



**Energy Corporation v Penelly Construction and Engineering Limited (Miscellaneous Application E424 of 2022) [2023] KEHC 1059 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1059 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E424 OF 2022  
DAS MAJANJA, J  
FEBRUARY 17, 2023**

**BETWEEN**

**ENERGY CORPORATION ..... APPLICANT**

**AND**

**PENELLY CONSTRUCTION AND ENGINEERING LIMITED .. RESPONDENT**

**RULING**

**Introduction and Background.**

1. The Applicant has approached the court by way of the Notice of Motion dated 7<sup>th</sup> June 2022 seeking to set aside the Award under the provisions of section 35 of the *Arbitration Act*, 1995. The application is grounded on the facts on its face and supported by the affidavit of the Applicant's Chief Executive Officer, Peter Mbugua, sworn on 7<sup>th</sup> June 2022. It is opposed by the Respondent through the replying affidavit sworn by its director, Moses Chelugui on 25<sup>th</sup> July 2022. The parties' arguments and positions are further supplemented by the written submissions they have filed.
2. In order to resolve the issues, it is necessary to understand the factual background of the dispute between the parties. The parties entered into an agreement dated 18<sup>th</sup> October 2010 ("the Contract") for the Supply, Installation and Commissioning of 80 KVA and 150 KVA enclosed Diesel Generators plus Associated Distribution Board located at Hulugho and Kiunga for the sum of Kshs. 54,218,400.00. A dispute arose regarding performance of the Contract which dispute, as per the Contract, was referred to arbitration for resolution before a sole arbitrator ("the Arbitrator").
3. The substratum of the Respondent's claim before the Arbitrator was that the Applicant breached the Agreement by failing to honour undertakings, not performing its contractual obligations, failing to appoint a Project Manager, delaying to approve switchgear drawings, illegally using the Respondent's equipment on leasing term before handover, unforeseeable circumstances including insecurity and



having to retain staff for an undue period on site. The Respondent prayed for payment of the contract value being the market price of the equipment procured by the Respondent amounting to Kshs. 91, 745,944.00 plus profit for all the money used towards servicing the Agreement at 40% as per the Agreement being Kshs. 36,698,377.60 coming to a total sum of Kshs. 128,674,321.60. The Respondent sought interest at the commercial rate of 19% per annum from the date of the claim until payment thereof in full, special damages of Kshs. 244, 829,261.40 with interest thereon at the rate of 19% per annum from the date of the award until payment thereof in full, a declaration that all the two stations be deemed as having been taken over by Applicant and the Project Engineer to issue a take-over and final certificate within 7 days of the award and that the final award resulting from the claim be paid by the Applicant within 14 days of the award.

4. In its response, the Applicant denied the Respondent's claim and prayed that it be dismissed. The Applicant filed a counterclaim on the grounds of breach of contract, delay and non-completion of the project and prayed for an award of Kshs 5,421,840.00 being damages for the delayed completion, Kshs 44,690,392.00 being liquidated damages incurred by the Applicant in engaging a separate contractor to complete the remainder of works which sums the Applicant stated were paid out to the said contractor. The Applicant also sought interest at commercial rates computed from 26<sup>th</sup> November 2016 until full payment and costs of the counterclaim.
5. After considering the pleadings and evidence presented by the parties, the Arbitrator published an award on 8<sup>th</sup> March 2022 ("the Award"). In the Award, the Arbitrator stated that it was not in dispute that the expected completion period was five months from the date of signing the Contract, that the parties mutually agreed to extend the Contract more than six times resulting in six further contracts with the contention around whose instance the contracts were extended. The Arbitrator further found that it was not in dispute that the Respondent supplied four Generators and two Transformers on site and the issue in contention was whether the Respondent delivered all the equipment as per the Contract but more specifically the auto recloser and switchgear. That the Applicant paid the Respondent Kshs. 13, 780,800 inclusive of VAT being 60% of the Contract based on the goods supplied albeit on an *ex-gratia* basis, that the Applicant engaged Mashtech Engineering and Supplies Co. Ltd to complete the works at Hulugho and Kiunga and paid it Kshs. 44,690,392.00 in full.
6. On the issues in dispute, the Arbitrator framed the following issues for determination:
  - a. Which party was responsible for the Contract delays?
  - b. Whether the Contract was properly terminated or terminated as per the Contract.
  - c. Whether the Respondent was entitled to the reliefs as prayed in the Claim.
  - d. Whether or not there were insecurity challenges that hampered the implementation of the project.
  - e. Whether the Respondent was entitled to the cost of maintaining idle staff at the site
  - f. Ownership of the equipment and plant on site.
  - g. Whether the Applicant was entitled to the reliefs as prayed in the Counterclaim.
7. On who was responsible for the Contract delays, the Arbitrator stated that the express letters requesting for extension of completion and the subsequent contracts indicated that the Contract was extended until 31<sup>st</sup> March 2014 but that there were other express or implied extensions until it was terminated in 2015. Although the Arbitrator stated that evidence of the other extensions was not availed to him, he found that the letters and first four extensions demonstrated that it was the Respondent who made



