Lloyd Masika Limited v Stanbic Bank Limited (Miscellaneous Application E206 of 2022) [2023] KEHC 2671 (KLR) (Commercial and Tax) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 2671 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E206 OF 2022

DAS MAJANJA, J

JANUARY 27, 2023

BETWEEN

LLOYD MASIKA LIMITED ..... APPLICANT

AND

STANBIC BANK LIMITED ..... RESPONDENT

RULING

1. Before the court are two applications in relation to the Award dated 20th December 2021, the Additional/Corrected Final Award dated 3rd February 2022 and the Additional Award on Quantum of Costs dated 2nd May 2022 made by Dr. Wilfred A. Mutubwa, the Sole Arbitrator (collectively "the Award" unless the context otherwise admits).

2. By the amended Notice of Motion dated 18th March 2022, the Applicant seeks to set aside the Award under the provisions of sections 35(1), (2), 3 and 40 of the *Arbitration Act*, 1995. It is supported by grounds set out on its face and the supporting affidavit and supplementary affidavit of its director, Peter Muswii, sworn on 15th March 2022 and 14th September 2022 respectively. It is opposed by the Respondent through the replying affidavit of its Senior Manager, Business Rehabilitation and Recoveries, Amos Mugambi, sworn on 16th May 2022.

3. The Respondent's Notice of Motion is dated 16th May 2022 and made, inter alia, under section 36(1), (3)(b) of the *Arbitration Act* and seeks to enforce the Award. It is opposed by the Applicant through the replying affidavit of Peter Muswii sworn on 31st May 2022.

4. The parties filed written submissions in support of their respective positions. In order to deal with both applications is it necessary to appreciate the background of the dispute between the parties as it emerged through the arbitral proceedings.

5. On 8th February 2018, the Respondent instructed the Applicant to carry out a valuation over the properties known as Land Reference Number Machakos/Ndalani Phase II/461, 462 and 465 ("the Property"). The Respondent intended to use the valuation report in advancing facilities to its customer, Penta (KK) Limited ("the borrower"). According to the instructions, the Applicant was required to carry out the valuation under the terms of the Service Level Agreement ("the SLA") and was to make a determination of, inter alia, the Open Market Value and the Forced Sale Value of the Property.

6. The Applicant submitted a valuation report dated 13th February 2018 ("the Valuation Report") which assigned the Property an Open Market Value of Kshs. 87,000,000.00 and a Forced Sale Value of Kshs. 56,500,000.00. The Respondent then advanced the borrower banking facilities in the sum of Kshs. 40,000,000.00 secured by a charge over the Property. In due course, the borrower defaulted on its obligations to service the advanced amount whereupon the Respondent sought for a re-evaluation of the Property in order to commence the recovery process. The re-evaluation was carried out by Real Appraisal Limited which issued a valuation report dated 31st March 2019 ("the Re-evaluation Report") assigning the Property a lower Open Market Value of Kshs. 17,500,000.00 and a Forced Sale Value of Kshs. 13,125,000.00.

7. The Respondent, by its letter dated 9th May 2019 and another by its advocates dated 29th July 2019 addressed to the Applicant, expressed surprise at the difference assigned in the Applicant's Valuation Report compared to that in the Re-evaluation Report and demanded an explanation. The Respondent claimed that it had relied on the Valuation Report to advance the borrower the facility and had, as a result, suffered a loss of Kshs. 42,896,009.00. It sought an admission of liability and demanded payment of the said amount.

8. As the Applicant failed to respond to the letters and the further letter of demand dated 31st March 2021, the Respondent invoked the dispute resolution in Clause 13 of the SLA. In accordance with the request to appoint an arbitrator, the Chairman of the Chartered Institute of Arbitrators appointed Dr. Wilfred A. Mutubwa as the sole arbitrator ("the Arbitrator") on 1st June 2021.

9. The Respondent filed its Statement of Claim seeking, inter alia, Kshs. 40,000,000.00, the sum lent to its customer and which it claimed was a direct loss suffered for relying entirely on the Valuation Report when lending the money to the borrower.

