REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 189 of 2012

MUMIAS SUGAR COMPANY LIMITED .....APPLICANT

- VERSUS -

MUMIAS OUTGROWERS CO. (1998) LIMITED .....RESPONDENT

R U L I N G

1. On **28th March 2012** the Plaintiff/Applicant Mumias Sugar Company Limited filed an Originating Notice of Motion under **Section 7, 13 (3) and 14 (3)** of the **Arbitration Act**, **Section 38** of the **Arbitration Rules** and the **Inherent Powers** of the court seeking the following orders namely:-

1. This application be certified urgent and be heard *ex-parte* in the first instance.

2. All proceedings in the arbitration between Mumias Outgrowers (1998) Limited and Mumias Sugar Company Limited, presently before Mr. Ahmednasir Abdulkadir, the sole arbitrator be stayed pending the hearing and determination of this application.

3. Mr. Ahmednasir Abdulkadir be removed from acting as the sole arbitrator in the dispute between the parties herein, and his appointments as such be terminated.

4. The court do issue interim measures of relief by ordering the Defendant to furnish security for the counter-claim in the arbitral proceedings in the sum of **Kshs.3,512,037,682/=**. In the alternative, the Defendant do furnish security in the sum of **Kshs.208,000,000/=** admitted as being due to the Plaintiff at paragraphs 49 and 50 of the statement of claim dated **10th May 2010** filed in the arbitral proceedings.

5. The costs of these proceedings be costs in the arbitration.

2. The said application is premised on the grounds set out therein, that is:-

a) The Plaintiff has justifiable doubts about the sole arbitrator's impartiality and independence in determining the dispute between the parties herein.

b) The sole arbitrator has failed to treat the parties to the arbitration equally.

c) The sole arbitrator's general language in his ruling dated **20th February 2012** demonstrates bias against the Plaintiff.

d) The sole arbitrator has determined who the eventual winner of the arbitration is before the hearing of

the arbitration.

e) The Defendant has admitted it is having financial difficulties and is facing possible winding up actions.

f) The sole arbitrator, Mr. Ahmednasir Abdulkadir has at **paragraph 17** of the Ruling dated **20th February 2012** found that the Defendant is facing financial difficulties and would not be able to meet any order for security for costs.

3. The application is supported by affidavit and further affidavit of **EMILY KADENYI OTIENO** dated **28th March 2012** and **28th April 2012** respectively. Annexed to the affidavits are many documents in support thereof. The affidavits restates and expands the grounds set out in the application.

4. The application is opposed by the Defendant/Respondent Mumias Outgrowers Company (1998) Limited, **MR. JUSTIN RAPANDO**, who described himself as the Company Secretary of the Defendant replied to the application by an affidavit which was not dated but appears to have been filed in court on **18th April 2012**. The stamp on the date is faint and invisible. Annexed to the affidavit are many documents in support of the averments therein. In its opposition to the application the Defendant/Respondent raises *inter-a-alia* the following issues, that:-

(i) This court lacks jurisdiction to hear and determine this case.

(ii) The orders sought by the Plaintiff were heard and determined by the Arbitrator.

(iii) That the motion has been brought under the wrong provisions of law and is defective.

(iv) The court lacks the powers to remove the Arbitrator in the absence of such an agreement having been entered into between the Plaintiff and the Defendant.

(v) The Plaintiff did not serve the Defendant with the *ex-parte* order made herein.

5. Pursuant to the above grounds the Defendant/Respondent formally filed **Notice of Preliminary Objection** to the suit dated **5th April 2012** citing some of the above grounds of objection.

6. Briefly, the history of the suit is as follows:-

The present application arises out of an Arbitration matter between the Applicant and the Respondent in which Mr. Ahmednasir Abdullahi is the sole Arbitrator. The sole Arbitrator, Mr. Ahmednasir Abdullahi is an advocate of the High Court of Kenya and a partner at the law firm of Ahmednasir Abdikadir & Company Advocates based in Nairobi. The Chairman of the Law Society of Kenya appointed the said Mr. Ahmednasir Abdullahi as sole arbitrator on **25th March 2010** pursuant to the provisions of **Clause 11** of an agreement dated **28th May 1976** between the Applicant herein and a company known as Mumias Outgrowers Company Limited. The Respondent claims to be a successor in title of the said Mumias Outgrowers Company Limited.

In the said arbitration, the Respondent herein is the Claimant and the Applicant herein is the Respondent. The Claimant therein claims a sum of **Kshs.3,723,008,011/=** from the Respondent in its statement of claim. The Respondent therein on the other hand claims the sum of **Kshs.3,512,037,682/=** from the Claimant by way of counter-claim.

