Odyssey Capital Limited v Mburu & another (Miscellaneous Application E029 of 2022) [2022] KEHC 16115 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E029 OF 2022

WA OKWANY, J

NOVEMBER 24, 2022

BETWEEN

ODYSSEY CAPITAL LIMITED ..... APPLICANT

AND

DAN GAIKU MBURU ..... 1ST RESPONDENT

ANN WAMAITHA KANYUI ..... 2ND RESPONDENT

RULING

1. Through an in investment agreement dated December 22, 2017, the respondent herein agreed to invest a total of Kshs. 12,800,000 ("Investment Amount") in the applicant as follows: -

    a. Kshs. 2,581,502 being existing investment in the Applicant at the time of the Agreement which was turned into convertible debt;

    b. Kshs.8,118,498 to be paid on or before 27th December 2017; and

    c. Kshs.2,100,000 to be paid on or before 30th July 2018.

2. The applicant's case was that due to numerous financial challenges including the effects of the Corona Virus pandemic, it was unable to meet its part of the bargain in the agreement and therefore proposed a payment plan towards the payment of the interest accrued. The Applicant thereafter made an initial interest payment of Kshs. 500,000 to the Respondents.

3. The Respondents subsequently issued the Applicant with a demand letter dated 6th January 2021 that prompted the Applicant to propose an amicable settlement of the dispute. The proposal did not however materialize thus precipitating the Respondents' decision to refer the dispute over the

payments to arbitration. The Arbitrator Mr. Arthur lgeria, rendered the Award on 1st December 2021 in the following terms:-

a. Kshs 3,628,000

b. Kshs. 7,447,278.42 as interest on the interest amount as at 22nd March 2021;

c. Kshs.12,800,00 as the principal amount on the investment;

d. Kshs. 24,578,55.78 as interest on the principal amount as at 22nd March 2021

e. Interest on (a) - (d) above until payment in full.

f. Costs of the arbitral proceedings.

Applications

4. The arbitral Award gave rise to the two applications that are the subject of this ruling, namely;-

a. The Applicant's Chamber Summons Application dated 21st March 2022 (hereinafter "the Setting Aside application") wherein it seeks orders to set aside the Final Arbitral award dated 1st December 2021 together with the clarification contained in the letter dated 28th January 2022 and,

b. The Respondent's Chamber Summons Application date 14th December 2021 (hereinafter "the Adoption Application") which seeks the adoption and enforcement of the Final Award as a Decree of this Court.

5. I will consider the setting aside application first as its outcome will have a bearing on the adoption application.

Setting Aside

6. The setting aside application is supported by the affidavit of Ms. Anne Ndungu and is premised on the grounds that: -

a. The award of an estimate of Kshs. 48,463,834.10 is contrary to public policy for the reasons set out herein below: -

i. The arbitral proceedings were premature and the Hon. Arbitrator lacked the requisite jurisdiction to hear and determine the matter.

ii. In accordance with section 17 (2) of the *Arbitration Act* the Applicant raised a jurisdictional objection in its Response to the statement of claim dated April 9, 2021 at paragraph 13;

iii. The jurisdictional objection was not determined at the preliminary level but was subsumed into the substantive suit and its determination rendered in the final award of December 1, 2021;

iv. Not having the benefit of invoking section 17 (6) and (8) of the *Arbitration Act*, the Applicant raises its grievance with the said determination in the instant application pursuant to section 35 (3) of the *Arbitration Act*.

