



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 635 OF 2015**

**PAMELA MWIKALI TUTUI.....PLAINTIFF**

**- VERSUS -**

**WANYONYI CHEBUKATI.....1ST DEFENDANT**

**PATRICK OKOTH OCHWA.....2ND DEFENDANT**

**SAMWUEL SHADRACK OUMA.....3RD DEFENDANT**

**JOB JUMA WELOBA.....4TH DEFENDANT**

**ERICK OKUMU OGOLA.....5TH DEFENDANT**

**(All t/a COOTOW & ASSOCIATES ADVOCATES)**

**RULING**

1. **Pamela Mwikali Tutui** (herein after referred to as the plaintiff), filed this case against five defendants all trading as **Cootow & Associates Advocates** (herein after referred to as the defendants).
2. The plaintiff was until her resignation, on **14th June, 2010**, was a partner of the law firm **Cootow & Associates Advocates**. Following her resignation a dispute arose on her entitlement under that partnership.
3. The partnership agreement dated **1st June, 2006**, has an arbitration clause under clause 29 which provides as follows:

*“29: Arbitration*

*“If during the continuance of the Partnership or at any given time afterwards any dispute difference or question shall arise between the Partners or their respective Representatives or between any Partner and the representative of any other Partner the decision of which is not specifically provided for in the agreement being a dispute difference or question touching the Partnership or the account or transactions of the Partnership or its dissolution or winding up or the construction meaning or effect of this agreement or the rights or liabilities of the partners or their representatives under this agreement then such dispute difference or question shall be rendered to the decision of a single arbitrator agreed upon between the parties to the dispute difference or question or failing agreement appointed by the Chairman for the time being of the Law Society of Kenya and be subject to the provisions of the Arbitration Act No. 4 of 1995 or any statutory modification or re-enactment of those Acts for the time being in force”.*

4. The parties were unable to agree on the appointment of an arbitrator. Accordingly, the plaintiff requested the chairman of the **Law Society of Kenya** (LSK) to appoint an arbitrator. The chair of LSK appointed **Okong’o Omogeni** as the sole arbitrator. He accepted that appointment on **10th October, 2012**. It is what followed that appointment that led the plaintiff to file this suit.
5. The plaintiff, by this suit pleaded in her plaint that the defendants obstructed and/or prevented the plaintiff’s attempt to get her dues from the partnership and further frustrated four arbitrators appointments at various times. It is for those reasons that the plaintiff, in the plaint, prayed for the following orders:

*“(a)A declaration that the issue relating to the Partnership between the Plaintiff and the Defendants as set out in the Partnership deed should be determined by an Arbitrator pursuant to clause 29 of the aforesaid deed.*

(b) In the alternative the Honourable court be at liberty to assess and determine the Plaintiff's share of benefit from the Defendant firm.

(c) The Honourable court to order the Defendants to submit to the nominated Arbitrator by the Law Society of Kenya within 30 days or any other reasonable set timelines.

(d) Costs of this suit.

(e) Any other relief the Honourable Court may deem fit to grant in the circumstances of the case.”

6. Defendants by the **Notice of Motion** dated **14th March, 2016** seeks stay of this suit pending determination of the arbitration. That application is based on the grounds that there exists an arbitration clause in the partnership agreement; the plaintiff had commenced arbitration which is pending before **Okong'o Omogeni**; and that this suit is an abuse of court process.

7. The defendants through its advocate, deponed that it was the plaintiff who frustrated the arbitration process by failing to attend before the arbitrator when a date had been agreed and failing to settle the defendants' cost which were awarded by the arbitrator against the plaintiff, when the plaintiff failed to attend.

8. The plaintiff by her replying affidavit deponed that the chair of LSK appointed **Steve Kairo** (as he then was). That the defendant in turn proposed another arbitrator, but parties could not agree. That subsequently, the chair of LSK appointed **Okong'o Omogeni** as the sole arbitrator.

9. I sighted the letter dated **10th October, 2012**, whereby **Okongo Omogeni** accepted the appointment and indeed proceeded to set up the preliminary meeting. What the application before bar and in this suit requires is this court to determine since **Okongo Omogeni** was appointed and accepted the appointment as the sole arbitrator, what the law provides on challenge of the appointment of an arbitrator.

10. The Arbitration Act Cap 49 under section 13 (3) addresses the grounds that can be invoked to challenge an arbitrator. That section provides:

*“an arbitrator may be challenged only if circumstances exists that give rise to justifiable doubts as to his impartiality and independence or if he does not possess qualification agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.”*

11. The procedure to be followed where there is a challenge to the appointment of an arbitrator are set out in **Section 14 (2) of Cap 49**. Under that section, a challenging party is required to set out the challenge to the arbitrator within 15 days of having acknowledged the appointment or becoming aware of circumstances falling within **Section 13 (3) of Cap 49**. If the arbitrator does not withdraw and the other party does not agree to the arbitrators removal the arbitrator can rule on the challenge. If the challenger is unsuccessful, he can, as provided under **section 14 (3) of Cap 49** refer the matter to the High Court. Arbitrators mandate can also be terminated as per **Section 15 (1) of Cap 49** due to failure or impossibility to act. Again, if the other party does not agree on termination of the arbitrators mandate, the challenging party may refer the issue to the High Court.

12. In this case the plaintiff did not follow that set out procedure. It follows that the plaintiff, when an arbitration clause existed, ought not to have filed the present suit. The plaintiff erred to have argued that she filed this suit under **Section 7 of Cap 49** because that section provides that a court may entertain a matter pending arbitration by granting interim orders.

13. There is merit in the defendants application in view of the above discussion.

14. In the end, therefore, this court orders that this suit be and is hereby stayed, pending arbitration proceedings. The defendant is awarded costs of the notice of motion dated **14th March, 2016**.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **19th** day of **July** 2018.

**MARY KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant