Westmounts Investments Limited v Tridev Builders Company Limited (Miscellaneous Cause E347 & E456 of 2021 (Consolidated)) [2022] KEHC 12070 (KLR) (Commercial and Tax) (19 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12070 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CAUSE E347 & E456 OF 2021 (CONSOLIDATED)

A MABEYA, J

AUGUST 19, 2022

BETWEEN

WESTMOUNTS INVESTMENTS LIMITED ..... APPLICANT

AND

TRIDEV BUILDERS COMPANY LIMITED ..... RESPONDENT

RULING

1. By an arbitral award dated 11/1/2021 and published on 12/2/2021, Hon Tom Onyango Oketch ("the Arbitrator") allowed the respondent's claim and ordered the applicant to pay the respondent a total sum of Kshs.78,469,485/66. The same constituted damages of Kshs.51,435,994/98 and interest of Kshs.27,033,490/68.

2. By separate applications, the applicant applied to set aside that award while the respondent applied to have the same recognized and/or adopted. The two applications dated 11/5/2021 and 7/6/2021, respectively were consolidated and are the subject of this ruling.

3. The Summons dated 11/5/2021 sought that the said award be set aside. It was brought under section 35 (2) (a) (iv) & b (iii) of the *Arbitration Act*, Rule (7) of the *Arbitration Rules*, and Articles 50 (1), 165 (6) and (7) of the *Constitution*.

4. It was supported by the affidavit sworn by Joseph M. Ogeto on 11/5/2021. The applicant's case was that by a joint building council agreement dated 12/6/2012, the applicant contracted the respondent to erect residential apartments along Menelik Road for a sum of Kshs. 247,000,000/=. The contract period was 65 weeks from the date the site was handed over being 3/11/2011 to 17/2/2013. That out of the contract sum, the builders work to be performed by the respondent was valued at Kshs. 133,920,000/=.

5. It was the applicant's case that as at 14/2/2013 which was 3 days prior to the completion date, only 21% of the total contract sum had been certified. That owing to the delay in completion and performance of the works, the applicant issued the respondent with a notice of default on 20/9/2013. Upon expiry of the notice, the respondent terminated the contract on 7/10/2013 and the applicant contended that it undertook completion works at its own cost. That clause 38 of the JBC Agreement made provision on how the respective rights of the parties were to be determined in the event the contract was terminated by the employer.

6. The dispute was referred to arbitration which resulted in the impugned award. It was contended that the arbitrator was bound to determine the dispute in strict accordance with the agreement as per section 29 of the *Arbitration Act* ("the Act").

7. That the arbitrator failed to determine core issues framed by the parties more so the issue of performance and breach of contract which was specifically pleaded by the parties, viva voce evidence and submissions. It also constituted the gravamen of the applicant's counter claim and its exclusion from the issues to be determined in the final award was prejudicial to the applicant's case.

8. That the exclusion was contrary to the procedure and rules agreed on by parties, and contrary to the *Constitution* and the public policy of Kenya. That the arbitrator re-wrote the contract in disregard to the clear provisions on key issues such as contract period, extension of time inter alia. The arbitrator dismissed the applicant's counter-claim on introduction of new terms not included in the contract such as substituting the contract period and holding that the contract time was "at large". That on these two grounds, the arbitrator went outside the scope of his jurisdiction.

9. That the arbitrator disregarded the clear terms of the contract thereby re-writing the contract between the parties. That he disregarded clauses 36.1, 38.8 and 43.1 and held that the contract was at large. That contrary to clause 34.6, the arbitrator awarded compound instead of simple interest.

10. That the arbitrator employed double standards thereby exhibiting apparent bias and procedural unfairness. He read words into the architect's certificate in declining the applicant's claim for liquidated damages yet read words into the respondent's application for extension of time and allowed it. That he varied his Order for Directions No.26 which denied the applicant the opportunity of having its cost of completion assessed in accordance with the contract.

11. That the arbitrator granted reliefs that had not being pleaded. He held that the contractual time was "at large" yet there was no such declaration had been sought. He granted extensions of time where none had been sought.

12. Finally, that the award was in conflict with the public policy of Kenya in that; he failed to make a determination on the cost the applicant suffered in completing the works leaving it without recourse. That the award of interest at a non-contractual rate of 22.% was against the in duplum rule as interest topped 48,594,134/34 in the award.