3. There are apparent errors in procedure on the face of the record.

a. The Hon. Arbitrator failed to issue the parties with Orders for Directions or keep a proper record of the proceedings;

i. Save for the initial Order for directions dated March 9, 2021 and issued pursuant to the preliminary meeting between the parties of 9th March 2021, the Applicant has never received, had sight of, reviewed, or had issued to it any further Orders for Directions from the Hon. Arbitrator or at all;

ii. Vide letters dated 28th February 2022 and 1st March 2022, the Applicant requested the Hon. Arbitrator for certified copies of the proceedings together with all the Tribunal's orders for directions to enable it complete its record. The Applicant has not received a response from the Hon. Arbitrator on this request, to date.

iii. The Hon. Arbitrator failed to keep a proper record of proceedings as further demonstrated at paragraphs 7 (a) and 8 (a) herein below.

b. The Hon. Arbitrator failed to grant the Applicant a proper opportunity to exhaustively ventilate its Application for clarification dated 22nd December 2021;

i. At the final paragraph of its Application for clarification dated 22nd December 2021, the applicant sought as follows "the Respondent kindly requests that the Hon. Tribunal do issue directions on the manner in which the above application ought to be ventilated"

ii. The Hon. Arbitrator disregarded the Applicant's request and issued the parties with a letter dated 28th January 2022 which he deemed to be his clarification.

c. The Hon. Arbitrator failed to issue a further award amending and/or clarifying the award dated 1st December 2021.

6. The Hon. Arbitrator failed to give reasons for his determination on certain issues.

a. Contrary to the provisions of section 32(3) of the *Arbitration Act* the Hon.

Arbitrator failed to give reasons for the award of interest on interest.

b. At paragraph 13.4 of the Award the Hon. Arbitrator simply states as follows: "It is undisputed that the Claimants are entitled to payment of interest earned on the investment amount."

c. The Applicant had clearly raised a dispute to the award of interest at paragraphs 69-85 of the Applicants submissions dated June 22, 2021 and the same was disregarded by the Hon. Arbitrator in his considerations;

d. The Hon. Arbitrator at paragraph 13.4 of the Award fails to make a distinction between interest on the principal investment amount and interest on interest.

7. The Hon. Arbitrator failed, neglected and/or otherwise refused to consider crucial arguments and evidence by the applicant on certain issues for determination.

a. The Hon. Arbitrator failed to take into consideration the Applicant's Supplementary List of documents filed on June 25, 2021 and as a result arrived at erroneous conclusions at paragraph 13.3 of the Award;

i. Through an application dated 22nd December 2021, the Applicant sought inter alia clarification on whether the Hon. Arbitrator considered the Applicant's Supplementary List of documents dated 22nd June 2021 and filed on 25th June 2021 in arriving at its determination; ii. In a letter dated 28th January 2022, the Hon. Arbitrator stated he did not in fact consider the Applicant's Supplementary List of documents for reasons that "In view of the of the fact that they [supplementary bundle of documents] were filed after conclusion of the hearing, the Respondent ought to have sought leave of the Tribunal to file the same. The Respondent did not do so."

iii. Further, vide a letter dated 22nd February 2022 the Hon. Arbitrator affirmed that "As per the record of this Tribunal at no point was leave sought nor granted, to file the supplementary list of documents as stated in your letter"

iv. In a letter dated 7th February 2022, the Applicant clarified that it did in fact request and was granted leave by the Hon. Arbitrator to file its Supplementary Bundle of Documents at the meeting convened on 24th June 2021.

v. Equally, through a letter dated 22nd December 2021, the Respondents herein stated that the Applicant's Supplementary List of documents was "filed outside the confines of the leave granted by the Hon. Arbitrator" Further, through a letter dated 2nd February 2022, the Respondents herein affirmed that "Indeed, the Respondent, at the mention of 24th June 2021 sought leave

"

to file a supplementary list and bundle of documents • • • • • vi. In a letter dated 1st March 2022 addressed to the Hon. Arbitrator, the Applicant explained that while the parties have through correspondence, differed on the scope of the leave granted by the Hon. Arbitrator to the Applicant to file and serve its Supplementary List of documents i.e the documents allowed to be submitted, the parties are in agreement that the Applicant sought and was granted leave by the Hon. Arbitrator to file and serve its Supplementary List of documents. As such the Applicant sought copies of the proceedings to enable the record be free of any uncertainty.