10. In its response, the Applicant stated the Respondent did not rely on the Valuation Report at it had already undertaken to advance the borrower money prior to instructing the Applicant to undertake the valuation. In any case, the Applicant averred that the values returned, that is, the market value, the mortgage value, the forced sale value and the insurance value, were arrived at after exercising all reasonable care and skill expected of a professional valuer and that the Valuation Report was arrived at after making and carrying out all the usual surveys, examination and inquiries. The Applicant stated that a mere variation in the values returned by two different valuers is not, in and of itself, evidence of negligence and that the valuation by Real Appraisal Limited, was evidently and admittedly undertaken in circumstances that were materially different from those that were prevailing when the Applicant undertook its valuation and that the Re-evaluation report establishes the value of the Property as of 4th April, 2019, a year post the Applicant's valuation and to that extent was irrelevant in establishing negligence on the part of the Applicant. The Applicant further stated that the Re-evaluation report was itself, curiously and for reasons exclusively within the knowledge of the Respondent and a gross undervaluation of the Property. The Applicant stated that the Re-evaluation Report and a further valuation conducted by Knight Frank Valuers Limited was prepared either with the sole intention of

discrediting the Applicant's Valuation Report or were incapable of being a reflection of the correct market value.

11. In sum, the Applicant denied that the Respondent suffered any loss or that there was breach of contract and/or breach of professional negligence as alleged. In any event, the Applicant stated that the Respondent had recovered a total sum of Kshs. 3,673, 900.00 by the time the borrower defaulted and this sum ought to have been deducted from the alleged loss which alleged actual loss the Applicant valued at Kshs. 7,026,102.00.

12. The matter was set down for hearing where both parties presented witnesses in support of their positions. After scouring through the pleadings, submissions, documents relied upon by the parties, the Arbitrator published an award 20th December 2021. The Arbitrator further published an additional and corrected award on 3rd February 2022 and an additional award on quantum of costs on 2nd May 2022. In the Award, the Arbitrator summarized the dispute of the parties as one of professional negligence and condensed the issues raised by the parties for determination into the following four issues:

    i. Whether the Applicant owed the Respondent a duty of care;

    ii. If the answer above was in the affirmative, whether the Applicant breached the duty of care;

    iii. What reliefs was the Arbitrator to issue to the parties; and

    iv. Who was to bear the costs of the arbitration proceedings?

13. On the first issue, the Arbitrator stated that the parties did not contest that the Applicant owed the Respondent a duty of care but that what the parties did not agree on is the extent of the duty of care, skill and competence warranted by the Applicant as a professional valuer. The Arbitrator held that fundamental to the contractual professional relationship between the parties were three features. One, that the Applicant warrants that it possesses the necessary qualifications, competencies, skills and licenses to undertake its professional vocation, which is both a statutory and contractual edict set out in section 12 of the *Valuers Act*, and clause 8 of the SLA. Two, that the Applicant was to apply itself to the assignment with reasonable skill and care generally expected of a person of its professional calling. The Arbitrator stated that the exact qualitative test of what is reasonable skill and care, is, as discussed by courts in the myriad of cases cited by the parties, a matter that varies from case to case and is largely a matter of appreciation of the evidence tendered. Three, that the warranties and undertakings were given by the Applicant as a corporate entity, and not individual directors, employees or agents thereof and that it was the Applicant, as a body corporate and firm that was engaged by the Respondent. In the upshot, the Arbitrator found and held that the Applicant owed the Respondent a duty of care to act with reasonable skill in the discharge of its obligations while rendering valuation services on account of the Property.

14. Having answered the first issue in the affirmative, the Arbitrator proceeded to consider the second issue of whether the Applicant breached the duty of care. The Arbitrator found that the Applicant had admitted that the Valuation Report was prepared by its employee who was not registered and qualified to practice as a valuer. The Arbitrator held that since the Respondent had no contractual relationship with the said employee and that the relationship was between the Applicant and the Respondent, then it was incumbent upon the Applicant to ensure that it had in its employment qualified personnel to undertake client's briefs as provided by the SLA. By qualified, the Arbitrator stated that this must be understood as one who possesses the necessary licences as prescribed by the *Valuers Act*, including sections 12 and 21, and any other enabling provision of the law. The Arbitrator rejected the Respondent's submissions that defined qualification outside the requirement of licensing

as the same would be to make nonsense of clear and unambiguous provisions of the *Valuers Act* and the SLA. To this extent, the Arbitrator agreed with the Respondent that parties must be bound to the law and their agreement, including the warranties to ensure compliance with licensing requirements and engaging qualified personnel and that by engaging the said employee while being well aware of his lack of professional standing, for over 10 years, and engaging him in business for which he did not qualify, was an act of recklessness and negligence and the Applicant thereby, exposed itself to the risk which eventually accrued.

