REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERICIAL AND TAX DIVISION

MISC CIVIL SUIT NO. 382 OF 2014

IN THE MATTER OF THE ARBITRATION ACT

AND THE ARBITRATION RULES 1997

BETWEEN:

GEORGE NDUATI MUNENE.....……..….APPLICANT

AND

MENTOR GROUP LIMITED ……..…...…… 1ST RESPONDENT

MAISIBA SAMSON KIRIOBA...…… 2ND RESPONDENT

RULING

1. The Application before the Court was brought under a Certificate of Urgency filed on 25th August 2014. It is brought by Chamber Summons under the ***Judicature Act Cap 8 Laws of Kenya*** and the ***High Court (Practice and Procedure Rules (Part 1 rule 3)***. It seeks the following orders hearing during the August vacation. The Substantive Application is brought under "***Article 50(1), 159, 165(3)(d)(ii), (6) and (7)*** of the ***Constitution of Kenya***, the ***Judicature Act Cap 8 Laws of Kenya***, the ***High Court (Practice and Procedure Rules (Part 1 rule 3), Section 14 and 15(1) and (2) of the Arbitration Act 1995*** (as amended) ***Rule 11 of the Arbitration Rules 1997, Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010*** *and the Inherent Jurisdiction of the Court*)." The Notice of Motion seeks the following Orders:

> *"1. THAT on the grounds set out in the Certificate of Urgency…. This application be certified urgent, be heart at the earliest possible moment…"*
>
> 2. *THAT this Application be heard ex parte in the first instance*
>
> 3. *THAT pending the hearing and determination of this Application, this Honourable be pleased to stay further proceedings befroe the Sole Arbitrator, Mr Maisiba Samson Kirioba in the matter of an Arbitration between George Nduati Munene and Mentor Group Limited.*
>
> 4. *THAT the mandate of Sole Arbitrator, Mr Maisiba,Samson Kirioba be terminated in respect of the Arbitral proceedings between George Nduati Munene and Mentor Group Limited.*
>
> 5. *THAT this Honourable Court be pleased to direct the parties to nominate and agree on the identity of a new Arbitrator or agree on an alternative mode of dispute resolution within such period as the Court shall specify.*
>
> 6. *THAT failing such agreement, the Honourable Court be pleased to direct that a new Arbitrator be appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) in accordance with Joint Venture Agreement dated 24th November , 2005 and letter dated 28th March, 2013 from the parties Advocates.*
>
> 7. *That the costs of this Application be provided for.".*

2. The Grounds set out in the Application are numerous and appear on the face of the Application. They can usefully be summarised thus:

(a) THAT an arbitrator is under an obligation to conduct the proceedings competently, reasonably and in accordance with the rules of natural justice;

(b) The arbitrator must remain diligent throughout the proceedings

(c) The Sole Arbitrator (Mr Maisiba Samson Kirioba) has by his words and conduct demonstrated a lack of competence and/or capacity and impartiality in the conduct of the Arbitral proceedings before him.

(d) The hearing of the substantive arbitration was scheduled to commence on 27th August 2014 but no proper arrangements had been made for recording of objective, proper and complete proceedings.

(e) The Arbitrator has failed to keep and then reproduce a proper complete and accurate record of the day to day proceedings of the Arbitation. As a consequence there is a risk that the proceedings will be haphazard and disorganised and inadequate to convey the full meaning and purport of the witnesses and in particular the Applicant's 3 witnesses;

(f) The arrangement now being suggested by the Arbitrator that each Party make its own recording is unsatisfactory for such a "hotly contested" dispute.

(g) The proposed arrangement runs the risk that:

(i) There will be several conflicting versions of the proceedings

(ii) There will be no single authentic and authoritative version of the proceedings

(iii) The reasons given for any decision and/or award would lack legitimacy as they would vary according to which version was used

(iv) The absence of an authentic record would impinge on either party's ability to take further proceedings and/or the taxation of costs;

(h) The grounds also complain about conduct so far, in particular that the Arbitrator has listed the matter for hearing but the discovery process is not complete and the 1st Respondent's witness would not be available until some time in October (nearly 3 months later).

(i) The Arbitrator has suggested he would decide the matter on the documents only, that is, without witnesses and without complete disclosure. That would mean that the proceedings would be unfair.

(j) That the Court has supervisory powers over the arbitral tribunal including powers under the Act and the inherent powers of the Court.