The Hon. Arbitrator has not responded to the said letter, to date vii. The Hon. Arbitrator, by his own directions on leave, ought to have considered the Applicant's Supplementary List of documents filed on 25th June 2021 and thereby avoid erroneous conclusions at paragraph 13.3 of the Award;

viii. The Hon. Arbitrator was empowered by Rules 52-53,56-57,59,90(h) and 91(f) of the Chartered Institute of Arbitrators (Kenya Branch) Rules (October) 2020 and section 20(3) of the *Arbitration Act* to consider theApplicant's Supplementary List of documents filed on 25th June 2021.

b. The Hon. Arbitrator failed to take into consideration the Applicant's arguments at paragraphs 69-85 of its submissions dated 22nd June 2021, in determining the question of interest.

8. Breach of tenets of justice including the right to a fair hearing as envisaged under article 50 of *the Constitution* of Kenya 2010.

a. In failing to consider the Applicant's Supplementary Bundle of Documents, the Hon. Arbitrator denied the Applicant a fair hearing and thereby arrived at an erroneous determination at paragraph 13.3 of the Award;

i. At paragraph 11 of a letter dated 2nd February 2022 (and served upon the Applicant on 1st March 2022), the Respondents herein contended that they opposed the adoption of the Applicant's supplementary list of documents vide their supplementary submissions; ii. In a letter dated 1st March 2022, the Applicant affirmed that it was never served with the Respondents supplementary submissions on the date of filing or at all and the position remains the same to date. The Applicant was notified of the Respondents supplementary submissions based on the contents of the letter dated 2nd February 2022. The Applicant is unaware of the contents of the Respondents supplementary submissions and was equally denied an opportunity to comment on the same; iii. Save for the suggestion; which can only be inferred from the letters exchanged between the parties and the Hon. Arbitrator between 22nd December 2021 and 1st March 2022, that the Respondents objection was upheld, the Hon. Arbitrator did not make any reference to the Respondents supplementary submissions, or any objection contained in them, in the final award or at all. The Hon. Arbitrator also did not draw any notice of the existence of the Respondents supplementary submissions, or any objection contained in them, to the Applicant.

iv. Further to paragraphs 5(a) and 7 (a) above, the Hon. Arbitrator, in failing to consider the Applicants supplementary bundle of documents without justifiable cause and otherwise upholding the Respondents objection contained in their supplementary submissions without notice to the Applicant, denied the Applicant a fair hearing.

b. In denying the Applicant a proper opportunity to exhaustively ventilate its Application for clarification dated 22nd December 2021, the Hon. Arbitrator equally denied the Applicant a fair hearing.

9. Unjust enrichment of the Respondents.

a. The Hon. Arbitrator awarded the repayment of Kshs. 12,800,000 to the Respondents for their initial investment;

b. It is a fact that the Respondents are shareholders in the Applicant, have been duly registered as such and possess share certificates;

c. It is unjust enrichment for the Respondent to have both shares in the Applicant and repayment of the said investment amount.

d. The Hon. Arbitrator in failing to give reasons for his determination on interest at paragraph 13.4 of the award, wholly adopted the figures pleaded by the Respondents even though the same had been challenged by the Applicant.

e. The Hon. Arbitrator failed to interrogate the Respondents greatly exaggerated figures against the provisions of the Investment Agreement and therefore awarded the Respondents an inordinate sum contrary to the provisions of the Investment Agreement.

f. The Investment Agreement dated December 22, 2017 expressly provides:-

i. Clause1.2 - "Interest Rate — means the investment interest rate of 15% per annum to be paid at the end of a minimum period of 24 months (starting from the date that the investment amount is facilitated). The interest generated is subject to withholding tax of 15% on the total interest generated from the investment"

ii. Clause 2 - "interest accrued on the investment shall not convert and shall be paid out to the investors nominated account on occurrence of any of the above events" iii. Clause 33 "in the event of failure by the company to pay any sum payable hereunder the investors shall be entitled to 10% interest per month compounded on the sums due until the company pays the sums owed."

g. At best, the sums alleged to be owed to the Respondents in accordance with the determination of the Hon. Arbitrator and the provisions of the Investment Agreement cannot be greater than Kshs. 3,215,335.64.

