# ETHICS

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# Can an Arbitrator be Called as a Witness?

Can an arbitrator be called as a witness to testify on arbitral procedure before the court hearing annulment or enforcement proceedings? The answer is in the affirmative especially when the arbitrator is asked to give testimony on the elements of facts in the proceedings. The Courts have however been careful not to interfere with the arbitrator's freedom of judgment and has refused to make enquiries about the grounds of their decisions. Mainly, the arbitrator's testimony could be used to determine how and on what basis the final award was originally reached this includes whether the parties' improper conduct affected the outcome of the arbitration such as disclosure of fraudulent documentation or whether the arbitrator exceeded his jurisdiction resulting in the annulment or setting aside the award. The courts in England have addressed this issue and concluded that arbitrators may be asked to give testimony of facts in a proceeding.

According to Gordon Blanke there is, "a discrete body of English common law that sheds light on the issue" more specifically the old English Case of **DUKE OF BUCCLEUCH v METROPOLITAN BOARD OF WORKS** (1871-1872, L.R. 5 H.L. 418) dealt effectively with this proposition. In this case compensation was awarded for the reduction in value of property pursuant to Section 68 of the Lands Clauses Consolidation Act. The claimant was the occupier under a lease from the Crown of an estate, it had a garden that ran down to the Thames River. Pursuant to the Thames Embankment Act the respondent effected certain works, which resulted in the creation of a dry area in which a roadway was constructed which reduced the value of the claimant's leasehold interest. The matter was brought before an arbitrator and subsequently determined by the House of Lords. On whether an arbitrator could serve as a witness in subsequent court proceedings the House of Lords summarised its position as follows:

1. That the umpire was a competent witness, like any other person to prove matters material to the issues [i.e. determining the arbitrators' jurisdiction].

2. That questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.

3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it."

The House of Lords distinguished the position of the arbitrator from a judge by stating that it did not know of any objection to the very possibility to hear arbitrators as witnesses. For the court, the reasons preventing judges from testifying and being cross-examined did not extend to arbitrators. The arbitrator could therefore be questioned as to what took place before him. The House however refused to hear arbitrators on the content of the award. It held :"As soon as the award is made it must speak for itself . . . but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it."

Romain Dupeyre further explains that the arbitrator is precluded from giving testimony on the content of the award partly because the arbitrator is functus officio once the award is rendered, therefore he cannot modify the award in any way once it is signed except to interpret the award or make a few corrections. The Court stated that "The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends on his memory . . ."

This early case was confirmed in Dare Valley Railway Co in which the court ruled:

"I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to


examine him" (L.R. Eq. 429 at 435).

In later cases the English court decided that the testimony of arbitrators should only be heard in exceptional circumstances, when the facts of the case could not be ascertained by any other means:

"In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from perusal of the affidavits on one side and the other – namely what are the essential facts of the case" (Leisarch v Schalit [1934] 2 K.B. 353).

Under Nigerian Law the Arbitration and Conciliation Act does not specifically refer to the arbitrator acting as a witness during subsequent court proceedings.

**Conclusion**

Since the Arbitration and Conciliation Act does not contain specific provisions on whether an arbitrator can be called to give evidence in subsequent court proceedings. English common law can serve as persuasive authority. Based on **DUKE OF BUCCLEUCH v METROPOLITAN BOARD OF WORKS** cited above arbitrators can be called to give evidence in subsequent court proceedings as long as their examination does not go beyond the facts or procedure arising from the arbitral proceedings, this preserves arbitral proceedings from unnecessary interference from the courts. On a final note Romain Dupeyre in the Article titled "Arbitrators on the Witness Stand! Comparative approaches" notes that the admissibility of the arbitrators' testimony raises a number of questions: Is the arbitrator entitled to refuse to testify? Is the arbitrator entitled to receive compensation for the time spent on his testimony? In cases where there are several arbitrators, should the president alone testify? What would happen if the testimonies of the arbitrators differ with one another? Could an arbitrator be subject to cross-examination? Should this issue be dealt with by institutional arbitration rules? These questions represent the possible dilemmas arbitrators might face if they are asked to give testimony in court proceedings.

## CHILD CUSTODY AND PRACTICE IN NIGERIA CONTINUED FROM PAGE 12

body in court by way of originating motion seeking for child assessment order or emergency protection order by virtue of provisions of Sections 36, 37 and 64 of the Child's Right Law of Lagos State.

In any case the appropriate body instituting the action must be satisfied that there is 'reasonable cause to suspect that the child is suffering, or is likely to suffer significant harm'

This point is particularly very important as the courts are not permitted to grant such orders in vacuum, as it may disturb the stability of the child. The court must weigh the alleged circumstances of the child vis-à-vis the need for the order to determine what amounts to best interest of the child.

