REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS CIVIL APPLICATION NO. 374 OF 2013

HON. SENATOR JOHNSTONE MUTHAMA.....APPLICANT

VERSUS

TANATHI WATER SERVICES BOARD.....1ST RESPONDENT

CABINET SECRETARY,

WATER & NATURAL RESOURCES…….....……2ND RESPONDENT

ATTORNEY GENERAL…….……..3RD RESPONDENT

DIRECTIONS

1. On 5th November, 2013 when this matter came before me in the presence of **Dr Khaminwa** for the Applicant and **Miss Maina** who was holding brief for **Mr Bitta** for the Respondents, this Court was informed that the parties had agreed that the Court be at liberty to nominate any judicial officer suitable to convene a meeting and preside over the same.
2. Pursuant to the foregoing on 8th November, 2013, I directed that this matter be heard by way of an Arbitration to be presided over by the Senior Deputy Registrar of this Court **Hon. Reuben Nyakundi**.
3. Subsequently, following the nomination of **Hon. Nyakundi** for appointment as a Judge of this Court, he was substituted by **Hon. Letizia Wachira.**
4. It would appear that when the parties and their respective learned counsel appeared before the Deputy Registrar on 28th February, 2014, the parties were unable to agree on the mode of hearing of the matter and whether such a hearing would be open to the public and the media.
5. Under Article 10(1) of the Constitution:

   The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

   (a) applies or interprets this Constitution;

   (b) enacts, applies or interprets any law; or

   (c) makes or implements public policy decisions.

6. Clause (2) of the said Article, on the other hand provides:

The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability;

and

(d) sustainable development.

7. It cannot be doubted that in determining a legal dispute a Court of law is necessarily applying or interpreting the law hence it is bound by the values and principles of governance one of which is transparency.
8. Article 50(1) of the Constitution on the other hand provides as follows:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

9. As already indicated hereinabove, this Court directed that the dispute herein be determined by way of arbitration. The confusion in my view may have been caused by reference to the process as mediation. According to ***Alternative Dispute Resolution in Northern Carolina,*** Edited by **Jacqueline R. Clare**, mediation is described at page 5 as :

"a structured negotiation conducted with the assistance of a third-party neutral, the mediator. Unlike a judge, a mediator never has decision-making power, his or her role being to help the parties arrive at their own resolution of their differences. Mediation is typically *consensual and confidential*. It can be used to resolve past disputes or to come to agreement on the terms of a future relationship or interaction…The mediation process usually consists of a combination of joint sessions and private caucuses. In joint sessions, the parties and their attorneys present and exchange information and proposals with the assistance of the mediator. In private caucuses the mediator confers with each side individually to elicit information and proposals. In both processes the mediator's objective is to help the parties move toward agreement." [Emphasis mine].

10. It is therefore clear that mediation is more of a private affair in which the mediator is neither applying nor interpreting the law but just facilitating the parties to arrive at their mutual agreement. Mediation, with its confidentiality protections, offers a much more private, low-keyed approach to conflict resolution.
11. Arbitration, on the other hand is described in the said work at page 6 as:

"….like litigation, a form of adjudication. The parties submit evidence and arguments to a third-party neutral, the arbitrator, who decides the dispute and makes an award. As in trial, arbitration is usually a win-or-lose process, though the arbitrator's award can have the incidental effect of facilitating a settlement." [Emphasis mine].

12. At page 132 it is stated:

"Arbitration hearings are scheduled by the court and are held in a courtroom (if available) or in any other public room suitable for conducting judicial proceedings. The hearings are open to the public. The witnesses can be called, but their testimony is usually kept brief. The arbitrator is empowered and authorised to administer oaths and affirmations in arbitration

hearings.. Hearings are to be conducted with decorum, but are more informal than a trial in the sense that the Rules of evidence apply only as a guideline." [Emphasis mine].

13. It is therefore clear that unlike in mediation, arbitral proceedings are, just like in litigation, open to the public and follows a similar procedure to that of litigations but with a more relaxed approach. The nature of the arbitration process therefore encompasses the application and interpretation of the law.
14. Article 50(1) of the Constitution provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

15. This position was restated by the Court of Appeal in **M'kiara Vs. M'ikiandi [1984] KLR 170** where the Court held:

"Section 77(9) of the Constitution states that a court or other authority prescribed by law for the determination of the existence or extent of a civil right or obligation, shall be established by law and shall be independent and impartial; and where the proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing, within a reasonable time. Section 77(10) of the Constitution states that except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public..... The oath administrator, though still a valued respectable member of the community in some areas, is not a court or an adjudicating authority established by law to determine the existence or extent of any civil right or obligation. The respondent in this appeal instituted his proceedings in the High Court and thereafter he and the appellant, were entitled to a fair hearing (and decision) within a reasonable time and this should have taken place in public. If they wanted their dispute resolved by the oath of administrator, they should not have begun or continued it in a court established by law."

16. However, Article 50(8) of the Constitution provides:

This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

17. The circumstances under which a court of law may hear matters in camera was enumerated by the Court of Appeal in **Miller Vs. Miller [1988] KLR 555** where the Court of Appeal expressed itself as follows:

"Subsection 11 of section 77 of the Constitution is an exception to subsection 10 which provides that except with the agreement of all the parties thereto, all proceedings of every court and proceedings for determination of any civil right or obligation before any adjudicating authority shall be in public. Subsection 11 properly construed, has several limbs, each limb independent of the other. Interlocutory proceedings are included in the subsection as an exception to hearing in public. The proceedings in the instant case were interlocutory and the only question is whether the trial judge had the jurisdiction to order for the holding of *in camera* proceedings.....Kenya, unlike England has a written Constitution with a provision for hearing *in camera* in specified circumstances and that is the law which the trial judge cited and relied on. English law, too lays down that the High Court in England may hear cases in private where a public trial would defeat the whole

subject of the action, and in cases affecting lunatics and wards of the Court..... So although the broad principle in England is that English Courts must administer justice in public, the principle is subject to exceptions and those exceptions and the exceptions in subsection 11 of section 77 of the Constitution, take account at all times, of the fundamental principle that the purpose of courts of justice is to ensure that justice is done. The paramount consideration in applying the material exception must be that without in camera proceedings justice should not be attained, that nothing short of excluding the public and publicity would secure justice. An example is where evidence to be given is of such character that a witness would not give it in public."

18. In this case as the dispute is not a private one but a public matter, it is my view that unless the circumstances dictate otherwise, the determination of the dispute ought to be transparent as mandated under Article 10(2)(c) of the Constitution and since the subject of the instant arbitration proceedings is a dispute that can be resolved by the application of law, under Article 50(1) the parties thereto have a right to have the same decided in a fair and public hearing. However, just like in litigation, the Court has the discretion to direct in appropriate circumstances that certain parts of evidence be heard in camera. That however is an exception to the general rule and ought to be exercised as and when circumstances dictate.
19. Therefore I do not agree with **Mr Kiarie's** submission that in all forms of alternative dispute resolution processes, confidentiality is not just the practice but the custom. I did not hear **Mr Kiarie** to contend that the issues in dispute mandate that the mode of hearing be in private. In fact learned counsel submitted that he was not opposed to the dispute being determined through a public hearing in court through litigation.
20. Accordingly, I direct that unless the Deputy Registrar directs that the press and other members of the public be excluded pursuant to the provisions of Article 50(8) of the Constitution, the arbitration proceedings ought to be conducted in public.
21. It is so ordered.

Dated at Nairobi this 3rd day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Khaminwa for the applicant

Mr Odhiambo for Miss Masaka for the Respondent