15. The Arbitrator recalled the evidence of the Respondent's witness, whom he noted exhibited candour and honesty to a fault, when he even questioned the signature on the Applicant's report and suggested that it resembled but was not his and that he was basically accusing the employee of forgery of his signature. The Arbitrator stated that it could not ignore these facts and could not reach any other conclusion other than that the Applicant acted in a manner below professionally reasonable conduct and must be found liable for negligence. The Arbitrator agreed with the Respondent that the principle of vicarious liability applies in this case against the Applicant for its own acts and omissions, and those of its acknowledged agent.

16. Having found that the Applicant's conduct was negligent, the Arbitrator stated that this would have been enough to put the issue to rest, however, for completeness of record, the Arbitrator decided to address the other aspects associated with this issue. The Arbitrator found that the approbation and reprobation by the Applicant on the role and report authored by its employee was inequitable and inconsistent as the Applicant could not be heard to raise serious complaints bordering criminal conduct against the employee yet in the same breath, defend his report as being regular, proper and professional and that this contradiction in positions could not be countenanced. The Arbitrator noted that three professionals from leading firms of valuers in Kenya could not agree on the formulae, methodology and matrix for conducting a valuation, which is supposed to be their most basic professional business. Be that as it may, the Arbitrator further noted that the most contentious issues were the inclusion of transient structures, the period/scope of comparable prices and the effect of the factors which may affect price. However, that while appreciating the foregoing factors, applying similar skill, methodology and approaches, the differences could not be so significant as nearly 80% and that valuation of properties at the very basic involves the use of sale prices of concluded transactions in the area for a relevant period and size of property, taking into account the amenities and other factors that may skew the prices. That from the cases relied upon by the parties, a margin of 15-20% is reasonable and that up to 30% can be explained by various factors, but not more.

17. The Arbitrator noted that the difference between the Knight Frank and Real Appraisal valuation is about 30%, primarily by the former's instruction being detailed to include transient green houses and that while it also appears that the prices compared would be captured in valuation reports, it seems to be the common practice, at least going by the three firms, that the actual transactions agreements or transfers would not be attached or exhibited by the valuer. A valuer would also describe the general characteristics of the property used in the comparison keen to examine its similarities and differences with the property sought to be valued. An average is then run to establish a range per acre or unit price as desired. Outlier properties would be excluded. These are properties which are either significantly higher or lower than the majority average. That though not an exact science but an art with canons common to the trade and its usage, the process of valuation must be anchored on some professionally common conventions. It is an effort to estimate, as far as human minds can the effects of supply and demand on property prices. The Arbitrator reiterated that being a process that largely relies on already concluded transactions recorded in land registries, valuation disparities cannot exceed 30% margins of error and that even then, cogent and persuasive explanations for variations must be given. Otherwise, the entire value and purpose thereof will be lost and the essence of valuations without basis.

18. The Arbitrator insisted that a margin of 79.2% is by all accounts and circumstances beyond reasonable and that even taking into account transient properties, the difference of one year between the valuations and the expanded or reduced radius of the comparables, the Arbitrator was not convinced that the margin would be as wide and that the strong inference drawn is one of overvaluation by the Applicant, which inference gravitates towards the conclusion on that the Applicant was grossly negligent. The Arbitrator further stated that this was in the line of thought in the longline of decisions very ably cited by the parties.

19. On the reliefs sought by the Respondent, the Arbitrator accepted the Respondent's explanation that it is its policy and commercial practice to lend, among other considerations, up to 50% of the value returned by its valuer and that while other processes ran concurrently with the valuation, and other forms of security may be required, the value of the security is a critical element of the lending approval. That while other forms of security and eligibility requirement ultimately determine whether a borrower will access financial accommodation of the Respondent, the extent of that accommodation is largely a factor determined by the quality (read value) of the security offered.

20. The Arbitrator rejected the Applicant's position that the Respondent had already decided to lend to the borrower the sum of Kshs. 40,000,000 regardless of the valuation of the Property terming this position as without legal or factual merit on account of various reasons. First, that the decision to lend on security is often and usually tied to the asset offered, thus, its value, which is what gives comfort to the lender of its ability to recover in the event of default, determines whether the lender will lend the borrower in the first place, and the amount he is willing to lend. That it is while exercising this judgement that an independent professional valuation report becomes a critical tool.