(k) The Applicant would suffer irreparable harm if the arbitration is not stayed in terms of cost and time

(l) The interests of justice favour the arbitral proceedings being held in abeyance pending hearing and determination of the challenge mounted against the Arbitrator

8. The Application was filed on 25th August and on that day it came before Hon F. Gikonyo J who did not certified it as urgent per se but did order:

(a) THAT the application intended to be heard during Vacation touching on matter be served in person to the Arbitrator to put a rejoinder before any order could be issued herein. The Matter was <u>not</u> certified as urgent.

(b) THAT the matter be heard on 8th September, 2014 by the vacation duty Judge…"

9. The Application is supported by the Affidavit of of the Applicant and Ms Elizabeth Ngonde his Advocate with conduct of the proceedings. They Exhibit the documents and set out the facts and matters that lead them to their stated concerns.

10. By way of factual background it is said the the Applciant and the 1st Respondent entered into a Joint Venture Agreement dated 24th November 2005, they were intending to develop a parcel of land. The Applicant's contribution was the land which is known as LR No 48957/121 and the 1st Respondent's contribution was its influence, equity, expertise and network. The profits were to be shared equally. The Parties set up a company, Easthaven Development Company Limited" and developed the property so that it had a complex known as Brooklyn Springs Apartments comprising 27 housing units under the joint venture agreeement.

11. Unfortunately there was a dispute. The Applicant states that the dispute arose in relation to the appointment/employment of consultants and the sale of the units together with a lack of transparency of the parties' respective shares. The Joint Venture agreement provided for dispute resolution by arbitration and with the consent of the Parties the Chartered Institute of Arbitrators – Kenya Chapter appointed the 2nd Respondent to determine the dispute.

12. It is clear from the Application that the Applicant had concerns about the conduct of the Arbitration and of the Arbitrator in particular. That brought Matters to a head and the Applicant says he has now lost faith in the arbitral process. The Complaints are in summary that:

(1) The Sole Arbitrator, has demonstrated a lack of competence and/or capacity

(2) The Arbitrator has failed to conduct himself impartially

(3) The Arbitrator has failed and/or been unable to keep a proper record of the proceedings.

13. The Second Respondent did not file a response to the Application, however, the First Respondent did. It is sworn by its Managing Director, Daniel Ojijo. the Application is opposed. It is firstly opposed for being incompetent for being lodged out of time and specifically Sections (2) and (3) of the Arbitration Act. It is also stated that the challenge was made and the Arbitrator's Decision is contained in order for Directions No. 18 given on 15th August 2014. The Challenge was refused from being out of time. The Replying Affidavit sets out the text of the Order for Direction, which is unnecessary as the Order itself is exhibited. It shows that the Arbitrator records that he received a challenge letter dated 25th July 2014 which was complaining of the contents of Order No 15 issued on 4th June 2014 which was received on 10th June 2014 by the Advocates for the challenger. The Order records clearly that under Section 14 of the Arbitration Act 1995 there is a window of challenge running for 15 days after notification of the circumstances. That window expired on 25th June 2014. Therefore the challenge was deemed to be out of time. The Arbitrator also asked the Parties to follow the proper procedure and reminded them that there was a decision that the hearing would commence on 27th and 28th August 2014.

14. The Replying Affidavit also states that the application is mala fides and is brought one year into the proceedings only as a device to scuttle the arbitration without any legal or factual justification. It is said that although the arbitration proceedings have been going on since 2013, it is only 3 days before the Hearing that the Application is filed. The Replying Affidavit also exhibits documents it says are comprehensive. The Supporting Affidavits also contain voluminous Exhibits in particular Orders for Direction and the Arbitration Agreement. The Replying Affidavit deals with each allegation and responds to it as follows:

(a) In relation to the allegation that the Arbitrator failed to maintain a record of proceedings: The allegation is untrue. The Arbitrator has kept a record of all 18 directions. Each of the Orders was sent to the Parties and no objection was raised at the time.

(b) The Applicant has not pointed to any of the documents and indentifying the specific discrepancies complained of

(c) The Claimant has not demonstrated how he will be prejudiced by the requirement that each party obtain its own record of proceeding. Advocates are required to take their own notes in any event.

(d) The Applicant has not demonstrated any legal requirement that the arbitrator has breached. Also that the Applicant has not demonstrated any valid objection that warrants the Arbitrator standing down.

(e) That the allegation that the Arbitrator would not be able to make arrangements to secure proper, objective and reliable proceedings is speculative and unfounded. The Applicant has not put forward any reasonable or factual basis for challenging the Arbitrator's competence.

