



Mistry Jadv Parbat & Company Limited v Grain Bulk Handlers Limited; Alikar (Proposed Interested Party) (Civil Appeal 230 of 2017) [2023] KECA 233 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 233 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 230 OF 2017
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
MARCH 3, 2023**

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITED APPELLANT

AND

GRAIN BULK HANDLERS LIMITED RESPONDENT

AND

PHILLIP BLISS ALIKER PROPOSED INTERESTED PARTY

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Ogola, J.) dated 12th October, 2016 in Miscellaneous Civil Application No. 538 of 2015)

JUDGMENT

1. The notice of motion dated 24th June 2019 was filed on behalf of Phillip Bliss Alikar (the applicant/proposed interested party) seeking to be enjoined as an interested party in the appeal filed by Mistry Jadv Parbat & Company Limited (the appellant), which preferred this appeal against the ruling of the High Court at Nairobi (Ogola, J.) delivered on 12th October 2016 in Miscellaneous Civil Application No. 538 of 2015 dismissing the applicant's prayer for recusal. The applicant also seeks orders to issue directing that he be served with all the necessary pleadings in the appeal so as to be able to file a response.
2. The applicant/proposed interested party herein practices as an Arbitrator. He presided over a dispute involving the appellant and the respondent and issued an award in favour of the appellant. The genesis of this matter stems from the decision by Ogola, J. setting aside that arbitral award in which the court made adverse findings against the applicant, directing his removal as an arbitrator, and that he refunds half of the total fees paid to him by the respondent. It is explained that, in the proceedings before the High Court, the applicant's appearance and participation had been allowed vide a letter dated 22nd February 2016; and that, when the appeal was filed in this Court, he was not enjoined as a party. The applicant/interested party thus contends that he has a legal interest in the subject matter which affects



him personally and professionally; and that he is a necessary party in the appeal to enable this Court to effectually and completely adjudicate on all questions arising in the appeal.

3. Opposing the application, the respondent through a replying affidavit dated 27th January 2020 and sworn by Jonathan James Stokes, clarifies that the subject of the appeal does not relate to the decision setting aside the award, but relates to the ruling made on 12th October 2016, which dismissed an application seeking the Judge's recusal; and that the judgment being alluded to by the applicant was delivered on 8th December 2016, and is not the subject of the appeal.
4. As regards the application for joinder, it is pointed out that the applicant/proposed interested party chose not to participate in the proceedings leading to the appeal, and cannot therefore be a necessary party given that the originating motion dated 11th December 2015 had sought: the removal of the applicant/proposed interested party who had been the sole arbitrator in the arbitral proceedings; the award declared null and void; and the applicant/proposed interested party herein to refund fees and expenses paid to him in the arbitration proceedings, and yet the applicant/proposed interested party chose not to enter appearance.
5. It was during the High Court proceedings that the appellant herein filed an application dated 5th September 2016 essentially seeking recusal of Ogola, J. from further hearing the matter; that the file be transferred to the Commercial and Admiralty Division at Nairobi for hearing and disposal; and that the matter be mentioned before the presiding judge for further directions.
6. The appellant's application was premised on the ground that the appellant was apprehensive that there was evidence of bias in the manner the directions were given in the matter, and in the manner in which the appellant's pleas were heard and determined by the court with regard to the originating summons dated 11th December 2015. Even then, the applicant did not file any papers nor take any position in the matter of recusal; that the issues raised in the appeal are solely between the appellant and the respondent, who took part in the recusal proceedings.
7. The learned Judge, who was at that time on transfer with effect from 2nd June 2016, delivered a ruling and allowed the request for extension of time for the respondent to file its submissions, giving corresponding leave to the other parties to reply, if need be, and further directed that the Deputy Registrar sends the file to the Judge in Machakos for the ruling to be written and thereafter delivered. It is this ruling that gave rise to the application for recusal in which the applicant questioned the bona fides in the directions given by the Judge that the Deputy Registrar to keep the file, and that the file was handled differently from other files in the court's Commercial Division. The learned Judge found no merit in the application for recusal and dismissed it.
8. Both parties filed written submissions in relation to the present application, where the applicant/proposed interested party through its counsel argues that he has demonstrated that he is likely to be affected by the outcome of the appeal since he was the arbitrator in the impugned proceedings and that, in the High Court, the respondent on its own motion sought adverse orders against him thereby rendering him a necessary party in the determination of the appeal and placing him within the definition of an interested party. In this regard, he draws from the Supreme Court's definition in *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others*, Sup. Ct. Pet. No. 12 of 2013 where it defined an interested party thus:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when