21. The Arbitrator, therefore, disagreed with the Applicant and found that indeed, the Respondent substantially agreed to lend to the borrower on the basis of the professional valuation report by the Respondent of the borrower's assets. Second, that while indeed it was the Respondent's discretion to determine whether and how much to lend, clause 3 and 8 of the Term Loan Letter was clear that the lending would be on the terms and conditions of the offer which included the properties to be professionally valued by the Respondent's valuers. This was set as a condition precedent to completion of the lending contract and that the Respondent's letter of instructions to the Applicant was also succinct that the valuations were to be utilised in the lending facilities to borrower. The Arbitrator stated that the Applicant's witness, admitted in cross examination that he understood that the valuation report required of the Applicant would be used in determining the matter of lending by the Respondent to the borrower. On the basis of this evidence, the Arbitrator concluded that the Respondent had not predetermined its lending to the borrower prior to the valuation by the Applicant and that it largely depended on the Applicant's valuation in reaching the lending decision. Third, that the Applicant seemed to have overlooked the fact that once a loan account falls into arrears, both interest and principal merge with the lender possessing the right to recover the full amount due to it. That the Applicant's computations ignored the critical element of interest, which is the time value for money and that recovery of money lent several years ago without interest does not serve the commercial/investment interest of the lender whose only reason for lending is to earn a return in the form of interest. Further, that the security offered by a borrower is meant, and should be sufficient, to cover both principal and interest up to the date of full recovery.

22. Having said the foregoing, it was the Arbitrator's view that the Respondent would still have lent the borrower had the Applicant acted professionally and diligently, albeit a much lesser sum and thereby mitigated its risk and loss. That the Respondent, a financial institution whose business is to lend to its deserving clients, takes an informed and calculated risk based on professional advice, including that of valuers on its panel, such as the Respondent. With the foregoing in mind, the Arbitrator's disposition

was to award the Respondent against the Applicant compensation of the loan amount as at the time of commencement of the arbitration proceedings, less the lowest forced sale value returned by Real Appraisal.

23. In reaching the foregoing conclusion, the Arbitrator was further guided by the following facts.Firstly, that the Respondent possesses a legal charge over the Property and has the right to sale to recover any sums due to it, and which seems to already have accrued and that a sale has indeed been attempted in vain. To the Arbitrator's mind, the excess exposure not covered by the charge is that which is beyond the real forced sale value and that if the Respondent accepted that Real Appraisal's report, whose valuation it relied upon in the proceedings, was the most accurate in projecting the values of the Property, then the said firm's forced sale value would sufficiently cover the Respondent's exposure. Secondly, that the Respondent would not infringe upon the legal duty to sell the Property at least 75% of the Property's forced sale value since the Applicant's valuation report would stand impeached by the Arbitrator and the one by Real Appraisal stands. Thirdly, the Arbitrator had accepted the Valuation by Real Appraisal because it omits transient items which even the Applicant's own witness and director agreed were temporary and no longer exist on the Property. Fourthly, the Arbitrator had not deducted the amounts paid back by the borrower towards the loan instalments since the same had already been given credit in the loan account statement produced by the Respondent. That the credits were therefore already acknowledged and subsumed in the outstanding loan amounts and the loan account statement was unchallenged at all and the Arbitrator found its contents to bear credible evidence.

24. The net effect of the Arbitrator's computation of the amount due to the Respondent from the Applicant, on the first limb was the difference between the Outstanding Loan amount as at 1st July 2021; Kshs. 56,878,083.00 and Real Appraisal's Forced Sale Value; Kshs. 13,125,000.00 which equaled to Kshs. 43,753,083.00. The Arbitrator noted that this sum represents both principal and interest as claimed under prayer (a) and (b) of the Statement of Claim, as at 1st July 2021 and that this amount would continue accruing interest at the contractual rate from the 1st July until payment in full. The Arbitrator also found that the Respondent was entitled to both the valuation and auctioneers fees in the sum of Kshs. 283,472.51 and further awarded it simple interest on the sums awarded at the rate of 14% per annum from 1st July 2021 until payment in full. The Arbitrator also granted the Respondent costs which he later assessed and taxed at Kshs. 2,394,974.54.