requests for extension and that it was apparent that it was the Respondent who unequivocally and voluntarily admitted breach of the Contract. The Arbitrator considered the correspondence between the parties leading to a meeting on 14<sup>th</sup> April 2015 and a letter dated 19<sup>th</sup> May 2015 and found that the Applicant was determined to fast track the process of getting the switch gear approvals and that the delay was occasioned by the Respondent presenting inadequate drawings that failed to capture the Contract design specifications which had to be revised several times.

8. From the totality of the evidence, the Arbitrator was convinced that the Respondent was to be blame for the delay and that the contract extensions spoke for themselves as they clearly stated that the Respondent was to blame for the delay. Accordingly, the Arbitrator found and held that the Respondent was responsible for the Contract delay.
9. As to whether the Contract was properly terminated or terminated, the Arbitrator found that as per Clause 7 of the sixth further contract, the Applicant was required to at least notify the Respondent of the pending termination or of the Project Manager's recommendation to terminate the Contract which the Applicant asserted it had issued through a letter of 19<sup>th</sup> May 2015. However, the Arbitrator found that there was no evidence that this letter was emailed to the Respondent as claimed by the Applicant. The Arbitrator also found that upon termination, the Applicant re-advertised the tender to complete the pending installation works and that the Applicant posited that the Respondent did not object to the re-advertisement and actively participated in the re-tendering. The Arbitrator therefore held that despite the Respondent actively participating in the re-tendering, it did not waive its right to receive a notice under the Contract and that at this point the Applicant was already in breach of the Contract as it had already terminated the Contract without warning or notice. The Arbitrator accordingly held that the Contract was not properly terminated.
10. Turning to the reliefs sought by the Respondent, the Arbitrator stated that a mere delay in the performance of a party's obligation cannot give rise to special damages by itself unless the claimant pleads and proves that they suffered special damages incurred as a result of the delay. The Arbitrator then considered the Respondent's claim for Kshs. 91,745,944.00 comprising Kshs. 68,092,000.00 being the market price of the procured equipment comprising the price of 4 gensets and 2 transformers and 6 components of generator spares delivered on site and Kshs. 23,653,944.00 being the price of Auto reclosures and 2 low tension switchboard type mother board supplied by ABB Ltd. The Arbitrator found that the parties agreed that the Respondent delivered on site 4 gensets and 2 transformers and 6 components of generator spares and that this was affirmed by the joint inventory undertaken by both parties. That subsequently, the Engineer raised a Certificate of payment as per Clause 33 of the Contract which valued the equipment delivered on site at Kshs 13,780,800.00 inclusive of VAT that this payment was in fact admitted by the Respondent. The Arbitrator noted that the Respondent did not challenge the prices of the equipment delivered on site as indicated in the Certificate of payment and the Arbitrator took it that the facts were admitted to be correct and so the Arbitrator found the same. That since the Applicant already paid for the equipment delivered on site as per the Certificate of payment, the Arbitrator found no basis for this claim.
11. On the claim for Kshs. 23,653,944.00 for equipment supplied by ABB Ltd being Auto reclosures and switch gear, the Arbitrator held that the Respondent had failed to prove on a balance of probabilities that the equipment was delivered and thus the Respondent was not entitled to payment for goods it had not delivered.
12. As regards the claim for profit for money used amounting to Kshs. 36,698,377.60, the Arbitrator noted that the Respondent did not adduce any evidence to ascertain the amounts already expended by the Respondent to service the Contract. The Arbitrator agreed with the Applicant that this claim was directly tied to the previous claim of Kshs. 91,745,944 with the consequent result that they rose and



failed together. That since the Respondent was not entitled to the claim of Kshs. 91,745,944 being the market price of the procured equipment, the claim on profits of the Contract price also could not stand and was accordingly dismissed.

