REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCOMMMISC/E140/2023

CITATION: STATE LAW VS DANIEL OUTLETS LTD AND PAUL PAUL NGOTHO

RULING

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
MISC APPLICATION NO E140 OF 2023
BETWEEN
THE PRINCIPAL SECRETARY MINISTRY OF MINING, BLUE ECONOMY & MARITIME
(Previously Ministry of Agriculture, Livestock, Fisheries & Cooperatives)
…….APPLICANT
VERSUS
PAUL NGOTHO…….1ST RESPONDENT/ARBITRATOR
DANIELS OUTLETS LIMITED……2ND RESPONDENT

RULING

Brief Facts

1. Before the Court is an originating summons dated 24th February 2023 brought under sections 1A, 1B, 3A of the Civil Procedure Act, section 14(3)(A) of the Arbitration Act and rule 3 of the Arbitration Rules 1997.

2. The application seeks the following orders;
i. SPENT
ii. That the mandate of Paul Ngotho as the sole arbitrator in the matter of arbitration between the applicant and the 2nd respondent be terminated.

iii. That a substitute arbitrator be appointed by the chartered institute of Arbitrators.
iv. That costs of this application be provided for.

3. The genesis leading to the application is a contract dated 19th January 2021 entered into between the applicant and the 2nd respondent. The contract related to a proposed ultra-modern fish hub at Liwatoni Fisheries Complex which tender had been advertised on 13th November 2020. A dispute ensued and the same was referred to arbitration as per the parties' contract.

4. Mr. Paul Ngotho was appointed as the arbitrator. Before the hearing commenced, the applicant challenged the arbitrator's impartiality and independence. In a ruling dated 27th January 2023 the arbitrator dismissed the applicants claim. Dissatisfied with the finding of the arbitrator, the applicant filed the present application.

5. The application was premised on the grounds on the face of it and the supporting affidavit sworn by MARY MURUGI NGIGE. The applicant's case was further buttressed by the submissions dated 4th April 2023. The applicant faulted the arbitrator for a culmination of issues and incidents that led to a lack of confidence in him.

6. The first issue that the applicant took issue is the tribunal's deposit for fees. The arbitrator had on on 8th January 2022 issued an order for directions (No. 3) directing that the parties would jointly and severally be liable for the tribunal's fees and disbursements. The applicant was unable to pay its part of the fees deposit on time and the 2nd respondent, without consulting the applicant, paid the amount of Kshs. 500,000/= on account of the applicant's deposit. This surprised the applicant as there was no indication as to when the applicant was expected to refund the same or whether this would form part of fees due in future.

7. The applicant also submitted that subsequently, the applicant through an email dated 1st September 2022 copied to all parties, sought leave to file further documents. Before the 2nd respondent had responded to the email, the arbitrator in an email dated 2nd September 2022 responded stating that the 2nd respondent's advocate could not respond to the email then, since he was involved in the presidential petition. This raised doubt in the impartiality of the arbitrator who appeared to be prosecuting the matter for the 2nd respondent including ascertainment of the 2nd respondent's advocates whereabouts.

8. The applicant read the continued bias when later on, the arbitrator issued an order for directions, asking the applicant to refund the deposit paid on its behalf by the 2nd respondent. The applicant stated that it seems that the arbitrator may have had a conversation with the 2nd respondent in the absence of the applicant, as he did not seek clarification from the applicant on whether the money had been refunded first.

9. The applicant further faulted the arbitrator for issuing an order for directions giving the dates when the matter would be heard while disregarding the applicant's letter on convenient dates. This, the applicant avers, was a clear indication of bias by the arbitrator since the 2nd respondent had not even objected to the dates proposed by the applicant.

10. The applicant took issue with the order for directions (No. 5) dated 10th March 2022 but issued on 8th December 2022, a day after the applicant had challenged the arbitrator's impartiality. The applicant states that the order for directions 'were likely to taint the image of government entities

including the applicant herein'.

