable to the appointment of the Arbitrator being replaced.

32. The Applicant herein has faulted the manner in which the 2nd Respondent has conducted the proceedings herein. The provisions of part (IV) deals with the conduct of Arbitral proceedings in particular Section 19 states that the parties shall be treated with equality and each party shall be given full opportunity to present its case. It however suffices to note that under Section 20(3), the Arbitral Tribunal is empowered to conduct the Arbitration in a manner it considers appropriate especially where the parties fail to agree on the procedure to be followed. The power given to the Tribunal includes the power to determine the admissibility, relevance, materiality and weight of the evidence. First and foremost, the provisions of Article 159(2) of the Constitution stipulates that the courts and tribunals should while exercising judicial authority be guided by principles which include inter alia promotion of alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Further, Section 10 of the Arbitration Act, No. 4 of 1995, expressly prohibits the intervention by the courts in matters that are subject of Arbitral process, except as provided for under the Act. Therefore the courts will intervene in arbitral proceedings as a last resort.

33. Secondly, the matter herein has already been heard and determined in relation to the first issue of condemned works. The evidence indicates that, it was heard on four different dates and is awaiting the final decision on the issue. Thirdly, any party in an arbitration process who is not satisfied by an arbitral award rendered by the Tribunal is empowered under Section 35(2) to apply for setting aside of the final award. Among the grounds for the same is that the Arbitral award deals with matters not falling within the terms reference or contains decisions on matters beyond the scope of the reference. Therefore, even if the court does not grant the prayers sought at this stage, the Applicant will not suffer prejudice as it can raise concerns thereafter if the decision made is not in their favour.

34. Finally, the Applicant has argued that the appointment of the 2nd Respondent did not comply with the arbitral clause under 45 of the contract between the parties. The provisions of that clause states that; in-case of a dispute or difference between the employer or the architect and the contractor the following shall take place:-

> (a) *Such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration or to concur in the appointment of the arbitrator within thirty (30) days of the notice;*
>
> *(b) No arbitration proceedings shall commence where notice of a dispute or difference has not been given by the applying party within ninety days of concurrence or discovery of the matter of issue giving rise to the dispute;*
>
> *(c) Notwithstanding the notice, the arbitration shall not commence unless an attempt has in the first instance been made by the parties to settle the dispute or difference amicably with or without the assistance of a third party.*

35. I note that the process started vide a letter herein dated 21st June 2016, written by the Claimant/Respondent to the Respondent/Applicant in this matter giving notice of referral of the dispute to Arbitration. In my considered opinion, this letter which is not disputed by the Respondent and which clearly states that the Applicants were being invited to concur to the submission of the dispute to arbitration, complies with the requirement of the sub-clause above. It is also supported by the analysis and the finding of QS. Mwaura that the employer sent a default notice to the contractor on 25th May 2016, and terminated the contract on 11th June 2016. By this letter of 21st June 2016, the contractor notified the employer of the default and wrongful termination.

36. It is noteworthy that, the only challenge against the QS. Mwaura related to sub-clause 2 is that the arbitral proceedings had commenced before the entry of the ninety (90) days after the service of the notice of the dispute or difference. QS. Mwaura was clear that the proceedings should not have commenced before 19th September 2016. The sub-clause on amicable settlement between the parties seemed to have been a subject of argument between the parties in the meeting held on 30th November 2016 referred to herein.

37. Finally, it suffices to note the following issues; that though the 2nd Respondent herein was appointed on 7th November 2016, the proceedings in this matter did not commence until 21st May 2018 which was long after the 19th September 2016. Secondly, this matter is already part heard, the Applicant has participated in the proceedings all along. In my considered opinion, the Applicant should have moved the court immediately it felt aggrieved within the time set and before proceedings commenced, but proceeded to file another challenge before the arbitrator on 29th May 2018. Be that as it were, among the grounds for setting aside of an arbitral award is that the party making the application was not given proper notice of appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case.

38. Be that as it were, I do find that the language used by the arbitrator in his comments upon receipt of the last challenge was dishonourable and quickly leads to the conclusion that the Applicant has become irritant to him. It gives an impression that the Applicant may not get a fair trial.

39. The upshot of all this is that, I allow the application and order that the costs of this application shall abide the outcome of the arbitral proceedings.

40. Those are the orders of the court.

Dated, delivered and signed in an open court this 23rd day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Kamotho for the Applicant

Mr. Kakai holding brief for Ms. Lumalas for the 1st Respondent

No appearance for the 2nd Respondent

Mr. Oketch for Mr. Aloo for the interested party

Dennis ----------Court Assistant