REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 114 OF 1990

PATRICK MUTURI..PLAINTIFF/APPLICANT

-VS-

KENINDIA ASSURANCE COMPANY LIMITED...........DEFENDANT

RULING

1. Before me is the Motion dated 23rd July 2019 brought pursuant to **Article 159(2) and (3) of the Constitution of Kenya and Arbitration Act, Act No. 4 of 1995**. The applicant seeks among other orders that the court drops the arbitrator on record Dr. Kariuki Muigua.

2. The grounds upon which the application is premised are set out in the application and supporting affidavit of Patrick Muturi sworn on 23rd July 2019. It is contended that the applicant's health has deteriorated resulting to exhaustion of his financial resources on hospital bills. That the arbitrator on record and others are charging too high an amount. That the court should take judicial notice that the applicant has also dropped his advocates on record because he could not afford to pay legal and court attendance fees

3. The application was opposed by the respondent vide their grounds of opposition dated 6/11/2019 in which it was argued; that the application lacks merit as it is not based on any of the grounds recognized under the Arbitration Act. The orders sought by the plaintiff will occasion prejudice to them as they have already paid its portion in 2016, filed the required documents and made several appearances before the arbitrator. That it is the applicant who has failed to comply with the arbitrator's directions.

ANALYSIS AND DETERMINATION

4. To use the Applicant's own words, the court is called upon ***to drop [sic] the arbitrator***. But looking at his application, it is essentially a challenge to arbitrator.

5. Under section 13(4) of the Arbitration Act: -

> **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**

6. Such application and reasons thereof should satisfy the threshold stated in section 13(3) of the Arbitration Act. However, I see a dilemma: the challenge ought to be raised first with the arbitrator. See section 14(2) of the Arbitration Act that: -

> **2) 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.**

7. And it is only: -

> **14(3) 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.**

Only such competent challenge will this court entertain and give orders pursuant to section 14(5) of the Act which provides that: -

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

8. This procedure is deliberately tailored to prevent interference with the arbitral process by parties through improper invocation of the jurisdiction of the court. Court intervention in matters governed by the Arbitration Act is only as provided in the Act. See section 10 of the Act.

10. Extent of court intervention Except as provided in this Act, no court shall intervene in matters governed by this Act.

9. It should be noted also that the said procedure entitles the arbitrator sought to be removed to appear and be heard before the application emanating from his rejection of the challenge is heard and determined. See section 14(4) below:

(4) 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.

10. The procedure adopted by the Applicant circumvents all the noble safeguards of the Arbitration Act as well as the intention of the parties when they declared that their dispute shall be heard through arbitration. In sum, the application before me is incompetent.

11. Be that as it may, I am aware that the application is expressed to be brought *inter alia* under article 159(2)(d) of the Constitution which frowns upon undue reliance on technicalities in determining cases. However, the requirement that the challenge should be raised first before the arbitrator is not a mere technicality but a substantial matter in arbitration law which acts as a necessary safeguard of the arbitral process- a process that is largely consensual and one that is initiated by the parties themselves.

12. In the upshot, I dismiss the application with the advice that the challenge be lodged with the arbitrator immediately for his determination thereof. It is so ordered.

Dated, signed and delivered in open Court this 16th day of December, 2019

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F. GIKONYO

JUDGE

In presence of

Applicant – present

Respondent – absent

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F. GIKONYO

JUDGE