



**Milicon's Limited v National Commission for Science, Technology & Innovation & another (Commercial Arbitration Cause E043 of 2022) [2023] KEHC 24515 (KLR) (Commercial and Tax) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24515 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL ARBITRATION CAUSE E043 OF 2022**

**DAS MAJANJA, J  
OCTOBER 31, 2023**

**BETWEEN**

**MILICON'S LIMITED ..... APPLICANT**

**AND**

**NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY & INNOVATION ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK S KISIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction and Background**

1. On 01.09.2011 the parties entered into a contract where the 1<sup>st</sup> Respondent (“the Respondent”) engaged the Applicant to construct an office block, hostel, swimming pool and associated works for an initial contract sum of Kshs. 990,990,990.00 (“the Contract”). The Applicant completed the project works and handed it over to the Respondent in March 2017. After the Respondent moved into the new building, it identified defects that needed to be rectified. The Applicant proceeded to carry out remedial work on the identified defects to the satisfaction of the project’s professionals. The Respondent complained that the Applicant had failed to attend to all the defects which remained outstanding hence the Applicant was not entitled to the payment certificates it had raised during the defects period.
2. The Respondent’s refusal to honour demands for payment of these certificates prompted the Applicant to declare a dispute which was referred to the 2<sup>nd</sup> Respondent (“the Arbitrator”) for resolution. The Applicant had sought Kshs. 801,105,973.57 which it claimed was outstanding as at 30.09.2019, interest, costs and expenses and exemplary damages. After considering the claim, the



Arbitrator published an award on 16.03.2022 (“the Award”). The Respondent was ordered to pay the Applicant Kshs. 198,337,242.57 within 30 days of the date of the Award in full and final settlement of the claim save for the accrual of further interest and payment of sums under Certificate No. 26 which the Arbitrator held that either party was at liberty to move the tribunal within 90 days of lifting the Award to make a further order with respect to the making good defects and the certificate.

3. The Applicant is aggrieved by the Award and seeks to set it aside by the Notice of Motion dated 08.06.2022 made, inter alia, under sections 35 of the *Arbitration Act* (“the Act”). The application is supported by the grounds on its face and the supporting affidavit of the Applicant’s Managing Director, Sai P. Parchuri sworn on 08.06.2022. It is opposed by the Respondent through the undated replying affidavit sworn by its Director General/Chief Executive Officer, Prof. Walter O. Oyawa. The Applicant has also filed written submissions to supplement its arguments.

### **The Application**

4. The Applicant faults the Arbitrator for illegally extending the Applicant’s liability for defects notified beyond the contractual provisions and the consequential order for the repair of such alleged defects which unilaterally amended the Contract. That the Arbitrator delved into and decided the issue of alleged defects notified beyond the defects liability period consequently rendering orders in favour of the Respondent, without any such counter-claim or set-off being sought by the Respondent in its pleadings. Further, that he opened up the dispute beyond the scope of the reference by the parties and then failed to finally determine the exact nature and extent of the alleged defects to the roof and floor it ordered the Applicant to repair.
5. The Applicant also claims that the Arbitrator erred when he ordered the Applicant to forfeit the entire moiety of retention under Certificate No. 26 if it failed to repair the alleged defects within 90 days of the Award. That the finding that the Applicant was legally entitled to interest of delayed payments then proceeding to ignore, disregard and or totally fail to consider and finally determine the claim for interest of delayed payments for Certificates No. 1 to No. 22 as quantified in the Claim was an error. The Applicant faults the Arbitrator’s determination disregarding Certificate No. 25 issued by the Project Manager on 29.11.2017 and upholding a dubious Certificate issued on 26.10.2018 in contravention of section 29(5) of the Act. That the Arbitrator erred in finding that the Applicant was always aware of defects notified to it for the first time during the Arbitration proceedings and then proceeding to deny it costs as a successful litigant.
6. The Applicant contends that the Arbitrator contravened Article 50 of *the Constitution* and section 29 of the Act and the Rules by disregarding the express provisions of the Contract. That he relied on conditional correspondence between the parties written 6 months after the Claim had been served and filed on the Respondent to unilaterally amend the Contract thus making the Applicant liable for alleged defects notified more than 2 years after a Certificate of Making Good Defects had been issued. That the Arbitrator went on to direct that a site visit be conducted to ascertain the alleged defects despite the Applicant’s protests that the Respondent had not raised any counterclaim in its defence regarding such defects and the issue was being raised for the first time years after all defects had been certified as being made good.
7. The Applicant reiterates that the Arbitrator went on to find that the Applicant was always aware of the alleged defects and directed it to repair the alleged defects without any such counter-claim or set off being sought by the Respondent, thus violating the tenets of a fair hearing, that submissions cannot substitute pleadings and that a tribunal can only decide on matters properly pleaded. It contends that whereas the Arbitrator under Rule 18(3) of the CI Arb Kenya, Arbitration Rules, 2012, has the power to conduct such enquiries as may appear to it to be necessary or expedient, the Arbitrator, after



