



REPUBLIC OF KENYA



KENYA LAW
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**Beqa Construction Company Limited v Nolega (Miscellaneous Application E147 of 2025)
[2025] KEHC 15529 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E147 OF 2025**

F GIKONYO, J

OCTOBER 30, 2025

BETWEEN

BEQA CONSTRUCTION COMPANY LIMITED APPLICANT

AND

PAMELA SELMA NOLEGA RESPONDENT

RULING

1. The Notice of Motion dated 11.2.2025, brought under section 14 of the *Arbitration Act*, seeks removal of arbitrator, more specifically, that: -
 - (2) Martin Mbugua be disqualified and be removed from continuing to preside over the arbitral proceedings in the Matter of an Arbitration between Pamela Selma Nolega versus Beqa construction company limited.
 - (3) This court be pleased to direct the parties to nominate and agree on the identity of a new arbitrator within such period as the court shall specify.
 - (4) The parties failing to make such agreement, the court be pleased to appoint a new arbitrator to act in the place of the said Marin Mbugua.
 - (5) The costs of this application be provided for.
2. The application is supported by the affidavit sworn by Meg Muhia, Advocate on 11.2.2025 and written submissions dated 14.5.2025.
3. The application is premised on the following grounds: -
 1. The arbitration proceedings were set down for hearing on the 13.2.2025 in the absence of the applicant and its counsel.



2. The arbitrator has demonstrated a lack of impartiality on several instances in the conduct of the arbitral proceedings, and that the arbitrator cannot be trusted to decide in view of his remarks and comments.
3. There is, therefore, a real apprehension that the arbitrator is incapable of conducting the arbitral proceedings before him with the requisite impartiality. This is contrary to the *Arbitration Act* which places a continued obligation for the arbitrator to remain impartial throughout the arbitral proceedings.
4. The applicant relied on the following cases: -
 1. Kenya Pipeline Company Limited v Kenya Oil Company Limited & another [2015] KEHC 4470 (KLR)
 2. Runji Partners Consulting Engineers & Planners Ltd v National Water Conservation & Pipeline Corporation & another [2017] KEHC 28 (KLR)

Response

5. The respondent opposed the application through a replying affidavit sworn on 19.2.2025 and written submissions dated 16.6.2025.
6. The respondent's main contentions are: -
 1. The court does not have power to appoint an arbitrator on behalf of the parties. Clause 45.1 of the Construction Contract between the parties, provides that an arbitrator can only be appointed by the parties, the Architectural Association of Kenya or the Chartered Institute of Arbitrators.
 2. the applicant ought to have raised the issue of disqualification before the arbitrator first for consideration and issuance of directions on the same before moving the court.
 3. the application raises no tangible ground for recusal, instead, the applicant is abusing the court process to waste time and delay the expeditious disposal of the matter.
7. The respondent urged the court to dismiss the application and to allow substantive proceedings to continue before the arbitrator. She relied on the following cases: -
 1. Milimani HCC Misc. App. No. E946 of 2023 – Pamela Selma Nolega vs Beqa Construction Co. Ltd
 2. Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR
 3. President of the Republic of South Africa v South African Rugby Football Union (1999)

Analysis and Determination

Issue

8. The question before the court is; whether the court could remove the arbitrator and appoint a new arbitrator.



Ground of impartiality

9. The applicant seeks the removal of the arbitrator on the basis of apprehension that the arbitrator will not conduct the arbitration proceedings with impartiality.
10. The issue of impartiality or the arbitrator's disqualification was not raised before the arbitrator. No application or challenge thereto was made before the arbitrator to disqualify himself.

Procedure for removal of arbitrator

11. Challenge procedure is provided for in Section 14 of the *Arbitration Act* thus: -

“ 14. Challenge procedure

- (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
 - (2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13 (3), 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 other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
 - (3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within thirty days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.
 - (4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.
 - (5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.
 - (6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.”
12. In *Chania Gardens Limited v Gilbi Construction Company Limited & another* [2015] KEHC 6202 (KLR), the court noted that: -

“Undoubtedly, the challenge has to be decided first by the arbitrator before the party challenging the arbitrator applies to the High Court for removal of the arbitrator. The application before me offends all these gallant provisions which are aimed at protecting the arbitral proceedings, and therefore, serves irreplaceable purpose in adjudication of arbitrations. It would certainly fail on that front.” See also *Mentor Group Limited v Kilbia (Sole Arbitrator) & another* [2025] KEHC 14966 (KLR)
 13. I wish to add, however, that, the requirement that a challenge to the arbitral tribunal must be in accordance with the challenge procedure agreed on between the parties or as provided in section 14



of the Arbitration Act, buttresses party autonomy and authority over arbitration process- the forum the parties chose for resolution of their dispute. It also ensures that the court does not interfere with party autonomy and authority over their process of adjudication of dispute. Perfectly in harmony with article 159(2)(c) of the Constitution which cuts the duty of the court; to promote alternative justice systems. The core content of the duty to promote derives from the genealogy of the word 'promote' traced to the human rights framing which encapsulates three principles or duties; to protect, to respect and to transform. See the Alternative Justice Systems (AJS) Policy. Therefore, the duty to promote commands; do no harm; let it be; and transform alternative justice systems including arbitration.

14. This duty completely removes arbitrary intervention by the court into arbitral proceedings but also entails protecting the process from any action by the parties which contravenes the law or tends to subvert party autonomy and authority. The constitutional as well as the statutory frame rests on equality of parties (art.27, 159(2)(c)) leaving no room for one party to have or exercise veto power upon the process or choose a course that departs from their agreement and the law; every action by the parties is guided by their agreement and the law.
15. Thus, the court cannot interfere with the arbitral process or usurp the authority of the arbitral tribunal and decide on a challenge to the arbitral tribunal other than as provided in law or agreement of the parties.
16. Flowing from the above, the court finds that the application dated 11.2.2025 contravenes section 14 of the arbitration Act. It is therefore struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF OCTOBER, 2025.

F. GIKONYO M

JUDGE

In the presence of:

Wasieba for Simiyu for Respondent

No appearance by Applicant

CA- Kinyua