13. On interest at 18% from 1<sup>st</sup> February 2015, that is, Kshs. 11,353,890.00 the Arbitrator held that on a balance of probabilities, the Respondent had failed to prove the basis of charging the 18% interests and added that interest can only be charged on a principal already ascertained and that this claim is tied on the claim of Kshs. 23,653,944.00 for the supply of Auto reclosures and Switch gear which had been dismissed.
14. On interest on Unpaid Certificates for 4 years 5 months, that is, Kshs 38,627,170.00, the Arbitrator noted that the Respondent did not produce any certificate of payment and that the Respondent's witness admitted in cross-examination that there were no unpaid certificates of payment. The Arbitrator therefore held that the Respondent was not entitled to the interest on unpaid Certificates.
15. As to whether or not there were insecurity challenges that hampered implementation of the Project, the Arbitrator accepted that there were challenges based on a report by the Applicant's Chief Engineer dated 27<sup>th</sup> June 2016 noting that there was insecurity in the area which made it risky and challenging to perform the Contract. The Arbitrator also observed that the insecurity in the area is not something the parties envisioned when signing the Contract, therefore, the cost of hiring additional security personnel could not be factored in the Contract price. Further, that considering the completion period of the Contract was five months, the parties could not factor in the cost for security personnel for the extended period of more than 4 years and that it would only be fair and just that the Respondent, subject to proving the Claim on a balance of probabilities, be compensated for the extended period.
16. The Arbitrator ruled that the Applicant had the opportunity to terminate the Contract but it failed to do so when it was in fact aware that the Respondent was providing security on the two sites which the Applicant's witness did not deny. The Arbitrator stated that the Respondent filed the letter requesting for quotation for security from Ellyhood Security Services, the security agreement, the invoices from Ellyhood Security Services and the Payment Vouchers as proof of payment. The Arbitrator took cognizance of the fact that in ordinary business transactions, a payment voucher signifies an authorization to pay, disbursement money or could also mean confirmation of payment and that a payment voucher, in the latter sense is not any different from a receipt and a proof of payment. Upon consideration of the evidence, the Arbitrator was satisfied that the documents produced by the Respondent confirmed on a balance of probability that it paid Kshs 18,250,000.00 and Kshs. 8,100,000.00 being cost for engaging normal security and extra security guards respectively.
17. On whether the Respondent was entitled to the cost of maintaining idle staff at the site, the Arbitrator noted that under the Contract, the Respondent was obligated to make arrangement for the engagement of all labour and for their payment, housing, feeding and transport. That as earlier noted, the completion period of the Contract was 5 months and the parties would never have contemplated and included the cost for the employees for more than 4 years hence the Arbitrator held that it would only be fair, that the Respondent be compensated for the cost. On the evidence, the Arbitrator stated that he had keenly scrutinized the Schedule for staff at Hulugho and Kiunga sites. That the schedule contained the names of the employees, No. of days, Rate of payment, total wage, and the date of payment. In his view, the document qualified to be a payment voucher. The Arbitrator observed that the Applicant avoided the issue of who was maintaining the site as its witness was evasive on this issue. The Arbitrator stated that he was aware, in many daily and official transactions, payees do not walk around with receipts to issue in acknowledgement of payment and that for some, they are neither issued with letters of employment nor pay slips and they merely counter sign the payment voucher to signify payment. That this is particularly common in cases where the payees are engaged