10. Re-writing of the Agreement between the parties.

a. The Investment Agreement dated 22nd December 2017 does not in any capacity provide for the repayment of the principal investment amount.

b. Clause 2 of the Investment Agreement stipulates:-

> "By way of this convertible note purchase the investors acknowledge and hereby consent that the principal amount invested shall automatically convert to equity if and when the company has a share offer based on the following conditions:-
>
> i. At the close of a new round of funding; or ii. The investment is held for a minimum period of 2 years"

11. The determination of the Hon. Arbitrator at paragraph 13.3 of the award, amounts to a unilateral rewriting of the Investment Agreement by a third party. The Hon. Arbitrator's determination at paragraph 13.3 of the award is in direct breach of the parties' autonomy and freedom to contract.

12. Through the letters dated 28th January 2022 and 22nd February 2022, the Hon. Arbitrator has affirmed that he made his clarification to the Final Award dated 1st December 2021, vide his letter dated 28th January 2022. Accordingly, this application is properly before this Honourable Court pursuant to section 35 (3) of the *Arbitration Act* as read together with Section 34 thereto.

7. The Respondents opposed the application through the 1st Respondent's replying wherein they confirm that they entered into an Investment Agreement which provided for the investment of Kshs 12, 800,000 for a minimum investment period of twenty-four (24) months in which the investment would accrue interest at the rate of fifteen percent (15%) per annum. They state that the Applicant breached the terms of the Agreement after which the matter was referred to arbitration for resolution.

8. The respondents contend that the application does not meet the threshold for the setting aside of an arbitral award as stated under section 35 of the *Arbitration Act* as it merely outlines the facts and the law that the applicant alleges that the arbitrator wrongly considered. The Respondents contend that the Arbitrator acted within the confines of law in its ruling on the objection to his jurisdiction.

9. Parties canvassed the application by way of written submissions.

The Applicant's Submissions

10. Mr. Guto, learned counsel for the Applicant, submitted that the proceedings before the arbitrator were premature as the Agreement required parties to attempt a resolution of their disputes before moving to arbitration. Counsel submitted that even though the Applicant responded to the Respondents' demand letter, the Respondents did not make a counter response but instead moved directly to arbitration thus abdicating their responsibility to act in good faith. It was the Applicant's case that the Arbitrator lacked the jurisdiction to hear and determine the dispute.

11. It was submitted that the contract created a burden on the parties to consider settlement proposals before going to arbitration. The Applicant conceded that the arbitrator dealt with the issue of jurisdiction in his final Award.

12. The Applicant argued that the Award is contrary to public policy as the issue before the arbitrator was whether there was conversion of the Respondents' investments into shares. The Applicant took issue with the Arbitrator's finding that there was no evidence to support the claim that the conversion process was underway yet such evidence was contained in the Applicant's supplementary bundle of documents. The Applicant further faulted the Arbitrator for failing to consider the supplementary bundle of documents despite having granted the Applicant leave to file the said documents.

13. It was submitted that the Award is a product of an opaque process that has resulted in the unjust enrichment of the Respondents who ends up keeping the shares and the Award for repayment of money paid in the investment for the same shares.

Respondents' Submissions

14. Mr. Okwatch, learned counsel for the Respondents, submitted that the Award is not contrary to public policy and that the Applicant is simply inviting the court to sit on an appeal against the Arbitrator's decision. For this argument, the Respondents cited the decision in the case of *Christ for All Nations vs Apollo Insurance Company Limited,* NRB HCC No. 477 of 1999 where the court held that:

> " The Respondent argued that the Applicant did not demonstrate how the Award would infringe on the rights of a third party or offend public policy."

