REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION & ADMIRALTY DIVISION

MISC. CIVIL CAUSE NO. 131 OF 2016

GOODISON SIXTY ONE SCHOOL LIMITED.....APPLICANT

Versus

SYMBION KENYA LIMITED.....RESPONDENT

RULING

1. Symbion Kenya Limited (Symbion) seeks Leave of the Court to enforce as a Decree of this Honourable Court the Arbitrator's Final Award of 25th February 2016. This request against Goodison Sixty One School Limited (Goodison) is contained in a Chamber Summons dated 16th March 2016 and anchored on the provisions of Section 36 of The Arbitration Act (The Act).

2. Goodison opposes and has filed Grounds of Opposition dated 25th April 2018, Affidavits of Zainab Jaffer sworn on 21st April, 2018 and 26th June 2018.

3. Section 36 of The Act makes provision for Recognition and Enforcement of Awards while Section 37 sets out the Grounds upon which Recognition or Enforcement can be refused. The Award sought to be enforced is a Domestic Arbitral Award and by annexing to the Application a duly certified copy of the Award and a duly certified copy of the Arbitration Agreement, Symbion has satisfied two essentials of Section 36(see subsection (3) thereof).

4. Goodison takes the position that this Court should neither Recognize nor Enforce the Award on the basis of two broad grounds namely that the making of the Arbitral Award was induced or affected by fraud, bribery, corruption or undue influence and that its Recognition or Enforcement would be contrary to the Public Policy of Kenya.

5. The Grounds set up by Goodison are among the Grounds for refusal of Recognition or Enforcement which are fully cataloged in Section 37 as follows:-

"(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—

(i) a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security".

6. A short history of the proceedings herein, not the dispute itself, reveals why this this late stage of the proceedings should not be involved.

7. In the proceedings before the Arbitral Tribunal, Goodison made two formal Challenges to the Arbitrator. The second of the two was that of 3rd February 2016. The Grounds for challenge made out by Goodison are reproduced in verbatim;

"The grounds for this challenge are that you hav**e** Failed to disclose the following facts which you were under a lawful duty to disclose under Section 13 of the Arbitration Act and the IBA Guidelines on Conflicts of Interest (2014):-

1.2.1 That you are a member of the Panel of Mediators of the Strathmore Dispute Resolution Centre ("SDRC") a position from which you presumably earn an income.

1.2.2 That Counsel for the Claimant, Mr. Anthony Gross, is described in the SDRC website as a Director of SDRC and "…a founder member and Director of the Dispute Resolution Centre in Nairobi now amalgamated with the Strathmore Dispute Resolution Centre under the Law School…".

1.2.3 As such, Mr. Gross and/or his firm presumably earns an income or other financial reward from SDRC or has an economic interest in its success.

1.2.4 As a Director of SDRC Mr. Gross is one of the persons who must have been privy to and responsible for your appointment to the Panel.

8. In a Ruling of 25th February 2016, Paul Ngotho (the sole Arbitrator), dismissed the said Challenge. By dint of the provisions of Section 14(3) an unsuccessful Challenging Party is entitled to apply to the High Court to determine the matter by either rejecting or upholding the Challenge. Goodison took its chance under these Statutory provisions and in an application dated 23rd March 2016, it asked the Court not only to uphold the challenge but also to declare the Arbitration proceedings a nullity and the Final Award and Costs Award dated 23rd February 2016 and any and all other Orders, Ruling or Awards in the Arbitration Proceedings void.

9. It fell to Hon. Ochieng J. to hear and determine that Application. In a Ruling dated 6th October 2016, the good Judge held as follows:-

"*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 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".

10. Aggrieved by that Decision, Goodison filed an application dated 15th November 2016 in which it sought to Review and have the Decision of Hon. Ochieng J. set aside. That Application was not successful and was dismissed by Hon. Mwongo J. on 2nd May 2018.