- in short term fixed contract and in such circumstances, as is in the current case, the voucher is considered as evidence of payment. Further, that the payment voucher might be the only evidence of employment. Consequently, the Arbitrator held the Respondent had proved that it had incurred Kshs. 43,800,000.00 as salaries paid to its maintenance staff.
18. On ownership of the equipment and plants on site, the Arbitrator held that the Respondent had not proved the claim hire or lease of the equipment on site hence its claim for Kshs. 108,000,000.00 could not stand.
  19. The Arbitrator considered the reliefs sought in the Applicant's counterclaim. He stated that on the claim for Kshs. 5,421,840.00 being damages for delayed completion, the Respondent had severally and expressly admitted delay in completion in the second to sixth contracts through various correspondences and that the delay was for more than 5 years. Consequently, the Arbitrator held that the Applicant was entitled to Kshs. 5,421,840.00 being an award for delayed completion. On the claim for liquidated damages of Kshs. 44,690,392.00, the Arbitrator stated that as per Clause 27.3 of the Contract, the Applicant could only recover the loss suffered as a result of completing the works. That it was not in dispute that the Applicant paid the Respondent Kshs 13,780,800.00 inclusive of VAT being 60% of the Contract based on the equipment delivered on site and that the total amount used in the project was Kshs 58,470,392.00 and that compared to the initial contract price, the Applicant suffered a loss of Kshs 4,251,992.00. However, the Arbitrator stated that having held that the Applicant did not terminate the Contract properly, and therefore, comes to equity with dirty hands, he was reluctant to award this Claim.
  20. On costs, the Arbitrator noted that although each party had partially succeeded in their claims, he found it fair to award the Respondent to recover from the Applicant 50% of its costs of the reference and that the costs were to be agreed between parties or taxed before the Arbitrator. The Arbitrator also awarded interest to both parties at the rate of 14% per annum and that each party was to bear 50% of the Arbitrator's fees.
  21. The Arbitrator thus summarised the Award as follows:
    - a. The claim for an award for the contract value, being the Market Price of the equipment procured, being Kshs. 91,745,944.00 was dismissed.
    - b. The claim for an award for 40% being profits for all money used towards servicing the contract being Kshs. 36,698,377.60 was dismissed.
    - c. The claim for an award for 18% interest payable to ABB Limited being Kshs 11,353,890.00 was dismissed.
    - d. The claim for Kshs 18,250,000.00 as special damages for the costs of engaging normal security services succeeded.
    - e. The claim for Kshs 8,100,000.00 as costs for engaging extra security services succeeded.
    - f. The claim for the processing fee of Kshs 1,874,701.00 was dismissed.
    - g. The claim for accumulated interest on the Co-operative Bank Loan of Kshs. 7,063,500.00 was dismissed.
    - h. The claim for interests on the unpaid certificate being Kshs. 38,627,170.00 was dismissed.
    - i. The claim for the costs of leasing Gensets at Kshs. 3,000,000.00 per site per month was dismissed.



- j. The claim for Kshs 43,800,000.00 as special damages for maintaining technical staff at the site succeeded.
  - k. The Claim for demurrage Charges at the rate of Kshs 8000.00 per day was dismissed.
  - l. The Counter-Claim for Kshs 5,421,840.00 to the Applicant being an award for delayed completion succeeded. However, this sum was to be deducted and/or set off from the sums payable to the Respondent.
  - m. The counterclaim for liquidated damages to the Applicant being Kshs 44 690,392.00 was dismissed.
  - n. The Applicant was to bear 50% of the Respondent's costs of the reference and that the Arbitrator's Fees on the other hand was to be shared equally between the parties.
  - o. The Arbitrator awarded simple interest on (d) and (j)above at 14% p.a. from the date of the Award until payment in full
22. The Arbitrator then issued final dispositive orders as follows:
- 1. The Respondent was awarded the sum of Kshs. 70,150,000.00 with interest at 14% from the date of the Award until payment in full.
  - 2. The Applicant was awarded the sum of Kshs 5,421,840.00 with interest at 14% from the date of the Award until payment in full.
  - 3. The sums awarded to the Applicant in (2) above were to be deducted and/or set off from the sums awarded to the Respondent in (1) above, and therefore, the amount payable to the Respondent by the Applicant was to be the sum of Kshs. 64,728,160.00
  - 4. The Respondent was to be entitled to 50% of the Party and Party costs, which were be agreed by parties or as may be taxed by the Arbitrator. The Arbitrator's Fees were to be shared equally between the parties, which sums the Arbitrator confirmed had already been received and settled by the time of collecting the Award.
23. The Applicant is dissatisfied with part of the findings of the Award above more so the award on costs for engaging normal and extra security and of maintaining technical staff at the site on the ground that the same are in conflict with public policy.

### **Analysis and Determination**

24. 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 term "public policy" was broken down by the court in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 E.A 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.....”

25. The Court of Appeal, in *Kenya Shell Limited v Kobil Petroleum Limited* NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR, while quoting *Christ for All Nations v Apollo Insurance Co Ltd (Supra)* with



approval further stated that it is a matter of public policy and public interest that there should be an end to litigation and that the *Arbitration Act* under which the proceedings in this matter were conducted underscores that policy. This means that parties who enter into an arbitration agreement expect a level of finality in respect of their dispute.

