



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CASE NO. 131 OF 2016

GOODISON SIXTY ONE SCHOOL LIMITED.....APPLICANT

VERSUS

SYMBION KENYA LIMITED.....RESPONDENT

RULING

1. The applicant, **GOODISON SIXTY ONE SCHOOL LIMITED**, has asked the court to disqualify or to remove the Arbitrator from the Arbitral Proceedings.
2. Secondly, the applicant asks the court to declare the Arbitral proceedings a nullity. It also asks that the Final Award and Costs Award dated 25th February, 2016 be declared void.
3. All other Rulings, Orders and Awards which the arbitrator had given were also deemed, by the applicant, to be void, and the court was asked to so declare.
4. Thirdly, the applicant requests that the court should order that the Arbitral proceedings should start *de novo*, before a new arbitrator to be appointed by the parties.
5. In the event that the parties were unable to agree on the appointment of a new arbitrator, within such time as the court would specify, the applicant asks the court to appoint a new arbitrator.
6. The primary reason given by the applicant is that justifiable doubts had arisen about the impartiality and independence of the arbitrator.
7. The said arbitrator is said to have failed to make a disclosure about various facts, which he was under a lawful duty to disclose.
8. Those facts stem from the connection between the arbitrator and the advocate representing the respondent, **SYMBION KENYA LIMITED**.
9. The respondent's advocate is **Mr. ANTHONY GROSS**.
10. Mr. **Gross** was described, in the website of the **STRATHMORE DISPUTE RESOLUTION CENTRE ("SDRC")**, as a Director of the said centre.

11. Meanwhile, the arbitrator, **Mr. PAUL NGOTHO** was a member of the Panel of Arbitrators.
12. By virtue of being on the Board of **SDRC**, the advocate for the respondent was said to have been privy to and/or responsible for any/or involved in the appointment of Mr. Ngotho, as the arbitrator in these proceedings.
13. Secondly, the respondent's advocate was said to be in a position from which he stood to directly or indirectly earn an income or other financial reward and/or benefit, and to have an economic interest in the success of **SDRC**.
14. Therefore, the applicant felt that the arbitrator was neither independent nor impartial. His conduct was said to have been coloured by his relationship with or his connection to the advocate for the respondent.
15. The applicant cited several instances to illustrate how the arbitrator treated it's advocate is a shabby manner.
16. Indeed, the arbitrator is said to have barred the applicant from filing Witness Statements. At other times the arbitrator is said to have intimidated or bullied the applicant's advocate.
17. At some other instances, the arbitrator is said to have allowed the respondent's advocate to dictate the course of the arbitral process or to manipulate the said process.
18. The respondent has opposed the application, asserting that the allegations of the impartiality alluded to by the applicant, were simply speculative.
19. In any event, when the applicant had raised the issues of the alleged lack of independence and of impartiality on the part of the arbitrator, the same had been duly addressed by the arbitrator.
20. The applicant appears to acknowledge that the arbitrator addressed the concerns which the applicant had raised, concerning the arbitrator's lack of independence and lack of impartiality. However, the applicant insists that the arbitrator had acted improperly when he dismissed the applicant's concerns.
21. On the other hand, the respondent's view was that the arbitrator had handled the complaints competently.
22. In determining this application, the court first reminds itself that the arbitrator did deliver his Final Arbitral Award and his Costs Award on 25th February 2016.
23. Considering that the application for the disqualification or the removal of the arbitrator was filed in court on 23rd March 2016, that means that the application was made after the arbitral proceedings had been concluded.
24. I am unable to appreciate how the disqualification or the removal of the arbitrator, after the arbitrator had delivered his final Arbitral Award, would have any bearing on proceedings which had been concluded. In my considered opinion, the applicant may have moved the court a little too late in the day.
25. Pursuant to Section 13 (3) of the Arbitration Act, 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 or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.

26. By invoking the phrase;

“Circumstances exist that give rise to justifiable doubts as to his impartiality and independence....”, when canvassing the application against the arbitrator, the applicant had put itself within the ambit of Section 13 (3) of the Arbitration Act.

27. The procedure for mounting a challenge against an arbitrator is provided for by Section 14 of the Arbitration Act.

28. First, the parties are free to agree on the procedure for challenging an arbitrator.

29. Secondly, pursuant to Section 14 (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”.

30. Clearly therefore, when the applicant first made the challenge, the arbitrator was the right tribunal to determine the said challenge.

31. Pursuant to section 14 (3) of the Arbitration Act;

“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”.

32. Therefore, after the arbitrator had rejected the applicant’s attempt to have the arbitrator withdraw from the arbitral proceedings, the applicant was entitled to move to the High Court, to seek a determination on the application for the disqualification or the removal of the arbitrator.

33. My main concern in this matter is that the arbitrator was not enjoined to the application before the court. Consequently, the arbitrator would not have the opportunity of being heard before the court makes a determination of an application for his removal.

34. Section 14 (4) of the Arbitration Act provides as follows;

“On an application under sub-section (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application”.

35. By failing to make the arbitrator a party to the application before the High Court, the applicant denied the arbitrator an opportunity to be heard.

36. I also note that by dint of the provisions of Section 14 (8) of the Arbitration Act;

“While an application under sub-section (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 unsuccessful”.

37. In effect, the arbitrator and the parties did not err when the arbitral proceedings went ahead, to conclusion, even when the applicant had notified the respondent and the arbitrator of its intention to challenge the arbitrator before the High Court.

38. In the final analysis, the application dated 23rd March 2016 is unsuccessful, because;

a) It was brought after the arbitrator had already given his final Arbitral Award and Costs Award. Therefore, there was nothing further that the arbitrator could be stopped from doing, as his work had come to an end; and

b) The arbitrator could not be condemned without being accorded an opportunity to be heard. But, as the applicant had not made the arbitrator a party to the application before the court, the arbitrator was denied any opportunity at which he could have responded to the allegations directed against him.

39. For those reasons, the application is dismissed, with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

S. Amin & I. Ahmed for the Applicant

Njuguna for the Respondent

Collins Odhiambo – Court clerk.



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