11. The 2nd respondent opposed the application vide grounds of opposition dated 14th March 2023 and submissions dated 24th April 2023. The grounds of opposition were stated as follows;
i. THAT if the challenge be to the arbitrators ruling dated 12/10/23 the ruling was sound in law and fact
ii. THAT the ruling of the Arbitrator of 27.01.23 is self-evident on the facts and the law
iii. THAT in respect of all other allegations against the arbitrator some are premature as the applicant hasn't complied with section 14(2) and (3) of the Arbitration Act
iv. THAT the application doesn't demonstrate sufficient grounds for justifiable doubts as to his impartiality and independence.
v. THAT the arbitrator's eagerness to fast track the arbitral proceedings cannot be a reason to impute impartiality or bias.
vi. THAT the application is malafide.

12. It was the 2nd respondent's case that it had paid the deposit that the applicant refers to, when the applicant expressed inability to pay the deposit on time. This was as a result of the directions of the arbitrator so as to avoid suspending the proceedings. The 2nd respondent acknowledges that the arbitrator subsequently issued an order for directions No 10. requesting the applicant to refund the monies paid by the 2nd respondent. The 2nd respondent argues that the arbitrator acted within the law in reminding the applicant to pay back the portion of the deposit fees that had been paid on their behalf.

13. The respondent further submits that the applicant did not comply with section 14(2) and (3) of the Arbitration Act as the challenge was time barred having been raised after 15 days as required by law. Counsel submitted that the applicant had challenged the arbitrator by a letter dated 7th December 2022 on the decision of the arbitrator made on 3rd October 2022. Counsel further submitted that the applicant did not demonstrate justifiable grounds to show the arbitrators impartiality, lack of independence or bias.

Analysis

14. I have considered the pleadings and the written submissions by opposing parties. This court is called upon to determine whether the claim regarding the arbitrator's alleged bias, lack of impartiality and independence is merited. Section 13(3) of the Arbitration Act provides a leeway for parties to challenge an arbitral tribunal in circumstances which raise doubts on his impartiality and independence. It provides that;

"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''.

15. These words in section 13(3) have been the subject of judicial interpretation. It is generally agreed that it is not enough for a party to simply allege that it has lost confidence in the arbitrator's impartiality. Cogent proof of actual bias or prejudice is required. The procedure for challenging the arbitrator is in turn provided for under section 14 of the Act in the following terms;

(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 15 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 30 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.
(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.
(8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

16. The Court in Modern Engineering v Miskin 15 BLR 82 referred to Pili Management Consultants Limited v China Fushun No. 1 Building Engineering Company Limited [2021] eKLR citing Lord Denning on the applicable test in considering removal of an arbitrator.

“The proper test to apply when considering whether to order removal was to ask whether the arbitrator’s conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion….The question is whether the way he conducted himself in the case was such that the parties no longer have confidence in him. It seems to me that if the arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying “I have not had any fair hearing”.

17. In Justice Philip K. Tunoi and Another v Judicial Service Commission and Another NRB CA Civil Appeal No. 6 of 2016 [2016] eKLR, the Court of Appeal adopted the decision in Porter v Magill [2002] 1 All ER 465 where the court held that the test for apparent bias is “[W]hether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

18. In this instant case the court is called upon to analyze the evidence presented by the parties and determine whether the applicant has demonstrated circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality and independence.

19. I have carefully looked through the evidence presented by the parties. It was certainly part of the rules of the proceedings that neither party was to contact the arbitrator directly. The averments

made by the applicant that it would appear like the arbitrator had contacted the 2nd respondent directly would therefore be a breach of the procedure adopted by the parties. I have not found any evidence that the arbitrator contacted the 2nd respondents to discuss its refund. The applicant has also not led any evidence to show that there was personal knowledge of the whereabouts of the 2nd respondent's lawyer, out of personal communication.

20. It is on record in the order for directions No 8 that the issue of payment of deposit fees was discussed by the parties. The applicant requested for 60 days to pay the deposit. The arbitrator's final orders were that the 2nd respondent was 'at liberty' to pay the respondent's share of the tribunal deposit no 1'. The picture that the applicant paints is that the 2nd respondent had no reason at all to make the payment, yet paragraph 10(b) of the said order for directions, which was issued on 26th April 2022, clearly stipulates these directions. The words at liberty left the choice to the 2nd respondent to decide whether to pay or not.

21. It is also on record that the arbitrator thereafter followed up this issue of payment of the applicant's share of the deposit. In the next order for directions No.9, the arbitrator noted that the parties had been silent about the issue. It is on this occasion that the arbitrator informed parties that the proceedings would stand suspended if the parties did not pay the outstanding deposit or provide sufficient cause. This order for directions was issued on 17th June 2022.