15. The respondents conceded that Applicant obtained leave to file the supplementary bundle of documents containing documents that were referred to during the hearing and those that parties had consented to at the hearing. The Respondents however noted that the Applicant went ahead to include documents that they had not referred to including some documents that were generated after the hearing had been concluded contrary to the rules of evidence. It was the respondents' case that the

alleged exclusion of the documents that were filed out of time cannot constitute infringement of public policy.

16. Ms. Otieno, learned counsel for the Respondents, submitted that the Agreement did not prescribe the contemplated negotiations or the manner and form that the good faith should take. She added that the Applicant did not make any payments even after the investments matured. She added that the Applicant did not honor its own proposed payment schedule despite many telephone calls, personal visits and emails thereby leaving the Respondents with no option but to move to arbitration. It was therefore the Respondents' case that the Arbitrator was seized with the jurisdiction to entertain the dispute.

17. The Respondents reiterated that the application does not meet any of the conditions set out under section 35 of the *Arbitration Act* for the setting aside of the Award.

Analysis and Determination

18. I have considered the pleadings filed herein, the parties' respective submissions together with the law and the authorities that they cited. The main issues for determination are as follows: -

    a. Whether the Arbitrator had the requisite jurisdiction to hear and determine the matter.

    b. Whether the Final Award as read together with the clarification dated February 28, 2022 are in conflict with Public policy of Kenya?

    c. Whether the award dated December 1, 2021 should be adopted as prayed by the applicant in its application dated December 14, 2021.

    d. Who should bears the costs of these proceedings

19. The grounds or circumstances under which an arbitral award may be set aside are spelt out under section 35 of the *Arbitration Act* which stipulates as follows;

    35 Application for setting aside arbitral award

    1. 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).

    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.

20. The applicant summarized the grounds for the prayer to set aside the award in the written submissions as follows: -

a. The arbitral proceedings were premature and the Arbitrator was not seized of the requisite jurisdiction to hear and determine the matter;

b. In any event and without prejudice to (a) the question of interest on interest was not ripe for determination as the Respondents had granted the Applicant a moratorium;

c. The Hon. Arbitrator failed to keep an accurate procedural record of the conduct of proceedings or at all;

d. As a result, of (c) the Hon. Arbitrator failed to consider the Applicant's supplementary bundle of documents under the false narrative that the applicant failed to seek leave to file and serve the same, when in fact the Applicant had sought and was granted leave to file its supplementary bundle of documents;

e. The Hon. Arbitrator upheld the Respondents supplementary submissions; which to date have not been served upon the Applicant, without notice to the Applicant and without granting the applicant an opportunity to respond to the submissions; f) The Hon. Arbitrator denied the Applicant a fair opportunity to ventilate its application for clarification, which may have circumvented the instant proceedings;

g. The Hon. Arbitrator in effect rewrote the terms of the Investment Agreement in awarding the Respondents the repayment of the principal investment amount, when the Investment Agreement does not provide for the same;

h. As a consequence of (c) and (d) above, the Hon. Arbitrator unjustly enriched the Respondent by awarding the repayment of the Principal Investment Amount and when the Respondents are Shareholders in the Applicant;

i. Without prejudice to (a) and (b) above, the Hon. Arbitrator unjustly enriched the Respondents in awarding the Respondents interest (on the principal investment amount) and interest on interest sums inordinately higher then as envisaged in the investment Agreement;

j. The tenets of justice as envisaged under article 50 of *the Constitution* of Kenya 2010 as read together with articles 19, 20 (1) –(4), 25 (c), 27 and 47 of *the Constitution* of Kenya 2010, section 19 and 20 of the *Arbitration Act*, and rule 31 of the CIArb Rules 2020 were severally breached.