13. The opposed the application vide the replying affidavit of Manji Kanji Patel sworn on 4/6/2021. It was contended that the application as drawn was an appeal in disguise. That it was contrary to public policy which demands finality of arbitral awards and was an attempt to derail and delay the respondent from realizing the fruits and labour for work undertaken nearly ten years ago.

14. That the application did not demonstrate any grounds for setting aside an arbitral award. That the public policy contravened was not disclosed. That an error of law or fact on the part of the arbitrator was not inconsistent with public policy and that public policy must have a connotation with national interest and does not mean fairness and justice as per the applicant's case.

15. That each party filed its list of agreed issues for determination and the arbitrator set out the issues in the award before determining them. That he only resolved the matters that had been identified by the parties. That the issue of interest was dealt with by the arbitrator and was not a subject of an application to set aside the award. That the in duplum rule only applies to financial institutions defined under the *Banking Act*, and that the arbitrator weighed all the material evidence before him and made a correct finding. It was urged that the application be dismissed.

16. I have considered the record and the submissions of Learned Counsel. The main issue for determination is whether the award should be recognized or ought to be set aside.

17. Section 35(1) of the *Arbitration Act* ("the Act") provides:-

> "Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

18. Section 35(3) of the *Arbitration Act* sets out the grounds for the setting aside of an award. The relevant ones in the present application are: -

(a) The party making the application furnishes proof; -

...

iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference or contains decisions on matters beyond the scope of the reference to arbitration, provided that 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

(b) The High court finds that; -

i) ...

ii) The Award is in conflict with the public policy of Kenya.

18. In *Talewa Road Contractors Limited v Kenya National Higway Authority* [2019] eKLR, it was held: -

> " Arbitration is a free choice made by the parties in the contract agreement and in a situation where parties agree on the finality of the arbitral award, hence the court's intervention cannot be invoked by any party to overturn the arbitral award through an appeal. The finality of an arbitral award is forfeited in no uncertain words by the provisions of section 10 of the *Arbitration Act*..."

19. The cornerstone of arbitral process is party autonomy and finality of the process. Errors of law or fact cannot be a basis of impeaching an award unless it be so glaring and absurd that it causes grave injustice thereby qualify to be against public policy.

20. Arbitration is a forum and process in which parties freely choose and bind themselves to and they have to live with its consequences. Interference by the court is limited only to grounds set out in the law. One of them is public policy.

21. In *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, the court held: -

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the *Arbitration Act* as being inconsistent with the public

policy of Kenya if it is shown that it was either (a) inconsistent with *the Constitution* or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

22. In this regard, in an application for setting aside an arbitral award on the grounds of public policy, it must be shown that the award is contrary to fundamental policy of the law of Kenya, violation of our laws and that the enforcement of such that award would be contrary to justice and morality.

23. In the present case, the applicant has challenged the award on two grounds; that the arbitrator dealt with a dispute that was not submitted to him or not contemplated by the parties and that the award is against public policy of Kenya.

24. The applicant contended that the arbitrator framed his issues with a bias or with the intention of justifying the respondent's case. That he disregarded the issues that were submitted to him and thereby determined matters that were not before him.

25. The Court has carefully considered the record. It is clear from the issues submitted by the parties that the central issue between the parties was the performance of the contract. Both parties identified the same to be the principal issue from which the rest of the issues depended on or flowed from.

26. In the award, the arbitrator began by listing each of the party's issues, then proceeded to list his own. Both parties had similar issues and each began with the issue of whether the terms of the contract were complied with as framed by the respondent or whether the applicant was in breach of the contract.

27. The issues identified by the arbitrator were;

    i. Issue 1- Whether the claimant was entitled to extension of time, to what extent?

    ii. Issue 2- Whether the claimant was entitled to suspend the work as it did, to what consequences?

    iii. Issue 3- Whether the respondent was entitled to terminate the contract as it did, to what effect?

    iv. Issue 4- Whether the respondent is entitled to orders sought in the notice of motion filed on 26/5/2020, to what effect?

    v. Issue 5- Whether circumstances have arisen to warrant the orders sought in the notice of motion filed on 26th May 2020, to what effect?

    vi. Issue 6- Whether the claimant is entitled to the reliefs sought?

    vii. Issue 7- Whether the respondent is entitled to the counterclaim?

    viii. Issue 8- Who will bear the cost of the arbitration?

