Attorney General (On Behalf of the Republic of Kenya & the National Youth Service) v N. K. Brothers Limited (Arbitration Cause E047 of 2021 & E039 of 2022 (Consolidated)) [2023] KEHC 22503 (KLR) (Commercial and Tax) (26 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E047 OF 2021 & E039 OF 2022 (CONSOLIDATED)

DAS MAJANJA, J

SEPTEMBER 26, 2023

BETWEEN

ATTORNEY GENERAL (ON BEHALF OF THE REPUBLIC OF KENYA & THE NATIONAL YOUTH SERVICE) ..... APPLICANT

AND

N. K. BROTHERS LIMITED ..... RESPONDENT

RULING

Introduction

1. On 21.05.2021, the Arbitrator (also "Arbitral Tribunal") published an award in which the Respondent's claim was allowed to the extent that the Applicant was directed to pay the Respondent Kshs. 278,517,127.00 together with interest at 12%, 70% of the Arbitrator's fees and 70% of the arbitration costs ("the Award").

2. The Applicant has now filed the Chamber Summons dated 17.11.2021 made, inter alia, under section 35(2)(a)(iv) and (b)(ii) of the *Arbitration Act*, 1995 seeking to set aside the Award and stay its execution and enforcement. The application is supported by the supporting affidavit and further affidavit by Mary Murugi Ngige, a Senior State Counsel of the Applicant sworn on 17.11.2021 and 28.06.2022. It is opposed by the Respondent through the replying affidavit sworn by its Chief Executive Officer, Rajesh Rathod, on 17.06.2022 and the Preliminary Objection dated 16.12.2021. The parties have also filed written submissions to supplement their arguments which together with the pleadings, I have considered in my analysis and determination below.

Analysis and Determination

3. I propose to first deal with the Respondent's Preliminary Objection which impugns the competency of the Applicant's application. The Respondent avers that it is time barred contrary to section 35(3) of the *Arbitration Act* which provides as follows:

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> (3). An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award. [Emphasis mine]

4. Essentially, an applicant has 3 months to file an application to set aside the award from the date of receiving the said award. As submitted by the Respondent, the meaning of "received" has been expounded by the court in a catena of decisions holding that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection (see University of Nairobi v Multiscope Consultancy Engineers Limited [2020]eKLR and Mercantile Life and General Assurance Company Limited and Another v Dilip M. Shah and 3 Others [2020] eKLR).

5. The Applicant submits that the Respondent has not tendered any evidence to show that the Award was received by either party on the date it was signed and that there is no evidence that the Arbitrator notified the Applicant that the award was ready for collection. That time started running when both parties received the Award on 27.09.2021 and therefore the application to set aside the Award having been filed on 17.11.2021 was within the requisite three months. The Respondent states that in its submissions, the Applicant agrees that the Award was published on 21.05.2021 which clearly shows that the Applicant was aware when the Award was published and made available and accessible to the parties.

6. From a perusal of the record, I am inclined to agree with the Applicant that there is no evidence of the Arbitrator notifying the parties that the Award was ready for collection on the date of the Award or on an earlier date than 22.09.2021, which is the only evidence available of the Arbitrator forwarding the Award to the parties. I therefore find and hold that the application to set aside the Award having been filed on 17.11.2021 was within the statutory timeline set out by section 35(3) of the *Arbitration Act* above. The Respondent's Preliminary Objection is therefore dismissed.

7. Turning to the substance of the Applicant's application, it is not in dispute that the court's jurisdiction to set aside an arbitral award is set out in section 35(2) of the *Arbitration Act* which part material to its application provides as follows:

> 35. Application for setting aside arbitral award
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> (1) .....
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> (2) An arbitral award may be set aside by the High Court only if—
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> (a) the party making the application furnishes proof—
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> .....
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> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or 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, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside

.....

(b) the High Court finds that—

(i) .....

(ii) the award is in conflict with the public policy of Kenya.

8. The Applicant assails the Award on the ground that it is in conflict with the public policy of Kenya for a number of reasons. First, that the Arbitrator awarded the Respondent usurious and colossal sums of money despite the same not being provided for in the contract between the parties or proved as owed before the arbitral tribunal, which amounts to unjust enrichment on the part of the Respondent. Second, that the Arbitrator allowed payment certificates including of fluctuation amount whereas the contract did not provide for the same. This, the Applicant added, meant that the Award contains decisions on matters beyond the scope of reference to arbitration. Third, that the legal proceedings commenced by the Respondent were time barred by section 3(1) of the *Public Authorities Limitation Act* (Chapter 39 of the Laws of Kenya). The Applicant also faults the Arbitrator's award of interest and states that this was beyond the scope of reference to arbitration as this remedy was never provided for in the contract. The Applicant further states that the award of interest offends the in duplum rule which provides that interest on debt will cease to accrue where the total amount of interest has accrued to an amount equal to the outstanding principal debt.