conducting the so-called site visit, then abdicated his role to ascertain the extent of and measurements for the alleged repairs as he ordered the Applicant to repair the same within 90 days of the Award. That the Arbitrator did not prepare a site visit report and the Respondent did not bring out this information in any pleading or evidence. The Applicant proffers that even assuming this was a valid order, this part of the Award not only fails to deal with this purported dispute with finality but also subjects the parties to further disputes regarding what square meters of floor tiles or roof in the 2 different blocks to be repaired, whether such repairs are to be done as at 24.06.2020 when the alleged defects were notified, as at 12.01.2021 when the impugned site visit was conducted or as at 16.03.2022 when the Award was made.

8. The Applicant asserts that directing it to make repairs or forfeit the entire moiety under Certificate No.26 was oppressive and unjust in that the Contract specifically provides how parties are to deal with failure by the Contractor to attend to any defect notified during the liability period and forfeiture of the moiety of retention is not a remedy available under the Contract. Further, that the Applicant is being condemned to lose its entire moiety in the Award where the extent of the alleged repairs is not ascertained.
9. The Applicant states that it is a long-settled principle of Common law, which courts in Kenya have upheld, that a final award must deal with all the issues put to the tribunal and a final award that does not do so is imperfect thus liable to be set aside. That the Award issued by the Arbitrator is only made subject to inspection of the repairs it ordered which expressly means that the Arbitrator has not and will not address the Claim for interest for all the other certificates running into hundreds of millions of Kenya Shillings.
10. The Applicant further states that the Arbitrator in the Award further violated the usages of trade applicable to this dispute when it relied on a questionable Certificate No. 25 which was allegedly issued several months after the final certificate Number 26. That there is no evidence recalling the earlier Certificate No. 25 and reworking of the new certificate 25 neither was any alleged error in the certificate attended to in the subsequent certificate of the Final Account, as is industry practice. That as a result of the enumerated transgressions of the law, the Award violates the Act ought to be set aside for being contrary to public policy as defined in *Christ For All Nations v Apollo Insurance Co. Ltd* [2002] E.A 366.

### **The Respondent's Reply**

11. The Respondent opposes the application on the ground that it has failed to attain the threshold for setting aside an arbitral award under section 35 of the Act. It contends that the application is tantamount to an appeal as it invites the court to consider factual determinations by the Arbitrator. Further, that the Applicant has not substantiated its allegations that the Arbitrator delved into matters outside the scope of his mandate scope. The Respondent avers that the application is premature on the ground that its application is pending before the Arbitrator for the correction of errors apparent on the Award and any ambiguities thereof.
12. According to the Respondent, the Arbitrator considered all factual evidence presented by the parties and since the arbitrator is the master of facts as such the Arbitrator's factual findings and/or conclusions are beyond the reach of the High Court exercising jurisdiction under section 35 of the Act. That the Applicant, having agreed to submit any dispute arising from the Contract, it is bound to accept and honour the determination of the Arbitrator's findings of fact as provided at Condition 37.9 of the Contract which states that an Arbitral Award of such an arbitrator appointed under the Contract shall be final and binding upon the parties.