21. My finding is that apart from the challenge on the Arbitrator's jurisdiction and the claim that the award is against public policy, the rest of the grounds listed by the Applicant for the setting aside of the Award are ideally grounds for an appeal. I say so because arbitral proceedings are governed by the *Arbitration Act* which, at section 35 thereof specifies the grounds for setting aside an award. In *Kamconsult Ltd vs Telkom Kenya Ltd & Another* [2016] eKLR, the Court of Appeal referred to the case of *Nyutu Agrovet Limited vs Airtel Networks Limited* [2015] eKLR where Mwera JA stated that:

> " Certainly, I do not agree that the *Civil Procedure Act* applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the *Arbitration Act* is a complete code excluding any other law applicable in civil-like litigation, I do not see where the *Civil Procedure Act* applies in this matter...."

22. In *Kamconsult* case (supra), the court concluded that:

> " However, the *Arbitration Act* does not provide for review of High Court decisions made pursuant to section 17(6) of the Act, and therefore under section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases [Anne Mumbi and Nyutu Agrovet], a rule cannot override a substantive law. Sections 3A, 63e and 80 of the *Civil Procedure Act* are also not applicable pursuant to Section 10 of the *Arbitration Act*"

Jurisdiction

23. The Applicant challenged the Arbitrator's jurisdiction on two fronts, firstly; that the arbitral proceedings were premature because as at the time of the proceedings, the dispute between the parties had not crystalized. It was the Applicant's case that the Respondents had given it a moratorium over the payment of the sums due which moratorium had not been lifted, and secondly; that the jurisdiction was not rightly invoked because parties did not confer in good faith in order to resolve any and all disputes arising from the Investment Agreement promptly.

24. The Respondents, on their part, argued that the subject of jurisdiction is res judicata as the same issue was raised by the Applicant during the Arbitral proceedings and was subsequently determined in the final Award. The Respondents argued that the alleged prematurity of the arbitral award does not constitute a ground for setting aside of an award as stated under Section 35 of the *Arbitration Act*. The Respondents held the view that what the Applicant seeks may be termed as a "review" of the Arbitral award which goes against the principle of finality of Arbitral awards. For this argument, the Respondents cited the decision in *Boleyn Magic Wall Panel Limited vs Nesco Services Limited* [2020] eKLR where it was held that: -

> " ...The concept of the finality of arbitration awards and pro-arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modelled on the unicitral model law. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of this Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation. Where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the policy of allowing flexibility to the parties, clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render the informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process which is an unacceptable process. The goal of flexibility

must yield to a national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway..."

25. Article V of the parties' agreement stipulated as follows over the issue of dispute resolution: -

    a. Dispute Resolution

    b. 5. Should any dispute arise between the company and the investor at any time out of any aspect of the Investors' Agreement, including, but not limited to, the performance of the Agreement, the remittance of the Investment or any other reasonable dispute, the company and the investor will confer in good faith to resolve promptly such dispute.

    c. In the event the Company and the Investors are unable to resolve their dispute, and should either desire to pursue a claim against the other party, both the Company and the Investors agree to have the dispute resolved by one Arbitrator who shall be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Branch, whose decision shall be final and binding. The Company and the Investor agree that the Arbitration shall be held in Nairobi County.

26. It was not in dispute that the Applicant breached the terms of the agreement by failing to make payments to the Respondents despite the expiry of the maturity date that the Applicant had fixed for 15th April 2020. It was further not disputed that the Respondents wrote demand letters and emails asking for the payments but the Applicant still failed to remit the payments due. The Respondents' case was that the emails marked the commencement of the good-faith discussion on the settlement of the amounts outstanding.

27. The email correspondence availed before the Arbitrator reveals that the parties entered into negotiations to settle the payments due wherein the Applicant proposed a payment plan for the settlement of the amounts owing which proposal the Respondents accepted. It is however noteworthy that the Applicant did not keep its word on the proposed settlement thus precipitating the arbitral proceedings.