The Applicant herein in the arbitral proceedings made an application dated **4th October 2011** under **Section 18 (1)** of the **Arbitration Act** and **Section 401** of the **Companies Act** seeking an order that the Claimant therein gives security for the Respondent's costs of the arbitration. This application is alleged to have been made upon a genuine apprehension that if the Claimant does not succeed in the arbitration and is ordered to pay the Respondent's costs therein, it is highly unlikely that the Claimant would be able to

pay the costs to the Respondent which would be in the region of **Kshs.60,000,000/=**. The application was heard by the sole arbitrator on **1st November 2011**, and a Ruling delivered by the arbitrator on **20th February 2012.**

7. It is that Ruling of the sole Arbitrator that forms part of the basis for this application. The Applicant alleges that the sole Arbitrator Mr. Ahmednasir Abdulkadir is biased and that all the arbitral proceedings before him be stayed pending the determination of the application and that the said Arbitrator's appointment as such be terminated.

The other part of the application is prayer for interim measures of relief by ordering the Defendant to furnish security for the counter-claim.

8. When the application was heard *ex-parte* under Certification of Urgency on **28th March 2012**, the court certified the matter urgent and also stayed all proceedings in the arbitration between Mumias Outgrowers (1998) Limited and Mumias Sugar Company Limited before Mr. Ahmednasir Abdullahi the sole Arbitrator, pending the hearing and determination of this application. On **17th May 2012**, this court directed that the Preliminary Objection be addressed as a response to the application, which was heard on **7th June 2012** and **5th July 2012**.

9. The parties filed skeleton submissions and list of authorities which are all on record.

10. Before I may proceed any further in this application, I must address the issue as to whether or not current application is properly before the court and whether I have the jurisdiction to proceed with this matter. Mr. Lutta counsel for the Defendant/Respondent submitted that the application is premised on wrong provisions of the law. The application is stated to have been brought under **Section 7, 13 (3) and 14 (3)** of the **Arbitration Act, Section 3** of the **Arbitration Rules** and **Inherent Powers** of the court.

Under **Section 7** of the **Arbitration Act** the court has powers to grant interim measures of protection to an Applicant in arbitral proceedings. This means that as the Applicant has sought interim measures of protection in terms of security for the suit, this limb of the application is supported under **Section 7**. Further, under **Section 13 (3)** of the **Act** also cited by the Applicant, a party can sustain an application to challenge the appointment of an Arbitrator. The section states:-

"An Arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications 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."

However, **Rule 3** of **Arbitration Rules** cited in the application has no relevance as this application is not made under **Sections 12, 15, 17, 18, 28** and **39** of the **Act**. It is also clear that the procedure outlined under **Section 14** of the **Act** for challenging appointment of an Arbitrator have not been complied with. That section requires that parties agree on a procedure for challenging an Arbitrator. If they fail to agree, a party who intends to challenge an Arbitrator is required within **15 days** after becoming aware of the composition of the arbitral tribunal or after becoming aware of the circumstances referred to in **Section 13 (3)**, to 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 party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

Only if a challenge under agreed procedure or under **Sub-section 2** is unsuccessful, can the Applicant come to the High Court, within **30 days** after being notified of the decision to reject the challenge. Clearly, the Applicant has not complied with this procedure, which appear to me to be mandatory. Mr. Kiragu counsel for the Applicant responded to this lack of procedure by citing the Constitution, which he submitted, allows the court to be "*hand maide of justice*" and that there is no prejudice to any party.

In my view, the procedure under **Section 14** of the Arbitration Act for challenging the appointment of Arbitrator is mandatory and crucial and should be complied with. However, I decline to determine the matter at hand on the basis of procedural technicalities of the law. In my view, the issues raised in the application require a determination on their merit, and to that extent I reject and dismiss the Preliminary Objection filed in challenge of the application.

11. The issues for determination then remain as set out in the application, and these are firstly whether this court can stay the current proceedings before the sole Arbitrator and subsequently terminate the services of the Arbitrator and secondly whether interim measures of relief in form of security for the counter-claim should issue.

12. I will deal with the second issue first. The Defendant/Respondent has objected to the grant of this prayer arguing that the issue was considered comprehensively before the sole Arbitrator and was rejected and it should not be revisited. The application before the sole arbitrator dated **4th October 2011** had the following prayers:-

1. The claimant do within a time to be fixed give security in the sum of Kshs.60 million for the Respondent's costs of this application.

