



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2264 OF 1998 (O.S)

UAP PROVINCIAL INSURANCE COMPANY LTD.....PLAINTIFF

VERSUS

JOSEPH MURIUKI KENYATTI & ANOR.....DEFENDANT

RULING

The applicant, UAP PROVINCIAL INSURANCE COMPANY LTD filed Originating Summons under Section 14, 15 and 16 of the Arbitration Act, Act 4 of 1995 and the Arbitration Rules. The Applicant also filed the same Originating Summons under Section 3A of the Civil Procedure Act chapter 21 and process of the court an all enabling powers and provisions of the law. The Applicant is seeking orders that the applicant be at liberty to revoke and make void the appointment and authority of the said Respondent NJERI KARIUKI the sole arbitrator appointed by the applicant and the Respondent that the mandate of the sole arbitrator said Respondent NJERI KARIUKI be terminated. The applicant further seeks orders that some other fit and proper person may be appointed to act as Arbitrator in place of the second Respondent NJERI KARIUKI. That the second respondent be paid all fees, charges and disbursement due to upto to her the date of this order and the Applicant and the first Respondent do been the whole of the fees and charges and disbursement in the equal shares. Lastly the applicant is asking to cut off orders that there be a stay of all arbitration proceedings save for implementation of this order.

The Applicant also file Chamber /summons dated 9th November 1998 and file in court on 9th November 1998 in which the Applicant is seeking a stay of the arbitration before the arbitrator NJERI KARIUKI to be granted pending the hearing of the Originating summons. This is the application that came up before me for hearing today. However before the same application could be heard, the Second Respondent counsel raised a preliminary objection which was supported by the first defendant's counsel. This Ruling is therefore confined to that preliminary only.

The notice of the preliminary objection served on all parties stated four grounds of the objection. These were:-

- (a) That this honourable court has no jurisdiction to hear the application by virtue of the provision of section 14(3) of the Arbitration Act.***
- (b) That there is no provision of stay of arbitratral proceedings and section 14(3) of the arbitration Act cleary provides that the tribunal including the challenged arbitration may continue the arbitral proceeding and make an award notwithstanding the existence of a challenge.***
- (c) That the applicants Originating summons is improperly before the court having been file out of time contrary to the express provisions of section 14(3) of the arbitration Act and***
- (d) That no complete authority has been applied to decide in the challenge.***

All parties submitted before me at length. Section 10 of the arbitrators Act states and I quote “Except as provided by the Act, no court shall intervene in matters governed by this Act” Section 14(3) states

“Subject to subsection (3) the parties are free to agree on a procedure for challenging an arbitrator”

Section 13(3) 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, “and Section 13(4) states “A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment”

If I may pause here for a while. A look at the Originating Summons referred to here and the affidavit supporting the same shows that the reasons given for the application in the originating summons are inter alia that

(a) The conduct of the arbitrator (referred to as second Respondent) is partial and oppressive to the applicant.

(b) That the Arbitrator has without any consensus determined matters without application of either party ex-parte and without any representation by the applicant.

In the affidavit in support the learned counsel for the applicant states in paragraph 3, that the arbitrator is appointed by the consent of the parties and that as the impartiality of the arbitrator is lacking.

I do refer to these aspects only to show that the application before me is clearly a challenge as referred to in section 13(3) of the Arbitration Act the which provision I have quoted above for ease of reference.

That being the case, Mr. Igeria for second Respondent submits that the procedure to which a case where the arbitrator is being challenged is provided for in section 14(3) of the arbitration Act. that section states

“If a challenge under any procedure agreed upon by the parties factors or under subsection (2) is not successful, the challenging party may within 30 days after having received notice of the decision rejecting the challenge apply to such competent authority as the Attorney General may be notice in the Gazette designate to decide on the challenge and the decision of such of which competent authority shall be final and not be subject to appeal, but while such, an application is pending before such authority, the arbitral Tribunal including the challenged arbitration may continue the arbitral proceedings and make an arbitral award.”

He also submits that there are no provision for stay of arbitral proceedings in the arbitration Act. Before I look to the other aspects of his objection I would like to go on with this ground of preliminary objection to see whether it has any merits at all.

Mr. Mbuthi Gathenji the learned Counsel for the Applicant contends that preliminary points could only be raised after matter of evidence have been agreed first. My observation to this point is that Respondents learned counsel submitted on the application as it stood. They submitted on points of law only. They did not challenge any facts. All they said was that as according to them this was a challenge to arbitrator, it fell under section 14(3) and therefore was not before a proper forum. Mr. Gethenji referred me to section 3A of the Civil Procedure Act which he said gave me inherent powers. My understanding of this section is that it given powers under the act to ensure justice and fair play. It does not give the court powers to ignore provisions which clearly state what ought to be done to certain circumstances. In this matter, section 10 is clear and states clearly as I have quoted above that except as provided by the arbitrators Act, no court shall intervene in matters governed by the Act. Thus I cannot use section 3A of the civil Procedure to ignore this provision. I must look at the act and see if the exceptions talked about in

the act does exist i.e. if there are provisions in the act that would empower me to intervene in this particular matter. When the arbitration is being challenged, Mr. Githinji sees the same exception as provided by section 15 of the act and says that this section is relevant,

Section 15 of the Arbitration Act states:

(1) The mandate of an arbitrator shall terminate if -

(a) he is unable to perform the functions of his office or for any other reason fails to act without undue delay or

(b) he is withdrawn from his office or

(c) the parties agree to the determination of the mandate.