28. My finding is that since the Agreement did not prescribe the form and manner that the negotiations 'in good faith' should take, the decision by the Respondents to grant the Applicant an opportunity to make payments despite the expiry of the agreed timelines was a clear act of good faith. The Applicant acknowledged the indulgence by the Respondent before the Tribunal.

29. It is trite that an arbitral tribunal has the power to rule on its own jurisdiction and to consider any objections with respect to the existence and validity of the arbitration agreement. This position is codified under section 17 of the *Arbitration Act* and the doctrine of kompetenz-kompetenz that empowers a legal body/tribunal to rule on its own competence as enshrined in the Uncitral Model Law on International Commercial Arbitration and Arbitration Rules. Article 16(1) of the Model Law and article 23(1) of the Arbitration Rules provide that the arbitral tribunal has the power to rule on its own jurisdiction.

30. Having regard to my findings on the issue of the alleged prematurity of the arbitration proceedings coupled with the above position on the doctrine of kompenze-kompentenze, I find that the Arbitrator made the correct finding when he held that; -

> "I do not agree with the Respondent's contention that the dispute arose upon the issuance of the demand letter. I reiterate that it arose when the Respondent failed to make payments to the claimant as expected. The numerous emails exchanged, and the meetings held

between the parties were attempts to resolve the dispute which had arisen, amicably, in compliance with the arbitration clause. When such resolution failed, due to non-payment, the proceedings were instituted.

I therefore find that the arbitration proceedings are not premature, and that they are properly before the Tribunal for determination."

31. My above findings notwithstanding and even assuming, for argument's sake, that the arbitrator's decision on the issue of jurisdiction was incorrect, section 17(6) of the Act provides that where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any 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. This means that the Applicant ought to have appealed against the determination on jurisdiction within 30 days which is not the case in the present application for setting aside.

32. I further find that the issue of jurisdiction is not one of the grounds listed for the setting aside of an award under Section 35 of the Act as it can only be entertained as a ground for an appeal in a separate forum. I find that in view of the fact that the Arbitrator already rendered himself on the issue of jurisdiction, this court cannot revisit the same issue in this application as the matter may only be addressed on an Appeal.

Public Policy

33. The Applicant argued that the Award of Kshs. 48,463,834.10 is contrary to public policy for the reason that the arbitral proceedings were premature and the Arbitrator lacked the requisite jurisdiction to hear and determine the dispute. The Applicant noted that the issue of jurisdiction was not determined at the preliminary level but was subsumed into the substantive suit and its determination rendered in the final award of 1st December 2021. The Applicant added that it did not have the benefit of invoking section 17 (6) and (8) of the *Arbitration Act* and therefore raised its dissatisfaction with the said determination in the instant application pursuant to section 35 (3) of the *Arbitration Act*.

34. In *Castle Investments Company Limited vs Board of Governors Our Lady of Mercy Girls Secondary School*, [2019] eKLR the court adopted, with approval, the definition given by Ringera J (as he then was) in the case of Christ for All Nations vs Apollo Insurance Company Limited, NRB HCC No. 477 of 1999 where he expressed himself 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..."

35. *Black's Law Dictionary* Tenth Edition defines Public Policy as follows: -

> " The collective rules, Principles or approaches to problems that affect the commonwealth or (esp.) promote the general good; ..... principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the state and the whole of society."

36. It is trite that for an arbitral award to be against the public policy of Kenya, the applicant must demonstrate that it is immoral or illegal or that it would violate, in clearly unacceptable manner, basic

legal and/or moral principles or value in the Kenyan society. This is the position that was taken in the case of *Glencore Grain Limited –vs- TSS Grain Millers* [2002] I KLR 606, where it was held that

> " (a) against Public Policy would also include: -
>
> Contracts or contractual acts or awards which would offend the conceptions of justice in such a manner that enforcement would therefore stand to be offensive."