11. Following that determination, Goodison argued its Application dated 23rd May 2016 to set aside the Award. One of the Grounds put forward by Goodison and forcefully argued by its Counsel was that the Arbitrator failed to treat the Parties with equality due to his lack of impartiality or independence and his manifest bias. In a Ruling dated 13th April, 2018, I made the following observation on this Ground:-

"*3. Although Goodison has in the present Application also asserted that the Arbitrator failed to treat the parties with equality due to his lack of impartiality or independence and was manifestly biased, the occasion to consider that assertion is passed. The Court notes that in an Application dated 23rd March 2016, Goodison had not only sought to declare the Arbitral proceedings and the Award therefrom a nullity but also to have the Arbitrator disqualified and removed from the proceedings. The mainstay of that Application was an allegation of partiality and lack of independence by the Arbitrator. That application was dismissed in a decision rendered by Hon. Ochieng J. on 6th October 2016. It would be needless therefore for this Court to reconsider the veracity or otherwise of that complaint.*

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57. As to issues of bias and partiality allegedly displayed by the Arbitrator in the course of the hearing, this Court has already found that those are matters that were or ought to have been the subject of the Application that was dismissed by Hon. Ochieng J. on 23rd March 2016. It is not helpful for this Court to give them any further consideration".

3. Having read the current Application, the Written Submission filed by Counsel and having heard their Oral highlights, it is clear to this Court that the backbone of the resistance of the Application now before Court is that the Arbitrator was not independent and impartial. This is the pivot to the two Grounds put forward.

4. In arguing that the Award was induced or affected by fraud and/or undue influence, Goodison bases it on the alleged lack of independence and impartiality of the Arbitrator. Arguments that were made in the three applications this Court has already alluded to. It is submitted, for instance, that Mr. Gross Advocate for Symbion exerted undue influence over the Arbitrator because of the position he held at SDRC. It is further asserted that the Arbitrator acted fraudulently in knowingly concealing his relationship with Mr. Gross.

5. The questions of lack of partiality and independence and bias also find their way into the argument that the Recognition and

Enforcement of the Arbitral Award is against the Public Policy of Kenya. Goodison urges the Court not to approve the Award as it would violate the Respondent's Constitutional Right to fair hearing before an independent and unbiased Tribunal and this would otherwise be a manifest breach of the Rules of Natural justice. These are arguments that have been made before.

6. It may therefore be understandable when Symbion asserts that the issues raised by Goodson in respect to this Application are *resjudicate.* Yet again it is fundamentally true, as submitted by Goodison, that the issue of the Arbitrator's apparent failure to disclose his alleged conflict of interest said to result from an alleged close relationship with Counsel for the Claimant by virtue of their co-affiliation in SDRC has never been addressed in substance by the High Court. Goodison would be right because the Court before which the issue was squarely placed determined the Challenge application on a technicality. Thereafter the issue was not substantively addressed in the Application for Review that followed. When it came up before the Court hearing the Application for setting aside of the Award, the Court was of the view that occasion for its argument had passed when the Challenge application was heard and determined.

7. Now, the provisions of Section (13) of The Act provide as follows:-

"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

(2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.

(3) 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.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment".

8. The Challenge procedure is provided in Section 14 in the following manner:-

"(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".

9. It would seem to this Court that a Party who is entitled to mount a Challenge to an Arbitrator but has, for good reason, not had the opportunity of raising the Challenge under the Procedure set out in Section 14 and an award has been made, can nevertheless use the circumstances contemplated by Section 13(3) to either seek the setting aside of the Award or resist its recognition and/or enforcement. For example, there is no reason why a Party who demonstrates the existence of justifiable doubts as to the impartiality and independence cannot use that reason to advance an argument that the Award made was induced and/or affected by undue influence or that it would be against Public Policy to recognize an Award made in those circumstances.