(f) The issue of discovery/disclosure has not been raised before the tribunal.

15. The Replying Affidavit goes on to criticise the conduct of the Applicant for the application which is said to be scandalous and vexation. The Deponent also specifically challenged the suggestion that the hearing date was fixed to suit him. He says he had to re-schedule his own commitments to fit in with the hearing. The delay to the Arbitration is of prejudice to the Respondent but not to the Applicant.

16. The Parties were directed to file Written Submissions. The Applicant in particular was to serve his as long ago as 31st July 2015. He did not do so. The Direction was repeated on 7th October 2015, again it was not complied with and again the Applicant was directed to file his written submissions in December 2015. In the event they were not filed and served until 19th and 23rd February 2016. The Court heard the Parties highlighting on 16th March 2016.

17. The Applicant's Submissions rely on the Court having jurisdiction under ***Sections 14 and15*** of the ***Arbitration Act*** and***Articles 50, 159 and 165(3)(d)(ii)*** of the Constitution of Kenya. The Applicant states that he seeks the removal of the Arbitrator on the grounds that he has lost confidence in him due to his lack of partiality and the summary procedure he threatened. The Applicant also complains that the Arbitrator was lenient to the Respondent. In that context, it is difficult to understand how requiring a witness to defer medical treatment can be considered lenient.

18. The Parties have filed voluminous Lists of Authorities and the Applicant has filed Submissions. The Applicant filed his List of Authorities on 2nd September 2014. The First Respondent also filed a List of Authorities on 28th July 2015, however, it was not placed on the File by the Registry Staff and was subsequently discovered on 7th September 2017 in a different file, namely ***HCC 361 of 2015.*** The reason for that is unclear however it is before the Court now. The Applicant filed his Written Submissions on 23rd February in time for the date set for Highlighting on 16th March 2016. The Respondent did not file theirs until 1st April 2016, in other words after a date for Ruling had been set on the basis that none had been filed. Nevertheless they are before the Court.

19. The Second Respondent is a professional man. He was appointed by the Chairman of the Institute of Chartered Arbitrators. In his Letter of Appointment and the Agreement with the Parties it is clear that he is an arbitrator of 10 years standing. Therefore, each allegation must be looked at carefully in the interests of fairness to all three parties.

20. Dealing with the first complaint that the Arbitrator required the Parties to arrange for their own record of the proceedings. The Applicant has not demonstrated why that is unacceptable or why he is prejudiced by that direction. The Court takes judicial notice of the practice that Parties usually make their own arrangements for the stenographic and/or audio recording and transcription of arbitral proceedings. Were the Arbitrator to arrange such a process under the Agreement the Parties would be liable to meet the cost so no prejudice has been occasioned.

21. Looking first at the complaint in relation to the date of the hearing. Order for Direction No 16 is exhibited. That Order together with Order 15 sets out clearly what transpired when the hearing date was fixed. The Claimant was seeking an early date. The Respondent wanted a later date due to some medical treatment needed by one of its witnesses. The Parties Advocates agreed the dates in August and that is what was ordered. For the Applicant's Advocate to allege at paragraph 33 that Order 16 does not record the details is disingenuous when she knows full well that the details were included in order 15. By now suggesting that, such was somehow, an underhand act by the Arbitrator demonstrates bad faith on the part of the Applicant. It is said that the Order for Directions do not constitute a complete and accurate record of proceedings. That is not surprising. That is not the function of an order, its function is to tell the parties what was decided and for what reasons. If a Party is concerned about record keeping, in particular, where they claim to distrust the Arbitrator, surely an opportunity to keep their own records would be welcome.

22. The allegations that the Arbitrator was meeting or wishing to meet the Parties away from their Advocates is not substantiated by specifics. Vague allegations about "*a gentleman in the office*" and requesting Parties to attend proceedings create suspicion. The Applicant must then substantiate those suspicions. In relation to the person in the office, who was that person, what was his name? what was the time and place of the event. Was Mr Nyachotti also present when the "discovery" was made or did he make his comment at some other time? The Applicant's Advocate says that on 17th June 2014 she accused the Arbitrator of being bribed. That Order deals with the challenge made on 25th July 2014, not the events of 17th June. However, Counsel for the Respondent is recorded as having complaint that having been dissatisfied with Order No 17 the Claimant's Advocates then raised issues of lack of impartiality in decision making when no ruling or interim award had been made. Order for Direction No 16 deals with the Preliminary Meeting held on 17th June 2014. As the proceedings on that day related to fixing a hearing date and an early date was fixed. That was the preference of the Applicant. In the circumstances, it is unclear why the Applicant's Advocate would accuse the Arbitrator of accepting a bribe when the decision was in the favour of her client. There is no correspondence where the Applicant, his Advocates or anyone else on his behalf complained in writing either to the Arbitrator, the Respondent or the Chairman of the Chartered Institute. Given the seriousness of the allegation, taken with that lack of action, the allegation seems implausible. The evidence was not tested by cross-examination so all the Court has before it is the evidence as filed.

