



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 239 OF 2014**

**PATRICK SAGWA KISIA T/A STEG CONSULTANTS LTD.....PLAINTIFF**

**-VERSUS -**

**BURRELL INTERNATIONAL LIMITED.....1<sup>ST</sup> DEFENDANT**

**MACHARIA P. MWITHAGA .....2<sup>ND</sup> DEFENDANT**

**PRINCIPAL SECRETARY MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup> DEFENDANT**

**THE HONOURABLE THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before me was filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, namely **BURRELL INTERNATIONAL LIMITED** and **MACHARIA P. MWITHAGA**.
2. The applicants seek a stay of the proceedings before this court, so that the plaintiff could be compelled to refer his claim to arbitration.
3. **PAUL MACHARIA MWITHAGA** is a Director of **BURRELL INTERNATIONAL LIMITED**. He swore the affidavit in support of the application.
4. Annexed to the affidavit was an Agreement dated 12<sup>th</sup> May 2010, which the applicants submit, provides that any dispute arising between the parties would be settled by arbitration.
5. The Agreement dated 12<sup>th</sup> May 2010 identified the Arbitrator as **ADVOCATE WILLIAM GITHARA**.
6. It was the contention of the applicants that because the plaintiff had made it clear that his appointment was pursuant to the Arbitration Act, it amounted to a breach of the said Agreement when the plaintiff instituted these proceedings by way of a plaint.
7. In support of the application, the applicants cited the following 2 authorities;
  - a. **SAFARICOM LIMITED VS FLASHCOM LIMITED HCCC No. 499 of 2012;**
  - b. **MOHAMED HASSAN MAALIM & 2 OTHERS VS GRAVES LIMITED CIVIL APPLICATION No. NAI.320 of 2013.**
8. In answer to the application, the plaintiff submitted that there was no Agreement which could bind all the parties in this suit to go to arbitration.

9. The plaintiff also pointed out that even as between the parties to the Agreement dated 12<sup>th</sup> May 2010, there was no dispute that could be referred to arbitration.
10. The reason why the plaintiff says that there was no such dispute is because the plaintiff is claiming payment of his fees, for the work he had done for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
11. As neither of the 2 defendants had denied owing the fees, the plaintiff submitted that there was no dispute which could be referred to arbitration.
12. It was also the view of the plaintiff that a party could never be precluded from going to court to seek protection, even if the party had executed an Agreement which provided for Arbitration as the medium for resolving disputes.
13. At any rate, the plaintiff submitted that **WILLIAM GITHARA** could not be the arbitrator because he was the lawyer for the 1<sup>st</sup> and 2<sup>nd</sup> defendants during the proceedings in which the plaintiff rendered services.
14. The plaintiff added that the said William Githara had already sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants, in relation to related services. Therefore, the plaintiff cannot see how the named arbitrator would be able to undertake his work.
15. But Mr. Kimetto, the Learned advocate for the applicants, insisted that **WILLIAM GITHARA** could still be appointed as the arbitrator in the proceedings pitting his own clients against the plaintiff.
16. According to the applicants, the only people who could decide whether or not to ask the arbitrator to disqualify himself, would be the parties to the Agreement dated 12<sup>th</sup> May 2010.
17. Finally, the applicants urged this court to find that a party cannot be allowed to escape from the contractual provisions leading to arbitration, by enjoining other parties to the claim which such a party had instituted against the counter-part in the Arbitration Agreement.
18. Having given due consideration to the application herein, together with the competing submissions and the authorities cited by both sides, I take the following view on the application.
19. In the Agreement dated 12<sup>th</sup> May 2010, **BURRELL INTERNATIONAL LIMITED** made it expressly clear that that company had retained **WILLIAM GITHARA** Advocate as their lawyer in the case between **BURRELL** and the Ministry of Public Works.
20. Pursuant to the decision of the Court of Appeal in **MELAS & ANOTHER VS NEW CARLTON HOTEL LIMITED [1970] E.A 672**, an interest about which all the parties were fully aware at the date when the arbitrator was being appointed by them, will not generally disqualify the arbitrator.
21. It would therefore follow that just because **WILLIAM GITHARA** was the advocate for the applicants at the time he was appointed as an arbitrator in matters that were between his said clients and the plaintiff, he need not disqualify himself.
22. As the Court of Appeal observed in the **MELAS** case;

*“With this knowledge they agreed to Mr. Bryson’s appointment, and they can only have done so out of respect for Mr. Bryson’s qualifications and integrity as an individual. At no time has any suggestion of bias or even of suspicion of bias been made against Mr. Bryson. In these circumstances I can see no valid reason why he should not have acted, and should not continue to act, as arbitrator...”*

23. In this case the proposed arbitrator has already instituted proceedings against the applicants herein. Therefore, I hold the view that it is highly improbable that the said proposed arbitrator can be seen to be an independent arbiter in a dispute involving his former clients, whom he has now had to sue.
24. Secondly, it cannot be said that the plaintiff enjoined the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the suit because he wanted to avoid the Arbitration Agreement. The Agreement dated 12<sup>th</sup> May 2010 expressly cited the Quantity Surveyor **FESTUS LITIKU** as the arbitrator in the dispute between **BURRELL INTERNATIONAL LIMITED** and the **MINISTRY OF PUBLIC WORKS**. The subject matter in that case was the Completion Works at the **KENYA INDUSTRIAL TRAINING INSTITUTE (KITI)**, at Nakuru.
25. By the said letter, **BURRELL** instructed the plaintiff to offer all support to the plaintiff.
26. On 26<sup>th</sup> March 2013, the Arbitrator awarded to the applicants, the sum of Kshs. 248,886,548.32.

The said award was made against The Principal Secretary Ministry of Lands, Housing & Urban Development, together with the Hon. Attorney General.

27.As the plaintiff is trying to recover his fees from the applicants; and because the Ministry and the Attorney General were the source of funds which were payable to the applicants, I hold the considered view that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were necessary parties to the suit.

28.The said 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not privy to the Agreement dated 12<sup>th</sup> May 2010. They cannot therefore be compelled to become parties to the Arbitration proceedings involving the plaintiff and the applicants.

29.In any event, the dispute involving the 3<sup>rd</sup> and 4<sup>th</sup> defendants was already resolved by Quantity Surveyor, Festus Litiku. There would therefore be no basis for compelling them to become parties to proceedings in which they had no legal or any other justiciable claims or rights.

30.Thus, it would not be right to refer the case herein to arbitration.

31.Finally, and in any event, the applicants have not given the court any idea about the nature or scope of any alleged dispute which they would wish referred to arbitration.

32.For those reasons, I find that there is no merit in the application dated 1<sup>st</sup> July 2014. The said application is therefore dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of December 2014.**

**FRED A. OCHIENG**

**JUDGE**

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

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

.....for the 3<sup>rd</sup> Defendant

.....for the 4<sup>th</sup> Defendant

Collins Odhiambo – Court clerk.