2. If the claimant fails to give security for the Respondent's costs as aforesaid then the statement of claim be struck out with costs to the Respondent.

This application was filed under **Section 18 (1) (c)** of **Arbitration Act** and **Section 401** of the **Companies Act**. In the current application the equivalent prayer is Number 4 which states:-

"4. The court to issue interim measures of relief by ordering the Defendant to furnish security for the counter-claim in the arbitral proceedings in the sum of Kshs.3,512,037,682/=. In the alternative the Defendant do furnish security in the sum of Kshs.208,000,000/= admitted as being due to the Plaintiff at paragraphs 49 and 50 of the statement of claim dated 10th May 2010 filed in the proceedings."

This application is filed under **Section 7** of the **Arbitration Act**. In my view, these applications are different from each other, although it remains arguable whether the ratio dietre applied in the determination of one would not be used in the determination of the other.

13. In seeking the order for temporary relief as stated above, the Plaintiff/Applicant submitted that the sole Arbitrator has already found at paragraph 39 of his Ruling (page 243 of the exhibit) that the Respondent "*is in poor financial state*." He went on to observe at paragraph 43 (page 244 of the exhibit) that "*counsel for the Claimant (Respondent herein) has conceded that if such an order for security was to be granted, the Claimant will not be in a position to pay*." The Plaintiff submits that this amounts to a finding of fact as to the Respondent's financial position, and that this finding, pursuant to **Section 7 (2)** of the **Arbitration Act,** is conclusive. The question is therefore, whether or not security should be offered.

Mr. Kiragu submitted that the wording of **Section 8 (2)** of the **Arbitration Act** makes it clear that a party can seek the assistance of the court before or during arbitral proceedings. He cited Peter Binder in the 22nd Edition of his book: *International Commercial Arbitration and Conciliation in Uncitral Model law Jurisdictions*: "***The provisions states that an application to a court for an interim measure of protection is not in conflict with the arbitration agreement, regardless of when such application is made***."

Submitting that the Respondent has admitted being indebted to the Applicant in the sum of **Kshs.208,000,000/=**, it is only fair and just that the Applicant's counterclaim be secured.

In response the Defendant/Respondent submitted that the order for security is being sought in bad faith and is deliberately meant to delay and frustrate the proceedings before the sole Arbitrator.

14. I have carefully considered this aspect of the application in the light of the entire proceedings in this

matter. I have also looked at the Ruling of the Sole Arbitrator dated **20th February 2012**, which dwelt at length on the merits of the application before him on the deposit of security for **Kshs.60 million**. From the outset, I must state clearly that the relationships between the parties in this matter is not an ordinary one like, say, between a buyer and seller or some parties in remote contractual positions. The pleadings before the court establish an extensive symbiotic relationship, which at one stage could have a fiduciary and trust connection. It is an allegation of fact which has not been controverted that the Plaintiff/Applicant was an accounting agent of the Defendant/Respondent pursuant to the contract they had. Their relationship has time and again been characterized by lack of money on the part of the Defendant, and that luck being met by the Plaintiff along mutually agreed grounds. This relationship had become necessary in order that the business between the parties could thrive and grow.

15. It is on record that the Plaintiff/Applicant has several times lent money to the Defendant/Respondent to support the Defendant's operations. The Plaintiff had absolutely no basis to extend such favours save for the fact that the Plaintiff feels obligated to do the same, both for historical symbiotic reasons and for their current need to work together. It may also have been based on the inherent belief that the Plaintiff, as the said accountant agent of the Defendant, knew or had reason to believe that whenever any proper account were to be taken, the Plaintiff would be found liable in some amount, to the Defendant. Else, why has the Plaintiff continued to financially bail out the Defendant if the Plaintiff believed that the Defendant owed it the money contained in the counter-claim in the Arbitration cause?

16. In my view, the Plaintiff knows, or has every reason to know, the financial status of the Defendant. The Plaintiff also knows the clear objectives for which the Defendant was established. To allow the prayer for security for the Plaintiff's counter-claim in the Arbitration Clause while it is obvious that the Defendant has no such money would amount to dismissing the Defendant's claim in the arbitration cause without hearing. While I would have no hesitation granting such an order were the parties clearly independent entitles, I would hesitate to do so in this case because I am convinced that the parties before the court, from history, purpose and objectives of their existence, are not independent. They have demonstrated a history of working together and the monies they now claim from each other arise from the unsatisfactory performance of that symbiotic relationship. Denying one of them an opportunity to be heard on merit would be a travesty of justice.