22. The 2nd respondent, following the directions by the arbitrator and obviously not wishing to have the process suspended, went on to pay the deposit. Through an email dated 2nd July 2022 it informed all the parties that this had been done, 'so as to allow the pleadings to proceed'. The fact that the 2nd respondent did not reach out to the applicant directly or confirm to the applicant the terms upon which the money was to be refunded does not under the circumstances point to bias on the side of the arbitrator.

23. The issue of the deposit was again revisited by the arbitrator. When the applicant requested an extension of time to comply with the deadline of 2nd October 2022 in order for directions No. 11 dated 5th September 2022, the arbitrator brought it to the attention of parties that the applicant was yet to refund the 2nd respondents share of the deposit. I find it hard to read impartiality in this statement noting that the applicant had undertaken to pay the amount within 60 days, and this was within the knowledge of all the parties.

24. The arbitrator still gave directions on the outstanding monies giving the 2nd respondent the 'liberty to claim interest at commercial rates from…the date of payment to the date of refund'. This was in the order for directions issued on 1st November 2022. This shows that the subject of the outstanding deposit was an open conversation between all the parties and was a continuous item of discussion.

25. The record also reflects that at some point the 2nd respondent made an application that the proceedings should continue ex parte in light of the non-payment of the deposit by the applicant. It is interesting to note that while the applicant accuses the arbitrator of making determinations in favor of the 2nd respondent, it does not point to the fact that the arbitrator in fact dismissed the 2nd respondent's application for ex parte proceedings. The arbitrator noted that even though the applicant had not made the deposit payment, the 2nd respondent was also late in submitting its statement of claim and this had nothing to do with the non-payment of the deposit by the applicant.

26. I have also considered the purport of the email dated 2nd September 2022 by the arbitrator and sent to all the parties herein. In the email the arbitrator urged the 2nd respondent to respond to the applicants request by 6th September 2022 and also acknowledged the fact that counsel was involved in the ongoing presidential petition but should respond to the email as it was not too involving.

27. I would consider the tenure of this email in the light of the rest of the email communication and thread that has been provided to the Court. It is obvious that parties and the arbitrator had time and again discussed the issue of timelines and requested for extension of time. The arbitrator, and rightly so, seemed keen on each party complying with the timelines set or giving reasons why it sought more time. In my view the email was one of the nudges for the parties to stick to the timelines. The mere fact that the arbitrator expressed the belief that counsel was participating in the election petition did not render him impartial. The presidential petition was a matter of public interest and the advocates and parties participating therein were public knowledge.

28. The applicant also took issue with the choice of dates by the arbitrator. I note that the applicant suggested that the hearing does commence from 10th May and the same was not disputed by the 2nd respondent. The tribunal in order to expedite the process chose the earliest dates and held that the claimants witness would be heard from 28th February to 10th March and the applicants witness would be heard on 15th, 17th, 27th, 28th,30th and 31st March 2023.

29. While I note that the last four dates given to the applicant's witness were in conflict with the dates proposed by the applicant in the letter dated 23rd February 2023, I do not equate that to bias. In fact, the arbitrator allowed the parties to inform him of their availability on the said dates. In my view there was an option for reviewing the dates and the same cannot be said to amount to bias because the 2nd respondent did not oppose the dates.

30. Finally, I agree with the arbitrator that the challenge was filed in December 2022, outside the 15-day period as provided for in section 14(2) yet it raised issues that transpired in September and October 2022.On this account, the arbitrator proceeded to down its tools having found that it lacked jurisdiction to entertain the challenge but ordered against the non-recusal.

Determination and final orders

31. In conclusion, from the evidence before this court and relying on the law and authorities cited by the parties and the court, I find that the applicant has failed to establish the grounds for removal of the Arbitrator under section 13 of the Arbitration Act. The application dated 24th February 2023 is devoid of merit and the same is dismissed with costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 2nd DAY OF JUNE 2023.

F. MUGAMBI
JUDGE

Court Assistant: Ms. Lucy Wandiri.

SIGNED BY: HON. LADY JUSTICE DR. GITHIRU FREDA MUGAMBI

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT COMMERCIAL AND TAX
DATE: 2023-06-03 14:20:58+03