25. The Arbitrator issued the following dispositive orders:

    i. A declaration is hereby made that the Respondent was wholly negligent in submitting false valuation reports and is liable to meet the direct loss of Kshs. 40 million suffered by the Claimant who relied entirely on the valuation reports when lending money to its customer.

    ii. A declaration is hereby made that the Respondent's valuations over the properties known as Land Reverence number Machakos/Ndalani Phase 11/461, Machakos/Ndalani Phase 11/462 and Machakos /Ndalani Phase 11/465, are outside permissible margins of error

    iii. The Respondent shall forthwith pay the Claimant the sum of Kshs. 44,036,555.51;

    iv. The Respondent shall also pay the Claimant simple interest on the sum stated in (iii) above at the rate of fourteen per cent (14 %) per annum, from the 1st day of July 2021 until payment in full;

v. The Respondent shall bear all the costs of these proceedings; being the Claimant's party and Party costs, and the Arbitrator's charges. These costs are to be paid within 30 days of the date of this award, failing which the Respondent is at liberty to file its bill of costs with the Arbitral tribunal for taxation;

vi. All other prayers not allowed expressly allowed above, are dismissed.

26. It is the Award that forms the basis of the applications before the court. Since the Applicant's application calls for the setting aside of the Award, I propose to first deal with it before determining the Respondent's application for recognition and enforcement, if at all.

The Application to set aside the Award

27. The Applicant's case is that the Award is in conflict with the public policy of Kenya, for being inconsistent with Article 162(2)(b) of *the Constitution*, the Environment & Land Court Act, 2011, the *Land Act*, 2012, *Land Registration Act*, 2013 the *Banking Act* (Chapter 488 of the Laws of Kenya), the Penal Code (Chapter 63 of the Laws of Kenya) and the Criminal Procedure Code (Chapter 75 of the Laws of Kenya).

28. The Applicant raises several issue to demonstrate the Award is against public policy. It contends that the Valuation Report allegedly prepared by the Applicant was a forgery that could not be ratified, had zero evidential value and was a nullity. It cited several decisions among them Mistry Amar Shah Singh v Kulubya [1963] EA. 408, Heptulla v Noor Mohamed NRB CA Civil App. No. 62 of 1983 [1984]eKLR and Kenya Airways Ltd v Satwant Singh Flora NRB CA Civil App No. [2013] eKLR to support the position that no person, court or tribunal ought to rely on or enforce an illegal contract or transaction where the illegality is brought to its notice and the person making aid of the contract or transaction is himself implicated.

29. In support of this argument, the Applicant points out that its sole witness, Peter Muswii alluded to the fact that the Valuation Report was a forgery as corroborated by the fact that the instruction to undertake the valuation were addressed to a specific officer without involving other staff and without copying the instructions to the designated email in accordance with the SLA. The Applicant submits that in his deposition, Peter Muswii confirmed that the Valuation Report was a forgery as he could not trace in its records and when the issue relating to this claim came up, he reported the issue to the police for investigation. The Applicant also contends that there was evidence of fraudulent and surreptitious dealing between an officer of the Respondent and an officer of the Applicant which vitiated the Valuation Report. In the circumstances, the Applicant urges the court to the claim and the resultant Award based on a fraudulent Valuation Report is incapable of conferring any rights on a party.

30. Without prejudice to the arguments relating to forgery of the Valuation Report, the Applicant contends that the Award is not consistent with the law on negligence in general, and the law on professional negligence by valuers in particular. The Applicant submits that other than evidence of that the Applicant's valuer, Mr. Alex Kagotho was not registered in accordance with the *Valuers Act*, the Respondent did not lead any evidence of breach of duty from which the tribunal conclude that there was negligence on the part of the Applicant. It points out that the uncontroverted evidence Peter Muswii was that Alex Kagotho valued the property in accordance with the ordinary standard of care and skill and diligence expected of a professional valuer. Further, that the difference in value indicated in the Respondent's report and the other two valuers, was attributable to change in material circumstances as well the global economic meltdown caused by the corona virus pandemic.

31. The Applicant submits that a valuer cannot be found liable for negligence in the absence of breach of the duty of care in not proceeding with ordinary care and skill, that is, by identifying and valuing the correct property in accordance with standards set by the profession and that mere difference in subsequent valuations cannot, by itself, result in an inference of negligence. In its view the Respondent failed to discharge its burden of proof as the Applicant valued the correct property using the accepted methodology. It therefore concludes that the Award is inconsistent with the law on negligence and the requisite burden of proof prescribed in the *Evidence Act*.