17. In my view, in the cause of time, a trust relationship ensued between the parties where the Plaintiff undertook serious responsibilities for the Defendant. In the fullness of that trust the Defendant left its financial management and issues at the mercy of the Plaintiff on assumption that the Plaintiff would professionally and faithfully manage the same. Upon being suspicious in the manner of such management, and filing a claim for accounts, the least the Plaintiff could do is to allow the Defendant to prosecute its claim without putting any impediment on its path. To demand, at this stage, and given the nature of this claim, that the Defendant provides the alleged security for the counter-claim in the Arbitration Clause would be the height of insensitivity on the part of the Plaintiff. For this court to grant such a prayer, this court would be unwitting participant to an unjust process.

18. I also believe that the application for security is not made in good faith. My understanding is that the Claimants claim in the Arbitration cause is based on funds allegedly received by the Plaintiff and withheld by the Plaintiff. While this is still an allegation to be proved, it is clear that probably on this basis that it owes the Defendant the alleged money, the Plaintiff has continued to advance various sums of money to the Defendant. To ask for security for the counter-claim, when the Plaintiff appears by its conduct to lend credence to allegations that it holds or owes the very same funds to the Defendant would not be justice. References to these kind of transactions are found in pages 47 to 51 of the Plaintiff's exhibit, showing how the Plaintiff has continued to pay all debts owed by the Defendant.

At **page 51** of exhibit '**1**" is a copy of the letter from the Plaintiff's Managing Director addressed to Kenya Sugar Board in which the Plaintiff is categorically stating that it administers the Plaintiff's farmer's debt which earns interest of **Kshs.15 million** per month. The Plaintiff undertook to pay any advances made to the Defendant.

It is curious to have the Plaintiff apply for security for the counter-claim when it strenuously opposed the

decision by Kenya Sugar Board to guarantee the costs of this arbitration in **Kisumu Misc. Civil Case No.30 of 2010**.

It is appears to me that this application, were it to be successful, was meant to deny the Defendant a right to have its claim in the Arbitration Clause determined on its merits.

19. The Sole Arbitrator clearly understood this element of bad faith when he observed in his Ruling in the application for security for costs at paragraphs **39**, **40** and **41** as follows:-

"*Issue Number 2, what is the financial position of the Claimant/Respondent and what is its relevant bearing to the application for security for costs? It is not in doubt that the Claimant/Respondent is in poor financial state. It has admitted so. The Respondent/Applicant contends that it is actually moribund and may disappear all together as a legal personality. In this regard I have to consider the Claimant's contention that its financial quagmire has solely been the creation of the Respondent/claimant and it is not equitable to saddle it with security for costs.*

At this stage I will merge this issue with the right of access to justice and the effect of an order for security for costs on the demise or continuation of the arbitration case. It is a very important consideration for the tribunal to inquire into the possibility or probability that the claim herein and the entire proceedings will be stopped and that the Claimant will be deterred form perusing further its claim if the tribunal makes an order for security for costs.

As I said a determination of an application like the one before me is a balancing act. On the one hand it involves an inquiry into the injustice that may occur if a party is stopped form pursuing its claim pursuant to an order for security. On the other hand that must be weighed against the injustice that is visited upon the other party who contends that once it wins the case it will have nowhere to turn to in recovering its cost.

In ***Keary Developments Ltd. - Vs - Tarmac Construction Ltd. and another [1995] 2ALL ER*** *page . . . The court in analyzing the balancing act of the competing rights of the parties states:-*

"The court will probably be concerned not to allow the power to order security to be sued as an instrument of oppression, such as stifling a genuine claim by an indignant company against a more prosperous company, particularly when the failure to meet the claim might in itself have been a material cause of the Plaintiff's impecuniosities. But it is also to be concerned not to be reluctant to order security that it becomes a weapon whereby the impecunious company can see its inability to pay costs as a means of putting unfair pressure on the more prosperous company," as per peter Gibson LJ."

20. Arising from the foregoing the prayer for interim measure of relief under **Section 7** of the **Arbitration Act** is untenable and I dismiss it.

21. I will now consider the first issue that is that Mr. Ahmednasir Abdulkadir be removed from acting as the sole Arbitrator between the parties herein, and that his appointment as such be terminated. To address this issue, I intend to approach the same as follows:-

(a) The law on termination of arbitrator's appointment.

(b) Reasons advanced for the request to terminate the arbitrator's appointment.