37. In *Ministry of Environment and Forestry vs Kiarigi Building Contractors & another* [2020] eKLR, it was held that:-

> " As I stated, for the Applicant to succeed in setting aside an award, it must show that the award is inconsistent with *the Constitution* or other laws of Kenya, whether written or unwritten or inimical to the national interest of Kenya or contrary to justice or morality. 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."
>
> 32. I hold that the Applicant has shown 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 the public finances. I would accordingly set it aside for violation of public policy." [Emphasis added]

38. The Applicant enumerated the following grounds in advancing its position that the award goes contrary to public policy: -Failure to keep a proper records.Failure to consider the Applicants supplementary bundle of documents.Breach of tenants of justice.Failure to serve the Respondents with the supplementary submissions.Denying the Applicant a fair opportunity to be heard on the clarification.Unreasoned award and unjust enrichment

39. As I have already stated in this ruling, most of the grounds set out by the Applicant in support of the prayer to set aside the Award border on the re-evaluation of the evidence presented before the Tribunal which is not permitted in an application of this kind as it will amount to a review or an appeal against the Arbitrator's Award. This is the position that was taken in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR, where Ochieng J. (as he then was) held, inter alia, that:-

> " [I]t is not the function nor the mandate of the High Court to reevaluate such decisions of an arbitral tribunal, when the Court was called upon to determine whether or not to set aside an award...if the Court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the Court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on an appeal over the decision of the arbitral tribunal.....
>
> "Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award.
>
> The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to section 35 of the *Arbitration Act*. Any other intervention by the court is expressly prohibited by section 10 of the Act. I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by

the arbitral tribunal. In the final analysis, I find no grounds to warrant the setting aside of the arbitral award dated July 29, 2016."

40. In the instant case, however, I note that the applicant's dissatisfaction with the Award is not with respect to the Arbitrator's evaluation of the evidence per se, but also relates to the failure by the Arbitrator to consider the documents contained in the Applicants supplementary bundle of documents despite having granted the Applicant the leave to file the said bundle of documents.

41. I note that it was not disputed that the Arbitrator granted the Applicant leave to file the supplementary bundle of documents. Indeed, the Respondent conceded that the Applicant was granted limited leave to file the documents that had been omitted from the pleadings. It was further not disputed that the Arbitrator did not consider the evidence contained in the said bundle and that no reasons were advanced for such failure.

42. My finding is that failure to consider the said supplementary bundle of documents robbed the Applicant of its right to a fair hearing which is a fundamental right under *the Constitution* thus contravening public policy in Kenya. I am guided by the decision in *Kenya Post Office Saving Bank & Another vs The Advertising Company Ltd & Another* [2017] eKLR wherein it was held:-

> " Further, it is clear from the above analysis that the Arbitrator was selective in the evidence on which he based his decision. He gave no reasons for discounting or dismissing the evidence incorporated in the Agreement itself and also the correspondence. In the circumstances, the applicant Post Bank has not had a fair trial. That is contrary to public policy."

42. In conclusion I find that the applicant's application fails on all the grounds except the ground on failure by the Arbitrator to consider the contents of the applicant's supplementary bundle of documents. I note that the Arbitrator's reason for the failure was that the bundle was filed without leave yet it was not contested that leave was sought and granted by the same arbitrator. I therefore find that the Award is contrary to public policy and hereby set it aside in the following terms: -

a. The Award of the sole Arbitrator Mr. Arthur Igeria dated December 1, 2021 as read together with the Clarification dated January 28, 2022 is hereby set aside.

b. The Award is remitted back to the said Arbitrator but only for the limited purpose of considering the documents that the Tribunal permitted the Applicant to present through the supplementary bundle of documents.

c. Considering that the failure to consider the evidence in the supplementary bundle of documents cannot be attributed to the fault of any of the parties herein, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Okwatch for respondents

Ms Aden for Mogere for applicant

Court Assistant- Sylvia