10. However, where like here, the Party has had an opportunity of filing a Challenge Application before the High Court and has in fact presented and argued it, and the Application has been determined, then it may amount to an abuse of Court Process for the Party to re-agitate the same Grounds in subsequent Applications for setting aside or opposing Recognition or Enforcement. Of course, it is true that the Application for Challenge made by Goodison was determined on technicalities and the substantive arguments were not decided but it has to be remembered that the primary forum to take up the issue of doubts as to the impartiality and independence of the Arbitrator (as opposed to the apparent bias during the Arbitral Proceedings) has to be by way of a Challenge under Section 14(3). Once the Court has rendered its Decision on the Challenge, albeit on a technicality, then it may amount to abuse of Court process to use the Grounds raised in the Challenge to advance a cause for setting aside or opposing Recognition. To allow a Party to argue the same issues would be to permit the Party to find a way of going round the technical difficulties it encountered in the Challenge Application by simply rearguing the Grounds in the subsequent Applications.

11. Even if I was wrong in this view, two other considerations sway this Court away from entertaining the arguments raised by Goodison.

12. First, in the Further Affidavit of Oscar Ogunde (on behalf of Symbion) filed on 21st June 2018 he depones,

"*That against the above backdrop, the Respondent has always filed Notices of Appeals (which are on Record) against every Ruling delivered by this Honourable Court in these aspects. In this regard and in response to paragraph 10 of the Respondent Replying Affidavit, the Respondent if dissatisfied by this Honourable Court various Rulings and/or findings will have an opportunity to canvass its grievances in the said Appellate Court as this Honourable Court lacks the jurisdiction to sit as an Appellant Court against its own Decisions*".

In response to this further Affidavit, Goodison filed a Supplementary Affidavit by Zainab Jaffer sworn on 26th June, 2018. In response to the issue raised by Ogunde, Jaffer depones,

"*5. THAT I am advised by my Advocates on record whose advice I verily believe to be true that the contents of paragraphs 10 and 11 of the Further Affidavit amount to legal submissions and the Deponent is not qualified to give an opinion on matters of Law and ought to be disregarded. Nevertheless I am further advised by the Respondent's Advocates on record that the Respondent raises clear and weighty matters of Law which directly pertain to the Respondent's Constitutional right to appear before this Honourable Court to seek redress for the manifest injustice that has been visited upon it and is properly before this Honourable Court*".

13. If it is true that the Ruling of 23rd March 2016 is under Challenge by way of Appeal (and this is not denied by Goodison) then it would be an abuse of Court process for Goodison to redeploy the same issues that will arise at the Appeal in resisting the enforcement proceedings. This Court has not been told why Goodison should not pursue the Appeal and await its outcome.

14. Secondly, in responding to the Application before Court, Goodison has made damning allegations against the Arbitrator. In much the same way as the provisions of Section 14(4) entitles the Arbitrator to appear and to be heard, the Arbitrator would have a right to appear and be heard on the allegations made against him by Goodison in the response made to the Application now before Court. This Court is not certain whether the Affidavits of Zainab Jaffer sworn on 21st April 2018 and 26th June 2018 in Response to the Application were served upon the Arbitrator. From reading the Affidavits themselves they were only to be served upon A.F Gross Advocate. This Court would be reluctant to make any findings against a person who has not been given an opportunity to be heard.

15. Even if this Court were to find that the issues raised are not *res judicate* those raised in the Challenge application, I still hold as I did in my Ruling of 13th Day of April, 2018 that the moment for raising the issue of independence and impartiality passed with the dismissal of the Challenge Application.

16. For the reason that the fulcrum of the resistance has crumbled, then the Court has no reason but to allow the Application for Leave under Section 36 of The Arbitration Act. The Chamber Summons of 10th March 2016 is allowed as prayed. Costs to the Applicant.

Dated, delivered and signed in open Court at Nairobi this 7th Day of December, 2018.

F. TUIYOTT

JUDGE

Present;

Amin for Respondent

N/a for Applicant

Nixon-Court Assistant