it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

9. He submits that his non participation in the recusal application was not fatal to his prayers and should not prejudice his participation in the appeal. He points out that rule 77 of the *Court of Appeal Rules*, 2010 under which the application is brought allows the Court to join a party regardless of their want of participation in the High Court. He submits that the rule enjoins an intended appellant to serve copies of the notice of appeal on "all persons directly affected by the appeal" before or within seven days after lodging the notice of appeal.
10. We are urged to hold that the applicant/proposed interested party will be "directly affected" by the outcome of this appeal and is therefore a necessary party, and to be guided by the case of *Attorney General v. Kenya Bureau of Standards* [2018] eKLR where this Court stated:

“ ... the Court can, at any stage of the proceedings, upon application by either party or suo motto, order the name of a person who ought to have been joined or whose presence before the Court is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party.”
11. In *Jobo v. Doshi & 4 others* (Civil Application 29 of 2020) [2021] KECA 137 (KLR), this Court explained the provision as follows:

“That provision has room for any person affected by a decision of the lower court and who desires to appeal to this Court to file a notice of appeal notwithstanding that such person was not a party to the proceedings in the lower court.”
12. The respondent submits that the application is incurably flawed as the appeal that the arbitrator seeks to be joined to is an appeal against the Final Judgment, which does not exist. In any event, the Final Judgment arises from an application by the respondent pursuant to Section 14 of the *Arbitration Act*, No 4 of 1995 (“the Act”), which, by section 14(6) of the Act, cannot be appealed, and the applicant had considered himself as a neutral party in the High Court proceedings the subject matter of this appeal and did not take any part in them. The applicant/proposed interested party is also accused of belatedly attempting to un-procedurally “rectify” its defective application through the written submissions by arguing that his presence is necessary in determining the present appeal against the ruling on the recusal application.
13. We take into consideration the issues raised by the respondent in weighing out the interest of the applicant in the said appeal, namely whether:
 - a. the applicant has sufficient interest in the appeal;
 - b. the applicant will be prejudiced if not joined in the matter; and
 - c. the applicant’s application for joinder sets out the case and/or submissions he intends to make before the Court, which must be relevant to the appeal.
14. To satisfy this test, the applicant/proposed interested party needs to demonstrate his stake/his relevance in the appeal; that he will be affected by the outcome of the appeal; that his presence is necessary to enable the effectual and complete adjudication of the appeal; and that his interest would only be articulated if allowed to join in the proceedings – see *Meme v Republic* [2004] 1 EA 124. Unfortunately, he has not led a scintilla of information as to how his non-participation in the appeal



on the issue regarding recusal of the Judge will leave the appeal poorer. The impression we get is simply a lament because the learned Judge made remarks about him and issued adverse orders.

15. The second issue to consider is what prejudice the applicant/proposed interested party would suffer if the application is not allowed and, thirdly, whether there exists a viable appeal to join in the first place. In this regard, we take note that the applicant/proposed interested party seeks to be enjoined in an application for recusal as an interested party, and yet the learned Judge heard the suit and rendered his decision delivered on 8th December 2016 setting aside an award issued in favour of the respondent. In our considered view, as relates to that application, the horse has already bolted. Further, the appellant has completely failed to present and/or identify any reasonable grounds from which an inference may be drawn of the prejudice he is likely to suffer if left out of the appeal, and the lament regarding the conduct of the Judge remains elusive. Having carefully considered the foregoing, we are satisfied that no fair minded observer aware of the facts in this application can conclude that the applicant/proposed interested party is a necessary party to the appeal, and we hereby find that the application is devoid of merit and is hereby dismissed with costs to the respondent herein.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