28. While a tribunal is not bound by the issues submitted to it by parties before it, it cannot rescile from the same by setting out its own issues unless they emanate from the pleadings and evidence before it. In the present case, the arbitrator decided to frame his own issues and thereby sidestepped the principal issue of performance of the contract. He should have first considered that issue and then proceed to the rest.

29. However, by failing to determine that issue, that alone cannot be a basis for setting aside the award. Section 35(3) (a) (i) permits the Court to separate those matters that were referred from those not referred. Since the other issues that the arbitrator determined emanated directly from the reference, they have to be maintained.

30. On public policy, both our Constitution and law recognize arbitration as a dispute resolution mechanism. They encourage parties to determine the forum and manner in which they should have their disputes determined.

31. It is public policy that a tribunal do determine disputes submitted to it fairly. It is also public policy that the rule of law be upheld. It is therefore the public policy of Kenya that disputes be fairly and justly determined. Although an arbitrator has a wide latitude in the determination of a reference before him, the latitude does not extend to deliberate disregard of the law or determining matters not referred to him.

32. The applicant complained that the arbitrator awarded reliefs not pleaded and re-wrote the contract. That he granted extensions of time where none were sought. That he failed to determine the applicant's claim for reasonable expense leaving it without any recourse for justice and applied none contractual rate of interest of 22.5%.

33. On the other hand the respondent contended that error of fact or law or in the construction of a statute or contract does not amount to be against public policy. That public policy must have a connotation of national interest and does not mean fairness and justice.

34. In

35. An award cannot be said to be contrary to public policy just because it is against one party. This Court is well aware of the pronouncement of Ringera, J in Christ for All Nations v Apollo Insurance Co. Ltd (*supra*) where he stated that: -

> "Justice is a double-edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust ... in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal 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 arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the *Arbitration Act*."

36. The Court was determining an application to set aside an award which however was couched like an appeal against the decision of the arbitrator. I do not understand the court to have given arbitrators a cate branche license to determine disputes before them as they wish.

37. Misconstruction of the law and or contract does not mean an arbitrator re-write a contract between the parties by reading into it what was not expressly agreed by the parties. That would be to discourage parties from pursuing arbitration as a dispute resolution mechanism.

38. To hold that an arbitrator can make a determination and mete out an injustice against one party without recourse, since his decision is un-appealable, would be absurd as it will make arbitration unattractive to disputants. Every disputant who approaches a tribunal for dispute resolution has the legitimate expectation that his case would be heard and justice be meted out in accordance with the law and the justice of the case.

39. In the present case, the JCB Agreement was specific as to the contractual period. The arbitrator framed an issue as to whether the respondent was entitled to extension of time. He found that the respondent had admitted and apologized for delay in the works.

40. However, contrary to the express term of the contract as to time, he coined a phrase that the contract was at large and granted the respondent extension of time. That had not been sought. The contract having been time bound, it could not be said to be 'at large'.

41. On the question of interest, the contract provided for interest at commercial rates on delayed payments. The arbitrator exercised his discretion and awarded interest at 22.5%. Obviously, that was neither contractual nor the applicable commercial rates during the period.

42. As a result of that none contractual rate of interest which was compounded, the interest constituted nearly 70% of the award. It is public policy of Kenya that a party who has been kept away from his money be compensated by way of interest. However, where the rate imposed is not contractual and is so monstrous that the 'compensation' by way of interest far surpasses the claim by over 200%, that would be unconscionable. That will be immoral and contrary to public policy of Kenya.

43. In my view, by reading into the contract terms that were not agreed to by the parties and by applying interest rates that was contrary to the law in the period 2012 – 2017 when clearly interest rates were controlled, that was in breach of the law and therefore against the public policy of Kenya. It is the public policy of Kenya that no one should breach the law.

44. It was submitted that the in duplum rule was not applicable in this case but in lending by banks. That may be so but the arbitrator broke the law when he awarded interest that was in breach of the law. The commercial rates of interest in the period of the claim was not 22.5%. An unlawful act cannot be left to stand.

45. Accordingly, the award dated 11/1/2021 cannot stand. In this regard, the application dated 11/5/2021 is hereby allowed as prayed.

46. Since the second application dated 7/6/2021 sought the recognition of the award which has been found to be against public policy, the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A.MABEYA, FCIArb

JUDGE