9. In response, the Respondent states that the Applicant has failed to establish at all how the Award conflicts with the public policy of Kenya and that the Applicant is essentially inviting the court to delve into the merits of the case despite submitting itself to the jurisdiction of the Arbitrator. That the Award was strictly in terms of the contract and that the sums awarded were consistent with contractual provisions of the contract and further, that the Applicant is attempting to appeal the decision of the Arbitrator by disguising the same as an application to set aside the Award. The Respondent urges that having voluntarily submitted themselves to the arbitration, the parties agreed to be bound by the decision of the Arbitrator.

10. The Respondent also states that during the arbitration, the Applicant did not dispute that the Respondent was entitled to a certificate which certificate could include fluctuation amounts and as such, it is estopped from raising the issue before the court. That the issue of the legal proceedings being time-barred by dint was raised by the Applicant and determined by the High Court on 12.04.2019, hence the issue is res judicata and the Applicant is estopped from raising it at this stage.

11. As submitted by the Applicant, in Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A 366 Ringera J., stated that an award will be set aside for being in conflict with the Public Policy of Kenya if it was shown that it was either 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. The court in Mall Developers Limited v Postal Corporation of Kenya ML Misc. No. 26 of 2013 [2014] eKLR added that '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.'

12. It is common ground that on 14.07.1987 the Applicant awarded the Respondent a contract to construct 28 No. of blocks of 4 Storey upland type E flats, 1 No. Block of 4 Storey type D Flats, 3 No. upland type C, Maisonettes, 3 No. upland two roomed Servant Quarters, 2 No. Three Storey dormitories, 2 No. Single Storey Officers accommodation Block, 2 No. Single Storey Kitchen and Dining Blocks, Associated External works, Mechanical and Electrical Installation for a consideration of Kshs, 279,676,143.00 ("the Contract"). The date of possession was to be 10.07.1987 and works were to be executed in 156 weeks with the completion date set on 21.07.1990. Following a dispute between the parties, the matter was referred to and determined by arbitration in accordance with the Contract.

13. The Respondent accused the Applicant of breach of contract for failing to certify payments at all or on their due dates, failing to pay the certified amounts on their due dates or at all, failing to reply to correspondences and frustrating amicable settlement, failing to fund the Project as per the Contract and obstructing continuance of the Project. That as a result of the breaches, the Respondent claimed that it had suffered loss and expense amounting to Kshs. 1,936,090,902.76 comprising of outstanding certificates, interest on delayed payment and interest on delayed certification. The Respondent thus prayed for this sum plus compound interest at 22.5% per annum from 31.10.2016 until payment in full.

14. The Applicant opposed the claim and also filed a counterclaim. It denied the Respondent Respondent's claim that it had failed and or delayed to pay certificates and it failed to issue the Final Certificate at its due date. It stated that the Contract did not provide for interest on delayed payments. That it was the responsibility of the Respondent under the Contract to raise Certificates after work was done including the Final Certificates and the Applicant thus denied that it failed to issue the Final Certificate. Further, that the Certificates were only to be issued after the work done had been inspected and a financial statement for valuation created.

15. The Applicant contended that the Respondent failed to complete the works during the duration of the Contract and as such it was entitled to terminate the Contract at any time. The Applicant averred that the Respondent was involved in the mutual winding up process and that the Project was mutually wound up on 13.01.2004. The Applicant further denied interest on delayed payments and stated that the Contract did not provide for the same. In its counterclaim, the Applicant stated that they had overpaid the Respondent on some certificates and thus sought, inter alia, Kshs. 57,684,942.04 being amounts recoverable for payment not due and the interest thereon.

16. In the Award, the Arbitrator framed five issues for determination which included whether the conditions of the Contract were adhered to, whether the Applicant was entitled to terminate the Contract as it did, whether the Respondent was entitled to the sums sought in its claim, whether the Applicant was entitled to its counterclaim and who was to be responsible for the costs of arbitration.