26. The Applicant submits that Award violates public policy by on one hand finding that the Respondent is responsible for the delay in the Contract but at the same time rewarding the said delay by according the Respondent Kshs. 70,150,000.00 which is gravely beyond the contractual sum of Kshs. 54,218,400.00 which constitutes unjust enrichment of the Respondent. It contends that the Contract before the tribunal was a turnkey project and that the Applicant is a parastatal whose funds are allocated from public monies and that the Applicant in its wisdom and in exercise of the prudent use of taxpayer funds knew the project ought not to cost more than the allocated Kshs. 54,218,400.00.
27. The Respondent denies that the Award offends the principle of public policy and that the Applicant is only seeking to appeal against the Arbitrator's discretion by urging the court to substitute the Award with the discretion of the court.
28. The Applicant's case is grounded on argument that the Award against it amounts to unjust enrichment. The doctrine of unjust enrichment based on the principle that a person should not retain a benefit in circumstances that the law considers unjust or inequitable. In *Madhubaper International Ltd and Another v Kenya Commercial Bank Ltd and 2 Others* 181 of 2004 [2008]eKLR the Court of Appeal cited with approval the following dictum of Lord Wright in *Fibrosa Spolka Akayina v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 61:

It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

29. In *Glencore Grain Ltd v TSS Grain Millers Ltd* MSA HCCC No. 388 of 2000 [2002] eKLR, Onyancha J., stated that, "Against public policy" would also include contracts or contractual acts which would offend conceptions of our justice in such a manner that enforcement would stand to be offensive." Thus there may be circumstances which the court may set aside an award on the ground that it violates public policy as its enforcement may result in unjust enrichment. In *Ministry of Environment v Kiarigi Building Contractors and Another* ML HC COMM MISC. MNo. E321 of 2019 [2020] eKLR, the court set aside part of an arbitral award that constituted compound interest which in the court's view was. "[32] .... inordinately high, does not constitute compensation but is punitive and amounts to unjust enrichment to the extent that if it is enforced, would injure the public finances."
30. As I understand, the Applicant's case is that Respondent was rewarded for delaying the project by being awarded a sum exceeding the contract price. This award, the Applicant argues, violates the public policy of Kenya. I have gone through the Award, whose contents I have summarized above, and it is indeed correct that the Arbitrator found that the Respondent was responsible for the delay in the completing the project. However, the Arbitrator also found that the Applicant condoned the delay and allowed the extension requests by the Respondent to complete the project. As a result of the extensions, express and implied, the five-month contract morphed into a five-year engagement. The Arbitrator further found that these extensions had some cost implications which again, the Applicant condoned and allowed



to accrue. For its part in the occasioning the delay, the Respondent was rightly sanctioned and for the Applicant, it was duly compensated.

31. The implication of this delay on the obligations of the parties were within the province of the Arbitrator to consider. Indeed, the issue was framed for determination and crystallized the parties' claims following the delay. On the one hand, the Arbitrator held that the Applicant did not exercise its right to terminate the Contract and was indeed aware that the Respondent continued to incur certain expenses for which it held the Applicant liable. On the other hand, the Respondent was held liable to pay liquidated damages as a result of the breach. The amount impugned by the Applicant was compensatory in nature and cannot be said to amount to unjust enrichment.
32. A review of the Award shows that the Arbitrator considered the evidence in detail including the evidence of the Applicant's report and testimony to come to the conclusion that the Applicant was liable for the security expenses incurred and that the amounts presented were proved to the required standard. These findings of fact were within the realm of the Arbitrator's jurisdiction and the court cannot intervene merely because it could have come to a different conclusion or because the arbitrator proceeded on an erroneous analysis as such intervention would amount to this court sitting as an appellant court.
33. Ultimately, I reject the Applicant's contention that the Award is contrary to the public policy of Kenya. The Applicant has not demonstrated that the findings of Arbitrator are 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.

#### **Disposition**

34. For the reasons I have set out above, I hold that the Applicant's Notice of Motion dated 7<sup>th</sup> June 2022 lacks merit. It is dismissed with costs to the Respondent. The costs for the Respondent are assessed at Kshs. 200,000.00 only.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Ligunya instructed by Rachier and Amollo LLP Advocates for the Applicant.

Mr Wesonga instructed by Okundi and Company Advocates for the Respondent.