23. Neither the Applicant nor his three Advocates have produced any notes or contemporaneous records taken and kept during the proceedings to demonstrate the alleged inconsistencies and shortcomings. The Parties agreed to an Arbitration. The Arbitral process is often preferred because it is different from legal proceedings before a Court. In the circumstances, where it is the expectation of one party that the Tribunal should mimic a court, the basis for that must be set out, in particular when a Party has consented to the process. In his Letter of Acceptance of Appointment the Sole Arbitrator states that his terms of engagement and remuneration will be in accordance with the ***Arbitration Act 1995*** and the ***Arbitration Rules 1998***. Neither the Applicant nor his Advocate has set out with direct reference to the Act and the Rules how the Arbitrator his breached his obligations, save for in submissions.

24. In relation to the threats to adopt a summary procedure, that is contradicted by The Agreement on Appointment Clause 1(i) which states clearly that the Arbitrator will "*hear evidence*".

25. The Court has considered the Submissions and Authorities carefully. The Applicant makes serious allegations against the Second Respondent, in particular that he is incompetent, unable to conduct proceedings, biased and possibly corrupt. Before the Court looks at whether there is any merit those allegations the Court must consider whether its jurisdiction is properly engaged. The Applicant's Submissions accept that the process of arbitration is intended to be final and binding. That is provided for in ***Section 10 of the Arbitration Act 1995*** as amended. It states that a Court cannot intervene except as provided for in the Act. The Act provides for intervention in very limited circumstances.

26. Those circumstances and the procedure are provided for in Section 13(3) and 14(2) of the Arbitration Act (See ***Mumias Sugar vs Mumias Outgrowers***)

27. From the above, it is clear that the Applicant must first take up his challenge with the Arbitrator within 15 days of the event complained of. He did not do so. On those grounds the Arbitrator deemed the challenge unsuccessful. It is correct that the Applicant then made his application to the Court within 30 days but in any event that challenge must be substantiated and within the Court's jurisdiction.

28. In relation to the complaint that the parties were directed to keep their own records, that direction was given on 4th June 2014. There is no evidence before the Court that it was challenged at the time. In any event that procedure is a well known process in arbitral proceedings. The Applicant has not produced any records to demonstrate a discrepancy between the records taken and the orders for Directions made. In relation to each allegation there is no independent evidence demonstrating the complaints made by the Applicant. The Applicant's evidence in support is in the main given by the Advocate with conduct both in the Arbitration and before this Court.

29. In relation to each of the allegations made against the Second Respondent, the Applicant must also demonstrate what prejudice has been suffered. In relation to the alleged absence of discovery and disclosure, the record shows clearly that it was the Applicant's Advocates who were pushing for an early date. If they had not realised that they wished to inspect documents and/or not applied for such a direction before the Hearing date, that is a matter of representation and not a matter affecting the conduct of the arbitration.

30. The Court must also evaluate the evidential value of the evidence placed before it for consideration. The Application is supported by two Affidavits, the Applicant's and the Advocate's. The Advocate has conduct of both matters. The Advocates Practice Rules, Rule 10 prohibits an Advocate from giving evidence in a matter in which he/she is acting. Nevertheless the assertions made in the Affidavit are not supported by independent evidence which would have been available had the same Advocate complied with the direction for recording the proceedings. Therefore, the Court must question the absence of those records and draw the appropriate conclusions. which are that, had they been beneficial to the Applicant's case they should and would have been produced.

31. In the circumstances and for the reasons set out above, the Application is dismissed with costs. Applicant to pay the costs of the First and Second Respondents. Costs to be taxed if not agreed. Leave for taxation before the matter is finalised is granted.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Dated this the 2nd day of July 2018

DELIVERED and SIGNED and DATED this the 2nd day of July 2018

In the Presence of

Court Assistant: Wangeci

Applicant: Ms Elizabeth Ngonde

First Respondent: Ms Nyabugu Holding Brief for Mr Nyachotti

Second Respondent: No Appearance