13. The Respondent contends that Condition 37.8 of the Conditions of Contract vests the Arbitrator with the powers to open up, review and revise any certificate opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him as if no certificate, opinion, decision, requirement or notice had been given hence the Applicant has not demonstrated that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute.
14. The Respondent reiterates that the Arbitrator extensively determined issues raised by the parties in the Award and that of specific reference is the issue of defects where the Applicant has stated in its application at Prayer 3(b) that the Arbitrator delved into and decided on the issue of alleged defects beyond the Defects Liability Period without any such counterclaim or set off being sought by the Respondents in its pleadings. The Respondent states that the issue of defects was manifestly brought out and established by the Respondent in its Amended Statement of Defence at Paragraphs 3(g-j) and 5 which demonstrates that the Applicant had been duly notified of the identified defects as well as during the site visit and at the hearing. The Respondent further states that the site visit was conducted by the Arbitrator on 12.01.2021 and parties prepared and presented their respective report to the Arbitrator and the issue of defects was therefore rightly before the Arbitrator for determination.
15. Furthermore, that the Applicant's claim in Prayer 3 (a) and (b) that the Arbitrator illegally considered defects notified beyond the Defects Liability Period is not a matter to be determined by this court for lack of the requisite jurisdiction as the instant prayers amount to a request to this Court to reopen the arbitral proceedings to determine factual matters contrary to the requirements of section 35 of the Act. That if the Applicant wished to re-open matter for consideration by the Arbitrator, it had the opportunity as empowered by section 34 of the Act to request the Arbitrator for corrections of any errors and ambiguities as well as any claim presented in the arbitral proceedings but omitted from the Award, which it forfeited. The Respondent contends that the Applicant application is an application for rectification of errors disguised as an application to set aside an arbitral award under section 35 of the Act.
16. The Respondent states that it is noteworthy that at Prayer 3(f), the Applicant is inviting this Court to look at merits of the Award by raising the question of validity of Certificate No. 25 and that this being an issue that should not be reopened at this stage for the reason that the issue of validity or lack of it thereof, is a factual issue which is within the Arbitrator's jurisdiction and not this court. That it is prudent to note that contrary to what the Applicant has pleaded as its grounds, that the Respondent did not raise a counterclaim on defects, the Applicant did not raise any objection of this nature in the course of the arbitral proceedings. That the Applicant is raising this issue for the first time in the instant application.
17. The Respondent also states that public policy, as a ground for setting aside an arbitral award, must be narrow in scope and an assertion that an arbitral award is contrary to the public policy of Kenya cannot be vague, haphazard and generalized. That in this case the Applicant has not been proved or demonstrated to the standard required by the law and that public policy demands finality hence the application should be dismissed.

### **Analysis and Determination**

18. The court's jurisdiction to set aside an arbitral award is demarcated and delimited by section 35(2) of the Act which provides as follows:
  35. Application for setting aside arbitral award



- (1) .....
- (2) An arbitral award may be set aside by the High Court only if—
  - a. the party making the application furnishes proof—
    - i. that a party to the arbitration agreement was under some incapacity; or
    - ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
    - iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
    - iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or 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; or
    - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
    - vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
  - b. the High Court finds that—
    - i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
    - ii. the award is in conflict with the public policy of Kenya.

19. In addition to the aforesaid provisions, the court is guided by section 10 of the *Arbitration Act* which provides that, “Except as provided in this Act, no court shall intervene in matters governed by this Act” and the conclusive nature of an arbitral award dealt with under section 32A of the *Arbitration Act* which states, “Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by the Act.” The collectively of these provisions restrains the court’s hand from interfering with an arbitral award except on the specific grounds set out in section 35 of the Act. In *Nyutu Agrovat Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* SCK Petition No. 12 of 2016 [2019] eKLR, the Supreme Court observed as follows:

[T]he *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process.

.....



It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, "expeditious and efficient way of handling commercial disputes."

- (53) Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that "parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. ...
20. Turning to the matter at hand, the court cannot interfere with an arbitrator's interpretation of the law and/or interpretation of a contract as the court's jurisdiction to set aside an award under section 35 of the Act is different from that of an appeal under section 39 thereof. The arbitral tribunal remains that master of facts and 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 arbitrator on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be as parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts (see *Kenya Oil Company Limited & Another v Kenya Pipeline Company* NRB CA Civil Appeal No. 102 of 2012 [2014]eKLR).
21. For these reasons, I will steer clear of any invitation by the Applicant to interrogate the Arbitrator's factual findings and limit myself to the grounds within section 35(2) of the Act. The thrust of the Applicant's case is that the Award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration or contained decisions on matters beyond the scope of the reference to arbitration. Further, that the Award is in conflict with the public policy of Kenya.
22. On the ground that the Award dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration or containing decisions on matters beyond the scope of the reference to arbitration, the Applicant faulted the Arbitrator for illegally extending the Applicant's liability for defects notified beyond the contractual provisions and the consequential order for the repair of such alleged defects which unilaterally amended the Contract. That he delved into and decided the issue of alleged defects notified beyond the defects liability period consequently rendering orders in favour of the Respondent, without any such counter-claim or set-off being sought by the Respondent in its pleadings. Further, that he opened up the dispute beyond the scope of the reference by the parties and then failed to finally determine the exact nature and extent of the alleged defects to the roof and floor it ordered the Applicant to repair. That the Arbitrator went on to direct that a site visit be conducted to ascertain the alleged defects despite the Applicant's protests that the Respondent had not raised any counterclaim in its defence regarding such defects and the issue was being raised for the first time years after all defects had been certified as being made good.
23. On this ground, the Court of Appeal in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR observed as follows:

In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.* (supra), the real issue in such an inquiry is whether



the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.