17. On the first issue of whether the conditions of the Contract were adhered to, the Arbitrator examined the site minutes and found that the Respondent executed the works to the satisfaction of the Departmental Representative (DR) who certified Certificates in favour of the Respondent which Certificates were honoured inconsistently, most of the time not within the stipulated periods provided for in the Contract and in some instances some Certificates were not honoured at all. The Arbitrator held that whereas he agreed with the Respondent's witness that this was a reimbursable Contract, the Contract reimbursement was to be monthly and not at the end of the Project as alleged and that the Applicant was not able to meet its obligations of paying for the monthly Certificates, starved the Project of the funds, which led to the stalling of the Project. That there was numerous correspondence where the Office of the President expressed its inability to fund the Project. As such, the Arbitrator

determined that the Applicant defaulted in paying the Certificates and did not adhere to conditions of the Contract.

18. On the second issue whether the Applicant was entitled to terminate the Contract as it did, the Arbitrator held in the negative. It stated that the process of mutual winding up of the Contract was started but never completed as the Certificates were never settled and the termination by the Applicant was invalid as there was no default by the Respondent to warrant a termination. That termination took place and most importantly at the time of the termination, the Applicant was in default as it had failed to settled some payment Certificates.

19. On the third issue and on the sub-issue whether the Respondent was entitled to outstanding certificates in the sum of Kshs. 115,303,253.95, the Arbitrator held that it was an express provision of the Conditions of the Contract at Clause 29(a) that the Respondent was to be entitled to a Certificate from the DR of the amount due to him from the Government after issue thereof to payment therefor upon presentation within 30 days. That the Contract being administered by the DR had a provision for fluctuation wherein the Respondent was to be reimbursed price increases for the JBC list of materials for which there was a Provisional Sum of Kshs. 20,000,000.00. Therefore, the Arbitrator held that it was not disputed that the Respondent was entitled to a Certificate which Certificate could include fluctuation amounts. For this reason, it found that certificates nos. 37, 38, 39 and 42 amounting to Kshs. 95,680,365.15 were still outstanding and had not been settled by the Applicant.

20. As to whether the Respondent was entitled to interest on delayed payments, the Arbitrator held that the Respondent continued to work with the payments delayed or not paid at all which in commercial sense could only be possible by borrowing, using its reserves or alternatively the Respondent was made to have a bigger overdraft than it would otherwise have had to maintain had the Certificates been paid in accordance with Contract. That they were also kept out of their money for long period of time and that it is a matter of fact that in the building and construction industry the “cash flow” is vital to the Contractor and delay in paying him for the work he does naturally results in the ordinary course of things in his being short of working capital, having to borrow capital to pay wages and finance charges. That the loss of interest which it has to pay on the capital it is forced to borrow and on the capital which it is not free to invest would be recoverable for the Employer's breach of Contract within the first rule in Hadley v Baxendale [1854] EWHC J70 without resorting to the second, would accordingly be direct loss.Therefore, the Arbitrator held that the contention by the Applicant that the Contract did not provide for payment on interest on delayed payment had no Contractual merit and was dismissed.

21. I have gone through the Award and I agree with the Applicant to a certain extent that the Award is in conflict with Kenya’s public policy for a number of reasons. Even though I agree that the Arbitral Tribunal had the discretion to award interest within the confines of section 32C of the *Arbitration Act*, in this matter, the Arbitrator awarded interest more than once on the same items. The Arbitrator awarded interest at 16% on the delayed payment certificates and also awarded interest at 12% in addition to this amount already awarded, in his disposition.

22. I also note that after the Arbitrator awarded interest at 16% on the certificate of 16.03.2006 which was in the sum of Kshs. 33,905,226.30 as at that date, it awarded further interest of 16% on account of the same being the Final Certificate which amounted to a double interest payment.

23. The court in Premier Bag & Cordage Limited v National Irrigation Board ML HC No. 1123 of 2001 [2014] eKLR and Ministry of Environment and Forestry v Kiarigi Building Contractors & another ML Misc. Civil Application No. E320 of 2019 [2020] eKLR held that charging interest on interest otherwise known in the commercial world as compound interest is punitive and not compensatory. Interest is meant to compensate a party for having been kept out of its/his funds or property for some

time and not either to enrich such a party or punish the opposing party. In this regard, the moment any interest is levied on any accumulated interest and not the principal sum, such interest stops being simple and becomes compounded, and therefore punitive. Therefore, the Arbitrator having applied interest on the delayed payments in the certificates ought not to have applied a further 12% interest on this sum and a further 16% interest on the Final Certificate.