22. The law Section 10 of the **Arbitration Act** limits the extent to which the court can intervene in matters governed by the Act. It states:-

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

However, **Section 13** lays grounds upon which an appointment of an Arbitrator may be challenged. If an

Arbitrator's appointment is challengeable under **Section 13**, then **Section 14** provides an elaborate procedure for the challenge,. I have already partly dealt with **Section 14**. The summary of what I have said is that the present Applicant has not complied with the mandatory procedure outlined under **Section 14**.

Section 14 (1) states:-

"Subject to Subsection (3), the parties are free to agree on a procedure for challenging an arbitrator."

If the parties fail to agree there is a procedure provided under **Subsections 2** of **Section 14**. **Subsections 3, 4, 5, 6, 7** and **8** indicate how the High Court may be moved in the challenge process, the duties and powers of the High Court throughout the process, and what is to happen during the time the High Court is considering the application. **Sections 15** and **16** and **16A** deal with various circumstances under which an Arbitrator may vacate office. These Sections are not relevant for the purposes of this application. What is clear to me is that the process outlined under **Section 14** of the **Arbitration Act** is mandatory. It is also clear to me that the said process has not been complied with. On this deficiency alone, the application challenging the appointment of the sole Arbitrator cannot stand. That notwithstanding, in my view, a consideration of the grounds upon which this particular application is made is important for the process of this application. This aspect of the application is filed under **Section 13 (1)** of the **Arbitrator Act** which states:-

"An Arbitrator may be challenged only if circumstances exist that gives rise to justifiable doubts as to this impartiality and independence, or if he does not possess qualifications 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."

From the application, it is clear the Applicant has no problems with the qualifications of the Arbitrator, or his physical or mental capacity to do his work. The problem appears to be in relation to the arbitrator's impartiality and independence.

23. The reasons then leads me to the reasons advanced by the Applicant, which are that the sole Arbitrator is impartial, biased and not independent. These alleged troubling traits of the sole Arbitrator are said to have been manifested in the Ruling of the sole Arbitrator dated **20th February 2012**.

At this stage an examination of these allegedly manifest troubling traits of the Arbitrator is in order.

At paragraph 12 of the Affidavit of **EMILY KADENYI OTIENO** dated **26th March 2012**, the deponent states as follows:-

"12. Upon perusing of the said Ruling, the Applicant herein noticed the following statements appearing at paragraph 56 of the Ruling which reads as follows:-

"so having stopped a third party from paying the costs of the eventual winner of the arbitral proceedings, is the Applicant estopped by its previous conduct form seeking an order for costs at this point in time?"

At paragraph 13 of the said affidavit, the deponent proceeds as follows:-

"13. I understood that statement to mean that the sole Arbitrator had already determined that the Respondent herein, Mumias Outgrowers Company (1998) Limited has already won the arbitral proceedings."

Mr. Kimani, learned counsel for the Applicant in his submissions reiterated that he too understood that part of the Ruling to mean that the sole Arbitrator had already made up his mind on the outcome of the arbitral proceedings before him. I do not agree with this interpretation. The deponent may be excused for

having misinterpreted that part of the Ruling. However, Mr. Kimani in my view, simply chose to misinterpret the same.

24. In my view, the plain meaning of the phrase, "*eventual winner of the arbitral proceedings*" did not refer to any of the parties, leave alone the Respondent. Those words are clear and do not lend themselves to any misinterpretation. The sole Arbitrator simply stated that a third party – Kenya Sugar Board, was stopped by the Applicant from paying the costs of the eventual winner of the arbitral proceedings. The eventual winner referred to here is one of the parties to the arbitral process who will have won the arbitral proceedings and whose costs would have been assured had the Kenya Sugar Board been allowed to guarantee the payment of those costs. That eventual winner could have been either of the parties before the sole Arbitrator. It is clear to me that the sole Arbitrator, in so far as this part of the Ruling was concerned, had no knowledge of that eventual winner. He simply alluded to a legal fact that the eventual winner would have had the payment of his costs guaranteed if the Applicant did not stop the Kenya Sugar Board from guaranteeing the payment of costs. It is clear in law that costs of the proceedings follow the event, and the winner gets the costs. So, in my view, this ground, that is, the allegation that the sole Arbitrator had already made up his mind of who the eventual winner would be is a misrepresentation of the Ruling, is baseless and I dismiss it.

