



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 24 OF 2013**

**FLORENCE KATHOKI KIVEVO.....CLAIMANT/APPLICANT**

**VERSUS**

**AGNES MORAA OGONGO.....1<sup>ST</sup> RESPONDENT**

**PETER NGOTHO .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Application dated 7<sup>th</sup> October, 2013, the Respondents are seeking for the following orders:
  - a. That the Arbitration Award read and adopted in the Honourable Court on 7<sup>th</sup> October, 2013 is unfair as the arbitration panel was partial.*
  - b. That I wish to set aside the said Award in its entirety and proceed to fully hear and determine this suit.*
  - c. The costs of this Application and suit be borne by the Claimant.*
2. The Application is premised on the grounds that the Chairman of the Arbitration Panel and the Advocate for the Claimant work for Kenya Industrial Property Institute (KIPI), hence reasonable fear of unfairness; that the Chairman of the Arbitration Panel ignored the Claimant's evidence and that the Applicant has been prejudiced by the outcome of the Award.
3. In his response, the Claimant's advocate deponed that the two advocates agreed to suggest names of would be arbitrators and that the Respondents' advocate picked Joab Apopo and Edwin Njagi who were personally known to him while he suggested Mr. Kurgat, who was known to him both personally and professionally.
4. The Claimant's advocates deponed that on 16<sup>th</sup> March, 2012, the Applicant and himself recorded a consent in court confirming the Award; that the Award of the panel was unanimous and that the Applicant had an obligation to raise the claim of undue influence, which he did not.
5. The advocates filed their respective submissions which I have considered.
6. It is not in dispute that the advocates for the Applicant agreed with the Respondent's advocate to have Machakos ELC Case No. 24 of 2013 to be decided by three Arbitrators.
7. In the suit that was before the court, the Applicant, Agnes Moraa Ogongo, had sought for an order of

the court directing the Land Registrar to rectify the register to reflect her as the owner of parcel of land number Mavoko Town Block 3/1404 and the Respondent, Florence Kathoki Kivevo, as the owner of parcel of land number Mavoko Town Block 3/1200.

8. In the consent that was filed in court on 15<sup>th</sup> April, 2015, the Applicant and the Respondent's advocate appointed Joab Apopo, Moses Kurgat and Edwin Njagi as the Arbitrators.

9. After hearing the parties, the panel made their Award on 5<sup>th</sup> September, 2012 in which they held as follows:

***“Accordingly and in full and final settlement now, having carefully considered the evidence and written submissions of parties hereby order and direct that we are inclined to conclude that the Claimant is the validly registered proprietor of Mavoko Town Block 3/1404 and is entitled to vacant possession of the said land. The entire agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent is void for all intents and purposes and incapable of enforcement. The restriction placed on the land by the 1<sup>st</sup> Respondent has, as result of the foregoing, no legal basis and should be removed.”***

10. On 17<sup>th</sup> October, 2013, the Arbitral Award was read to the parties and was adopted as an order of the court.

11. The Applicant is challenging the Arbitral Award on the ground that one of the panel members, Mr. Kurgat, was working in the same institution with the Respondent's advocate as at the time the panel heard the matter.

12. If a party alleges that an arbitrator is likely to be partial, he is allowed to challenge the appointment of the Arbitrator (*See Section 14 of the Arbitration Act*). Such a challenge is supposed to be raised before the Arbitration Award is made.

13. An Arbitral Award may be set aside pursuant to the provisions of Section 35 of the Arbitration Act under several circumstances. One of the circumstances under which an Award may be set aside is if the making of the Award was induced or affected by fraud, bribery, undue influence or corruption.

14. Although the Applicant has claimed that both the Respondent's counsel and Mr. Kurgat were working as members of the Industrial Property Tribunal as at the time the Award was made, there is no evidence to show that the Respondent's advocate influenced Mr. Kurgat to arrive at the decision that he arrived at merely because the two had been appointed to the said Tribunal by the then Minister for Industrialization.

15. In any event, the appointment of the two advocates to the said Tribunal was published in the Gazette Notice number 6203 of 4<sup>th</sup> June, 2010. The Applicant's advocate therefore knew or ought to have known that the two were members of the Tribunal as at the time the consent of appointing Mr. Kurgat to be a member of the panel was made.

16. Even if the Applicant's allegation that Mr. Kurgat was influenced by the Respondent's advocate is true, which has not been proved, the Applicant's advocate has not explained why the other two members of the panel did not arrive at a different decision.

17. Consequently, the Application by the Applicant does not meet the threshold set by the Arbitration Act in setting aside an Arbitral Award. The Application dated 7<sup>th</sup> October, 2013 is therefore dismissed with costs.

**DATED AND DELIVERED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**