24. It is for the above reasons that I find that the Award in this respect is inordinately high, does not constitute compensation but is punitive and amounts to unjust enrichment to the extent that if it is enforced, would injure public finances. I will accordingly set aside the interest of 12% applied on the awarded sum of 278,517,127.00 and the interest of 16% further awarded on the certificate of 16.03.2006 for being the Final Certificate as these awards are in violation of the public policy of Kenya.

25. On the ground that the interest awarded offends the in duplum rule, I will only state what the court held in Momentum Credit Limited v Kabuiya (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment) that the rule only applies to banks or financial institutions and relates to limits of the amount the said banks or financial institutions can recover from a non-performing loan in line with existing legislation. In this case, neither of the parties is a bank or a financial institution regulated by the *Banking Act* (Chapter 488 Law of Kenya) and the subject matter was not a non-performing loan. Therefore, the in duplum rule did not apply to them as it not a rule of common law or general application.

26. I note that in as much as the Applicant had stated that the Award went beyond the scope of the reference to jurisdiction for reasons that the Arbitrator allowed payment certificates including of fluctuations, it never submitted on this issue. In any case, I do not agree with its contention because as observed by the Arbitrator, the Contract expressly provided for Fluctuations at Clause 30 and therefore this was an issue within the Contract that the Arbitrator could deal with. This ground therefore fails.

27. On the ground that legal proceedings commenced were time barred by dint of section 3(1) of the *Public Authorities Limitation Act* which provides that 'No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued', I also note that the Applicant has not submitted on the issue. In any event, I can only state that this was a jurisdictional challenge that ought to have been raised from the outset of the arbitration proceedings otherwise it would be deemed that the party acquiesced to the arbitral tribunal's jurisdiction and it will be estopped from raising an objection afterwards. This means that it can be presumed that the Applicant acquiesced to the Arbitrator's jurisdiction and cannot plead the doctrine of limitations at this juncture. Be that as it may, the court does not have original jurisdiction to determine a question of the arbitrator's jurisdiction because in accordance with section 17(6) and (7) of the *Arbitration Act*, it is only where the arbitral tribunal rules as a preliminary question that it has jurisdiction that a party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter and that the decision of the High Court on this matter shall be final and shall not be subject to appeal (See Chania Gardens Limited v Gilbi Construction Company Limited & another ML Misc. Cause No. 482 of 2014 [2015] eKLR). This ground therefore fails.

28. My findings above dispose of the Applicant's application in its entirety. The application to set aside the Award succeeds only to the extent that the interest of 12% awarded in addition to the awarded sum of Kshs. 278,517,127.00 and the interest of 16% awarded in addition to the Final Account sum of Kshs. 33,905,226.30 in respect of the Final Certificate dated 16.03.2006 are hereby set aside as the same offend Kenya's public policy on award of interest.

29. The Respondent had filed an application dated 30.06.2022 in HCCOMM ARB. E039 of 2022 seeking to enforce the Award in accordance with section 36 of the *Arbitration Act*. The court had allowed the application on 09.12.2022 thus adopting the Award as a judgment of the court and also granted the Respondent leave to enforce it as a decree of the court. On 10.01.2023, the parties recorded a consent setting aside this ruling to pave way of the hearing and determination of the present application to set aside the Award.

30. Since the application to set aside the Award has now been determined, it follows that that there is no impediment standing in the way of the court recognising the Award and granting leave to the Respondent to enforce it as such.

Disposition

31. I therefore make the following dispositive orders:

    a. The Applicant's application dated 17.11.2021 is allowed and the Final Award is set aside to the extent that interest of 12% awarded in Paragraph 211 b) of the Award and interest of 16% on delayed certification of the Final Account upon Mutual Termination of the Contract in the sum of Kshs. 14,268,062.00 awarded at Paragraph 192 of the Award are hereby set side.

    b. The Respondent's application dated 30.06.2022 is allowed on terms that the Final Award dated 21.05.2021 subject to order (a) above be and is hereby adopted as a judgment of this court and leave be granted to the Respondent to enforce it as a decree of the court.

    c. The Applicant should also pay costs of the both applications assessed at Kshs. 100,000.00.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2023

D. S. MAJANJA

JUDGE

Ms Nthiga instructed by the Office of the Attorney General for the Applicant.

Mr Titoo instructed by Tito and Associates Advocates for the Respondent