(2) If there is any dispute concerning any of the grounds referred to in subsection (1)(a) a party may apply to the High Court to decide on the termination of the mandate.

(3) A decision of the High Court under this subsection (2) shall be final and shall not be subject of Appeal.

I do not with respect agree with Mr. Gathenji that being unable to perform duty in section 15(a) would be interpreted to include cases of partiality or inability to be impartial. In my humble opinion section 15 is providing for cases where an arbitrator either withdraws himself or parties agree to the termination of the mandate or where due to either infirmity or absence for the jurisdiction as having been engaged in other duties or just out of no case of his wish in an arbitrator is unable to carry out his duties. I would read section 15 (a) in that light and would apply ejusdem generis rule when really unable to perform the functions of his office with a phrase that means fails to act without undue delay. In that light then section 15(2) would apply when the parties do not agree with existence or meaning of any of the grounds set out in section 15 (1). I can't see section 15 as allowing me to intervene in matters governed by the arbitration act. In fact to marginal lands refer the section as failure or impossibility to Act.

But that is not all. I am also referred to section section 18 of the act and Mr. Gathenji the learned counsel for the applicant submitted that that section also gives me the power to intervene. That section states in fact as follows

18(1) Unless the parties otherwise agree the arbitral tribunal may at the request of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary necessary in respect of the subject matter of the dispute..”

18(2) The arbitral tribunal or a party with the approval of the arbitral tribunal may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1)....

18(3) If a request is made under subsection (2) the High court shall have for purposes of the arbitral proceeding the same power to make an order for”

This section does not allow me to intervene to the arbitral. Tribunal matter for purposes of terminating the mandate of the arbitrator. It only allows me to intervene to ensure protecting a subject matter of the dispute. Then section 7 is also referred to. That section states

7(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings an interim measure of protection and for the High Court to grant that measure.

7(2) When a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or

any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

This section only talks of actions that may proceed despite the existence of the agreement. It provides cases for instance where land may be wasted while the arbitration is still going. In such cases the High Court would have powers to grant injunction etc to protect the situation from waste or to protect any person from suffering while the arbitration is still in process. Again I don't see that provision as curing the case before me.

These were the provisions of the arbitration act which were treated as exceptions to section 10. However, I have gone through the act and found that section 17 also talks about the powers of the arbitral Tribunal to rule on its jurisdiction where such a ruling may be challenged in the High Court within 30 days of the making of the same ruling. That however refers to ruling on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. That does not touch on the revocation of the appointment of an arbitrator.

Section 60(1) of the Kenya constitution establishes a High Court which shall be a supreme court of record with unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred to it by the constitution or any other law. I think this is where arbitrators act has conferred to the High Court matter in section 7 and 15 of the same arbitrations act, but it is clear that it has not conferred to powers to remove an arbitrator. Again section 65(2) of the constitution gives the High court supervisory powers on the subordinated courts and court Martial but it does not seem to touch on the issue before me. Order LIII of the civil procedure code provides the High court with supervisory powers in matters like certiorari, mandamus and prohibition but the matter before me is different.

I cannot see under what powers I would entertain the originating summons before me and have not been shown any by the learned counsels. I gave Mr. Gathenji, the learned counsel for the Applicant time to be able to get me any authority on the same but all he showed me were orders in HCCC civil case No. 55 of 1998 one of which showed that Arbitration proceedings were postponed by consent of both parties and the other showed that interim orders already made as above were never extended. That is pursuant to consent orders and the matter does not seem to have been fully dealt with. I have also considered section 3 of the Judicature Act Chapter 8 laws of Kenya and do not find it lending me any hand to this matter before me.

Mr. Gathenji submits that this matter before me is an application for stay of the arbitration proceedings and that this is what I should be concerned with. It must be noted the stay he is seeking is a stay pending this the hearing of the originating summons. I can not grant the stay if I am shown that the originating summons is rightly before me and has chances of success. If the originating summons is not properly before me, in law then it would be of no use granting a stay.

The second point raised by Mr. Igeria was that the act does not provide for stay of proceedings. I do agree with him that in fact even when there are provisions for challenge like in section 14, the arbitration is still expressly given powers to proceed during the period of the challenge. Also see Provisions under section 17(8) where even when a party applies to High court challenging Ruling made by arbitrator, the arbitral proceedings may still continue and make award. However, I do believe that is the High Court would have powers to intervene and terminate the mandate of the arbitrator, then it would be in a position to grant a stay in such matters.

On the third point raised by Mr. Igeria about the whether or not the originating summons is time barred. I do agree fully with Mr. Gathenji that there must be affidavits or some evidence before I act on this claim: I cannot act on it on the allegations from the bar alone and I do agree with Mr. Gathenji that as far as the allegation as to whether or not the originating summons is filed later on or in time facts must first be canvassed before me or must be agreed first before me or must a preliminary objection can be considered on the same

The upshot then of all these is that I am not convinced that I have powers to hear originating summons upon which the the chamber summons before me is brought. That being the case I must and I do hereby

dismiss this application with costs to the respondents.

Onyango Otieno

Judge

Dated 13.11.98