25. It is also clear that the application to remove and to terminate the appointment of the sole Arbitrator is mainly hinged on the contents of the Arbitrator's Ruling dated **20th February 2012**. I have carefully considered that Ruling, the language used and the content. Without going into its merits, I find the Ruling balanced in its language, careful in what it reveals at that interim stage, and yet bold enough to assert the rights of the parties as they were at that stage.

Mr. Kimani referred me to several authorities on the elements of bias. He referred to the dictum of Lord Heward in **R. – Vs – Sussex Justices ExP. Mc Carthy [1924] 1KB. 256** where the Judge observed:-

"Justice should not only be done but should manifestly and undoubtedly be seen to be done."

The learned counsel also referred me to the following English Cases:-

HASPOP ARDAHALIA – VS – UNIFERT INTERNATIONAL S.A. (THE *"E LISSOR"*) where the court declared that:-

"the test of partiality is whether it is reasonable for either party to consider that the Arbitrator can no longer conduct the matter properly; whether in the court's view either party can reasonably say that his confidence has been wholly destroyed."

26. I do not agree that in the case at hand any party has a good reason to suggest that it has lost faith or confidence in the sole Arbitror. To hold that in the circumstances would mean that no Judge or Arbitrator would have the liberty to have an open mind in considering matters that come before them.

The counsel further referred me to the case of **BREMER HARDELSGESELLS CHEFF M.B. H - VS - ETX SOULES ET CIE. & ANTONY G. SCOTT [1985] LLYOD RE/ 160 & LAKE AIRWAYS INC. – VS. FLS AEROSPACE LTD. & ANOTHER [2000]1 WLR 113**. In both these cases it was stated that one need not prove actual bias, and that the importance of public confidence in the administration of justice is such that even an appearance of bias will disqualify a Judge or an Arbitrator.

27. While I appreciate the substratum or the persuasive intent of these cases, I must distinguish the same from what is commonly called "*judicial bias*". A Judge or an Arbitrator is not expected to demonstrates at all times that he is not biased. The judicial function by its very nature allows and intends an element of elementary bias which enables a judicial officer to give direction to his thoughts. This elementary bias is controlled by the Judge throughout the proceedings. It allows the Judge to prod into the issues before the court in order to prevent any miscarriage of justice. It allows the Judge to comment on the matters before him and give particular directions in the interest of justice. This kind of bias does not go into the decision of the Judge.

28. "**Bias**" is defined in Black's law dictionary as:-

"inclination, prejudice, predilection; actual bias is a genuine prejudice that a Judge, juror etc has against some other person. Implied bias is a prejudice that is inferred from the experiences or relationship of a Judge, Juror or other person. It is also termed presumed bias."

In relation to the matter before the court I am not satisfied that bias has been proved. What is clear to me is that the parties themselves have deep seated prejudices against each other, and have taken and entrenched certain positions and beliefs. The Applicant now, in my view, intends to make the sole Arbitrator part of those prejudices, systems and beliefs. To expect the sole Arbitrator not to make passing comments on some rather obvious aspects of the matter before him is to gag the Arbitrator. A gagged Judge or Arbitrator cannot perform his duties in the way that he should.

29. But if for some reason the sole Arbitrator has been biased as alleged, such bias, in my view, would amount to what is called in law "**judicial bias**". Judicial Bias is defined in Black's law Dictionary as

"A Judge's bias towards one or more of the parties to a case over which the judge presides."

It is worth to note that:-

"Judicial bias is usually not enough to disqualify a Judge from presiding over a case unless the Judge's bias is personal or based on some extrajudicial reason."

30. The context within which the allegations of bias and impartiality have been made is the sole Arbitrator's Ruling dated **20th February 2012**. I have considered that Ruling carefully. While the Applicant has chosen to intentionally misinterpret certain sections of that Ruling to give it an element of bias, the sole Arbitrator has simply given his Ruling and spoken as he should, having presided over the application and understood the matters before him. If still any bias would be shown or proved in the texture and tone of the sole Arbitrator's Ruling aforesaid, such is that bias which does not disqualify a Judge, as it is not shown to be personal or based on some extrajudicial reason.

31. Having considered this aspect of the application on its merits, I would say that the application fails on two fronts: Lack of mandatory procedural requirements under **Section 14** of the Arbitration Act, and Lack of merits on its grounds.

32. For the above reasons the application by way of Originating Notice of Motion dated **26th March 2012** is dismissed in its entirety with costs to the Defendant/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF OCTOBER 2012

E. K. O. OGOLA
JUDGE

PRESENT:

Kiragu, Wetangula & Wanyama for the Applicant

Lutta for the Defendant

Teresia – Court Clerk