24. The arbitration clause, which is common to the parties partly provides as follows:

37.1 In case any dispute or difference shall arise between the Employer or the Project Manager on his behalf and the Contractor, either during the progress or after the completion or termination of the Works.....the dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties.....

37.2 The arbitration may be on the construction of this Contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this Contract to the discretion of the Project Manager, or the withholding by the Project Manager of any certificate to which the Contractor may claim to be entitled to or the measurement and valuation referred to in clause 23.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of the Contract

.....

37.7 The Arbitrator shall, without prejudice to the generality of his powers, have powers to direct such measurements, computations, tests or valuations as may in his opinion be desirable in order to determine the rights of the parties and assess and award any sums which ought to have been the subject of or included in any certificate

37.8 The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision requirement or notice had been given.

37.9 The award of such Arbitrator shall be final and binding upon the parties

25. It is evident from the arbitral clause outlined above that there is no limitation as to the type of dispute arising under the Contract that could be referred to arbitration. Further, the arbitral tribunal's powers in dealing with any such dispute before it are wide and expansive. It had sweeping powers to make such orders that were necessary to determine the rights of the parties and ultimately determine the dispute before it.

26. The dispute as presented by the Applicant was that the Respondent had failed to honour its claims despite the Applicant having diligently carried out the respective works of all defects identified during the defects liability period. The Respondent countered this position by stating that despite notification of the defects, the Applicant did not rectify them to the Respondent's satisfaction and remained outstanding at the time of the arbitration. Issues of defects are captured at Clause 20 of the Contract and thus, there can be no contention that such a dispute as to whether there were any defects and whether any of the said defects were rectified to the satisfaction of the Respondent, were matters that arose within the Contract and were firmly within the Arbitrator's jurisdiction to determine.

27. In deciding the claim, the Arbitrator, in the Award, abridged the issues raised by the parties as follows: Whether the Applicant satisfactorily completed the works and to what extent. Whether the amount under Certificate No. 23 was payable to the Applicant. Whether the Applicant was entitled to payment of its contractual claim of Kshs. 109,664,261.39. What sums were payable to the Applicant under Certificate No. 25. Whether the amount under Certificate No. 26 was payable. Whether Applicant was entitled to interest on delayed payments. Who was to bear the costs of the arbitration.



28. Juxtaposing the Applicant's statement of claim and the above issues framed by the Arbitrator, I find that the latter encapsulates all the issues raised by the Applicant, which issues were within the Arbitrator's jurisdiction for determination. How the Arbitrator decided to deal with the issues were within his discretion and purview and as stated, this court cannot seat as an appellate court on his findings. The Applicant and the parties in general are bound by those conclusions as they agreed do so at Clause 37.9 of the Contract above.
29. Since the dispute and the issues framed by the Arbitrator arose from the Contract, it cannot be stated that the Arbitrator dealt with a dispute not contemplated by and falling beyond the scope of the reference to arbitration. This ground by the Applicant fails.
30. From the reasons advanced by the Applicant to support its contention that the Award offends Kenya's public policy, it appears that the Applicant is challenging the Arbitrator's conclusions and appreciation of the evidence before him. The fact that the Arbitrator concluded that the Applicant was aware of prior defects and the Arbitrator relied on the Applicant's letter made 6 months after service of the claim is not a violation of public policy. This said letter was part of the evidence that was before the Arbitrator and he had an obligation to consider the same and it mattered not that it was authored after the Applicant filed and served its claim.
31. The scope of the public policy as a ground for setting aside an arbitral award was explained by Ringera J., in *Christ For All Nations v Apollo Insurance Co. Ltd* (Supra) 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.....”

32. In same decision, the learned judge recognized that it is not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. He added 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*.

33. I also hold that the public policy exception must not be applied so widely that it becomes the end all be all ground for setting aside arbitral award. The court in *Mall Developers Limited v Postal Corporation of Kenya* ML Misc. No. 26 of 2013 [2014] eKLR underlined this concern by stating 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. [Emphasis mine]



34. It is for these reasons that I find that the Applicant has failed to satisfy the grounds it has advanced to set aside the Award.

**Disposition**

35. The Applicant's application dated 08.06.2023 is dismissed with costs to the 1<sup>st</sup> Respondent assessed at Kshs. 150,000.00

**SIGNED AT DUBAI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2023.**

**A. MABEYA**

**JUDGE**