It is observed that in the case of **DSD v SERA IGWALAH & BOLAJI PHILIPS** (supra), the applicant(DSD) instituted an action devoid of the procedure and the only ground stated in the application was that the "parents of the child are fighting each other"

It is our humble view that the court should have discountenanced such an application on the grounds that it failed to comply with the procedure under the rules and the grounds alleged were not sufficient to warrant the grant of the emergency protection order.

**The role of the Welfare Department**

The role of the "welfare Department" is sacrosanct in ensuring the best interest of a child is protected. The welfare department in bringing an application for determination of what amounts to best interest of the child must be satisfied that the child is suffering or likely to suffer harm. This role is given impetus by the provisions sections 36 and 37 of The Child's Right Act.

The relevant provisions of sections 36 and 37 are as follows:

Section36 (1)

(a) The applicant has reasonable cause to suspect that the child is suffering or is likely to suffer significant harm;

(b) An assessment of the state of health or development of the child or the way in which the child has been treated, is required to enable the applicant determine whether or not the child is suffering or is likely to suffer significant harm;

Section 37 (1) (c) in the case of an application made by an appropriate authority, that:

- the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm;
- enquiries with respect to the welfare of the child are being frustrated by access to the child being unreasonably refused to a person authorized to seek access, and
- the applicant has reasonable cause to believe that access to the child is required as a matter of urgency.

From the above provisions of the Child's Right Law, the Welfare Department referred to is in the law an appropriate body that can institute an action in respect to the situations mentioned above.

In the case of **DSD v SERA IGWALAH & BOLAJI PHILIPS** (Supra) referred to earlier the Department of Social Development (DSD) as assessors in exercise of their powers and functions brought the application for child emergency protection order before the court in a most inappropriate situation which in turn portended danger to the child involved. It should be stated here, that it was a wrongful exercise of such powers as the grounds upon which the application was premised was spurious not warranting the court's intervention or entertainment of the application. It is to be mentioned here that, the court in itself has not been able to retract the order it made due to the haphazard manner the suit was handled.

**The role of an assessor**

Section 36 (1) (b) above refers to"assessment of the state of health or development of the child or the way in which the child has been treated,…"

This assessment is usually carried out by an assessor. The assessor is a qualified social worker in the welfare department vested with the duty of assisting the state to properly analyse the subject given to him so as to achieve the intention of the statutes. The assessor in carrying out this duty of assessment acts as an officer of the court. An assessor becomes important in a proceeding for the determination of the best interest of a child where there are two disputing parties over custody of the child.

The family court of Lagos state (civil procedure) rules provides under order 12 rule13 (2), (3) and (4) for the duties of an Assessor to wit:

(2) An Assessor will assist the Court in dealing with a matter in which the assessor has skill and experience.

(3) The assessor will take such part in the proceedings as the Court may direct and in particular the Court may direct an assessor to-

(a) Prepare a report for the Court on any matter at issue in the proceedings; and

(b) Attend the whole hearing to advise the Court in any such manner.

(4) If the assessor prepares a report for the Court before the hearing has begun

(a) The Court will send a copy to each of the parties;

The duty of the assessor is very crucial in determination of the custody of the child as the assessor's report will be duly considered by the court before arriving at its decision.

In exercising these functions the assessor must not be biased in his assessment of the parties. In the case of **DSD v IGWELLAH & ANOR** referred to earlier the assessor on the day of the assessment of the respondents' premises, the assessor failed to ensure that the parties' legal representatives were present to encourage transparency. The assessor demonstrated a thorough lack of understanding of the principles herein discussed. The child's right law also places jurisdiction squarely at both the magistrate court and the High Court. Unfortunately, the Magistrate, who are used to summary trials and decision, have so far not been impressive.

**Conclusion**

In other to avoid emotional and psychological instability which affects adversely the proper development and growth of the child, it is preferred that the court, welfare service, assessors and all other institutions charged with the duty of protecting the interest of the child should exercise diligence in carrying out their functions. They ought to properly appreciate the process and learn to detach themselves from the process.

In view of the volatility of issues involving children where parents are concerned, the courts are enjoined to be dispassionate when deciding issues pertaining to the child. Whatever factor(s) the courts relied on in awarding custody to a particular parent, must be in the best interest of the child

Though the Lagos state government has made remarkable achievements in the passage of the Child's Right Law (2007), and in the establishment of the family court in Lagos State; it is pertinent to note that a lot still needs to be done on the areas of administration and training of personnel charged with responsibility of handling matters pertaining to children in other to ensure that the best interest of the child is assured.

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