



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

ELC CASE NO 1420 OF 2014

DAVID MUSHOKAMBERE.....PLAINTIFF

=VERSUS=

QWANZA HOMES LIMITED.....DEFENDANT

OMBATI OMWANZA ADVOCATE.....ARBITRATOR

RULING

1. The applicant David Mushokambere filed a suit against Qwanza Homes Limited on 7th November 2014. One of the prayers in the suit was reference of the matter to arbitration. The applicant had entered into agreements with Qwanza Homes Limited for purchase of apartments which were being put up by Qwanza Homes Limited. The applicant paid a deposit for the apartments and applied for a loan to clear the balance. Qwanza Homes Limited however rescinded the agreements on the ground that the applicant had failed to clear the purchase price within the time given. The applicant sought an injunction against Qwanza Homes Limited but the injunction application was dismissed in a Ruling delivered by the Court on 21st May 2015.

2. The applicant thereafter wrote to the chairman of the Law Society of Kenya seeking appointment of an arbitrator to arbitrate over the dispute. The chairman of the Law Society of Kenya then appointed Samson Omwanza Ombati the respondent herein as an arbitrator vide its letter of 22nd July 2015. Before the respondent could fully take up his appointment and proceed according to his mandate, the respondent through his lawyers wrote a letter dated 7th August 2015 in which he stated that he was not going to submit to the jurisdiction of the Respondent on the ground that he had learnt that the respondent came from the same ethnic community as the directors of Qwanza Homes Limited and that therefore he was apprehensive that the respondent may not be impartial in the dispute.

3. The applicant also contends that the Respondent had commenced his arbitral role without communicating to the respondent. That the applicant had learnt of an intended arbitration conference which was to take place on 5th August 2015 for which he had not been informed and this further strengthens his fears that the Respondent may not be impartial. This is the basis upon which he made the present application in which he seeks removal of the respondent as arbitrator.

4. The respondent opposed the applicant's application based on a replying affidavit sworn on 30th March 2016 and filed in Court on the same date. The respondent contends that the allegations that he comes from the same ethnic community as the directors of Qwanza Homes Limited are spurious allegation which are made in bad faith without any basis and would not form any ground for bias in law. The respondent further contend that he made several phone calls to the parties who did not co-operate. On 29th July 2015 he wrote to the parties and raised the issue of his mandate and jurisdiction in accordance with the Arbitration Act Cap 49 laws of Kenya.

5. The Respondent further contends that he wrote to the parties and advised them that in view of the existence of ELC No.1420 of 2014, it was not prudent for him to proceed with the arbitration. He asked parties to elect whether to submit to arbitration or go on with the case already filed as it will not be proper to hold parallel proceedings.

6. The Court had directed parties to file written submissions. The applicant filed his submissions on 26th April 2017. The respondent did not file any submissions. It is important to note that the hearing date for application dated 10th September 2015 was taken ex-parte on 8th February 2017. When the matter came up for hearing on 4th April 2017, the respondent was not present and there was no affidavit of service filed. The request to file submissions was made by the applicant's lawyer. There were directions given that the respondent was to be served with written submissions to enable him respond. Again there was no evidence that the submissions were served upon the respondent. However be that as it may, I will proceed to determine the application before me.

7. The applicant's application was expressed to be brought under Section 14(3) and (5) of the Arbitration Act no 49 Laws of Kenya. It is important to point out at the outset that section 14 of the Act does not have subsection (5). Section 14(3) provides as follows:-

“On the application of any party to a reference, the High Court may remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire so removed is not entitled to receive any remuneration in respect of his services”.

8. It is clear from the provisions of section 14(3) that the Court can only remove an arbitrator who has failed to use all reasonable dispatch in entering on and proceeding with the reference and making an award. The applicant's main ground for seeking to have the respondent removed is that he comes from the same ethnic community as the directors of Qwanza Homes Limited. I do not think that this is a ground for asking the court to remove an arbitrator. The respondent has indicated through his replying affidavit that he has made efforts to have the parties to go to his chambers so that he can start the arbitral process. It is the parties who have been uncooperative. The respondent has even given directions in writing and answered some of the issues raised on his alleged impartiality. He has indicated to the parties that they have to elect on whether to proceed with the suit filed or the arbitration.

9. The applicant is arguing that the issue of reference of this matter to arbitration is one of the prayers in the Plaint. This does not provide a solution to the issues at hand. It is the applicant who asked for an arbitrator which arbitrator has been appointed. The procedure in law is that the case before court should be stayed or in the alternative the same be withdrawn as the two processes should not go on at the same time. The respondent has already pointed out to the parties to elect on how they should proceed. This has not happened and the respondent cannot be accused of not proceeding on with the arbitration.

10. There is no misconduct which has been proved against the respondent as to warrant his removal. There has to be good grounds to warrant removal of an arbitrator and one such ground is not belonging to the same ethnic community as in one or some of the parties to the arbitration. I do not find any merit in the applicant's application which is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **20th** day of **September, 2017**.

E. O.OBAGA

JUDGE

In the presence of :

Mr Karanja for Plaintiff/Applicant

Court Assistant: Hilda

E. O. OBAGA

JUDGE