32. The Applicant complains that the Award was also inconsistent with the law of foreseeability and remoteness of damages as explained by the Ringera J., in Kenya Commercial Bank v O Philip Odongo (supra) where he held that only those losses which are not too remote should be compensated, that the bank had an obligation to mitigate the loss, that the valuer cannot be responsible to pay the entire outstanding amount on the customer's account, that there was no legal basis for the bank claiming interest at bank rates from the valuer, since "The defendant is not a borrower and there is no contractual obligation on his part to pay damages at commercial rates. I think given that this is a claim for professional negligence which has succeeded on the basis that the defendant has breached his duty of care to the plaintiff, the interest on damage should be applied at court rates from the date of assessment as is the usual practice". Thus in awarding Kshs 43,753,083.00 being the principal and interest, the Award was contrary to the principles of law on foreseeability and mitigation of all losses by the bank. The Applicant contends that there was no attempt by the Respondent to mitigate its loss by suing the principal debtor or pursuing the five or even exercising any of the other remedies prescribed in the legal charge and the provisions of the section 90 of the *Land Act*, 2012. It also states that the Applicant was not a borrower and was not under any obligation to pay damages at commercial rates. The net effect of the Award, according to the Applicant, was to substitute the borrower with the valuer contrary to the *Land Act*, 2012 which prescribes the manner in which securities in land are created and discharged. That by shifting the borrower's obligation to a third party, the Applicant, in this case, the Award is inconsistent with the law and ought to be set aside.

33. The Applicant argues that by the Award condemning it to pay the entire outstanding principal sum together with interest and costs, it is inconsistent with the law on the role of guarantors. It contends that as long as the debt has not been repaid by the principal debtor, the guarantors remain liable notwithstanding any recovery action the bank may have pursued against the principal debtor, and the charge remains valid as security for the due payment of the secured sum. The Applicant contends it cannot by any stretch of legal ingenuity, camouflaged as professional negligence, be a substitute of either the principal debtor or guarantors hence the Award ought to be set aside.

34. The Applicant faults the Award for failing to take into account the fact that there was a comprehensive mortgage protection cover in respect of the charged property which would, in effect, indemnify the Respondent against any default by the borrower. It points out the under the Term Loan Letter and as condition for the lending, the borrower was to provide comprehensive insurance cover for the full market value the secured assets and which the Respondent's interest noted as first loss payee. It submits that in case of a loss, the Respondent would be compensated by the insurance company. In the circumstances, the Applicant submits that the Award, by condemning it to pay the entire outstanding loan, unjustly enriches the Respondent as the it is also entitled to be compensated by the insurance company.

35. The Applicant complains that the Award is inconsistent with the doctrine of privity of contract, in that it seeks to make a third party fully liable for obligations that bind only the original parties to the contract, that is, the bank and the borrower. It further submits that the Award violates known legal principles on breach of contract. It maintains that by emailing the valuation instructions directly to

the Applicant's employee and subsequently exclusively exchanging corresponding with that employee, the Respondent also breached express provisions of the SLA which required instructions to be emailed the designated official email. To support its position, the Applicant invokes section 29(5) of the *Arbitration Act* Cap which requires the arbitrator to decide the dispute in accordance with the terms of the particular contract and to take into account the usages of the trade applicable to the particular transaction. The Applicant also submits that Award is inconsistent with the law on the essential ingredient that constitute a contract, that is offer, acceptance, consideration and specific performance. It invokes Mr Mutwii's uncontroverted evidence to the effect that, not only was the Valuation Report non-existent in the Applicant's official record of payment of fees for the valuation report, but that there was no record of payment of fees for the valuation report thus in the absence of consideration, there was no valid contract between the Applicant and Respondent capable of enforcement by either party.

36. Finally, the Applicant submits that the Award is contrary to the law of Evidence. That the Arbitrator's finding on the retrospective valuation report, at paragraph 310 of the Award, that, "The contents of an uncalled and untested report is of very little if any evidentiary value' and that, "The Respondent had all the opportunity and liberty to apply for production and inspection of the report if it deemed it useful for the prosecution of its case", are inconsistent with sections 107, 108 and 109 of the *Evidence Act*, on burden of proof, section 12 on facts effecting quantum of damages and section 48 on opinion of experts. The Applicant urges that these findings shifted the burden of proof to the Applicant, ignored evidence that would have enabled the court to properly determine the quantum of damages, and ultimately, lost an opportunity to be guided by the expert opinion comprised in the retrospective valuation report. That by dint of section 119 of the *Evidence Act*, the Arbitrator was bound to presume the existence of any fact which it thought likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case. The Arbitrator added that since the retrospective valuation was, admitted by both parties, a fact so connected with the disputed valuation of the charged property as to form part of the same transaction, it was a relevant fact and ought to have been taken into account, in terms of section 6 of the *Evidence Act*.

37. The Respondent opposes the application on the ground that the Respondent has failed to provide evidence to sustain grounds for setting aside an award under section 35(2) (b) (ii) of the *Arbitration Act* on the ground that the Award violated the public policy of Kenya.

38. It contends that the dispute between the parties was for breach of contract and professional negligence under the terms of the SLA. That each party set out their respective cases in the pleading and the issues for determination upon which the parties signed the Agreed Issues dated 15th September 2021. The Respondent therefore submits that the Applicant now raises new issues that were not agreed upon before the arbitral tribunal which is not permitted. Citing Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR, the Respondent submits that a party cannot depart from agreed issues before the tribunal particularly given the in this case, the Applicant did not file any documents in rebuttal and relied entirely on the bank's documents and the agreed issues. The Respondent also submits that the arbitrator meticulously considered all the issues as such the manner in which he dealt with the evidence is within its province and jurisdiction and the court cannot interfere as doing so would be as if the court is sitting as an appellate court which is not within the intendment and purview of section 35 of the *Arbitration Act*.

39. In relation to material facts which form the basis of the Applicant's case, the Respondent rejects the contention that the Valuation Report was a forgery. It points out that the Applicant stood by its Valuation Report and insisted that the valuation was accurate. That the issue of payment of fees was not in contention as the practice was that the valuer was paid directly by the borrower. It submits that

the Applicant did not produce any evidence or call another expert to counter the negligence claim or produce another expert valuation report to counter the Respondent's two valuation reports. As regards the Applicant's employee, the Respondent submits that it was admitted that the former employee who conducted the valuation was no licenced for the 10 years he had been employed and that he had allegedly forged the signature in 4 other valuation reports. That the Applicant's witness admitted that he was aware that the employee was not licenced and that this was in breach of the SLA.

40. On the whole therefore the Respondent submits that the application to set aside the Award is a disguised appeal from the decision of the arbitral tribunal. In relation to the issues of breach of contract, it points out that under the SLA, the parties agreed that the Respondent's customer would pay the fees. As regards the issue of forgery, the Respondent submits that this was not issue before the arbitrator as the issue was one of negligence as were the issue raised about the banking, land and insurance law.

Analysis and Determination

41. What the court is principally being called upon to determine is whether the Award ought to be set aside for being contrary to public policy of Kenya. It is common ground that under section 35(2)(b)(ii) of the *Arbitration Act* an award can be set aside if it is contrary to public policy. The Applicant rightly submits that the phrase "public policy" was well enunciated by the court in Christ for All Nations v Apollo Insurance Co Ltd [2002] 2 EA 366 where Ringera J., explained the scope of public policy as a ground for setting aside an arbitral award as follows:

> I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with *the constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality....."

42. The public policy exception connotes a matter broader than the narrow interest of the parties and ought to be interpreted in a manner that does not open the door for unnecessary court intervention as it is the policy of the *Arbitration Act* uphold the finality of arbitral awards. In fact, the court in Christ for all Nations v Apollo Insurance Co. Ltd (Supra) warned that not every infraction whether of precedent or misinterpretation of law or misapprehension of facts falls within the scope of the public policy exception. The learned judge observed that:

> [I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the *Arbitration Act*.

43. I therefore accept what the court stated in Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR as follows:

> Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not

both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.

44. I have gone through the Award, whose contents I have endevoured to set out in detail at the introductory party and juxtaposed the same with the grounds advanced by the Applicant and I am unable to agree with the Applicant that the Award is contrary to public policy for a number of reasons.

45. The case before the Arbitrator was simply a case of professional negligence and or breach of the SLA. The Arbitrator was called upon to resolve, and the parties agree, whether the Applicant was under a duty of care to the Respondent, whether the Respondent breached the duty of care and whether, as a result, the Respondent suffered loss and damage as claimed. The Arbitrator considered the issue each party had drawn up, the evidence and submissions and concluded that the Respondent was liable.

46. From the arguments and submissions set out by the Applicant, it is apparent that the Applicant is attempting to appeal the decisions under the guise of an application to set aside the Award. On the issue whether the Valuation Report was valid, the Arbitrator addressed the same at length when he considered the position of the Respondent vis-à-vis the Applicant's employee and its liability. It is clear that the issue of forgery of the report was considered and the Applicant's submissions at this stage amount to asking the court to review the Award.

47. I also agree with the Respondent that the Applicant has introduced new issues that were not raised by it before the Arbitrator and were not in issue for determination. While the court, in considering whether an award violates public policy, is entitled to weigh the award against new issues arising from the award in making its decisions, the arguments made by the Respondent are in reality grounds of appeal against the Award. The Applicant seeks to re-litigate the grounds for its case framed as violations of precedent and statutory provisions. At the end of the day, the Arbitrator considered the issues before him. It has been held that an arbitrator is the master of facts and the court must resist the temptation to become an appellate court. In Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR, the Court of Appeal cited with approval the following dicta by Steyn LJ., in Geogas S.A v Trammo Gas Ltd (The "Baleares") 1 Lloyds LR 215:

> The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

48. An error or misdirection on a point of fact or law does not result in the Award contravening public policy. The same point was emphasized in Continental Homes Ltd vs Suncoast Investments Ltd MLD HC Misc. Appl. 62 of 2016 [2018] eKLR as follows:

> (63) In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award.

> It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.

49. Likewise, in AJU v AJT [2011] 4 SLR 739; [2011] SGCA 41 at para. 66, the Singapore Supreme Court observed as follows:

> [W]here an arbitral tribunal has jurisdiction to decide an issue of fact and /or law, it may decide the issue correctly or incorrectly. Unless its decision or decision making-process is tainted by fraud, breach of the rules of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not per se contrary to public policy.

50. I find and hold that Applicant has not demonstrated that the Award is inconsistent with *the Constitution* or other laws of Kenya, whether written or unwritten; or inimical to the national interest of Kenya; or contrary to justice and morality in the manner contemplated by section 35(2)(b)(ii) of the *Arbitration Act*. The totality of the material on record shows that the Award was based on the evidence before the arbitral tribunal and that the Arbitrator was able to come to that determination based on his understanding and appreciation of that material.

Recognition and enforcement of the Award

51. The Respondent, in its application dated 16th May 2022, seeks recognition and enforcement of the Award. Under section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the *Arbitration Act*. The High Court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards and the court can only reject such an application on grounds set out under section 37 of the *Arbitration Act*. The grounds for rejecting an award mirror those for setting aside the Award under section 35 of the Act. Since the fact of the Award is not disputed and I have dismissed the application to set it aside, the is no reason why I should not grant the Respondent's application.

52. In addition to seeking the enforcement of the Award, the Respondent also seeks a refund of Kshs. 139,000.00 paid by it for the released of the Additional Award on Quantum of Costs dated 2nd May 2022. The Applicant has also not disputed that the Respondent paid Kshs. 139,000.00 as costs for the Award on Quantum of Costs. In any event, the Respondent produced evidence of payment which is not controverted. The Respondent is therefore entitled to this amount.

Disposition

53. The upshot of my findings is that the Applicant's amended Notice of Motion dated 18th March 2022 lacks merit and is dismissed. The Respondent's Notice of Motion dated 16th May 2022 is allowed. I therefore make the following dispositive orders:

    a. The Applicant's amended Notice of Motion dated 18th March 2022 is dismissed.

    b. The Respondent's Notice of Motion dated 16th May 2022 is allowed on terms that the Award dated 20th December 2021, the Additional/Corrected Final Award dated 3rd February 2022 and the Additional Award on Quantum of Costs dated 2nd May 2022 made by Dr. Wilfred A. Mutubwa, the Sole Arbitrator, be and is hereby recognized and entered as a judgment of this court and that leave be and is hereby granted to the Respondent to enforce the Award.

    c. The Applicant do refund the Respondent the costs of Kshs. 139,000.00 paid for the release of the Additional Award on Quantum of Costs dated 2nd May 2022

d. The Respondent is awarded costs of both applications assessed at Kshs. 150,000.00

DATED and **DELIVERED** at **NAIROBI** this **27th day of JANUARY 2023.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Katasi instructed by Matemu, Katasi and Associates Advocates for the Applicant.

Mr Gichuhi, SC instructed by Wamae and Allen Advocates for the Respondent.