Misort Africa Limited v Principal Secretary, National Treasury and Planning (Commercial Arbitration Cause E049 of 2021) [2022] KEHC 16906 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16906 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E049 OF 2021

DAS MAJANJA, J

DECEMBER 21, 2022

BETWEEN

MISORT AFRICA LIMITED ..... APPLICANT

AND

PRINCIPAL SECRETARY. NATIONAL TREASURY AND PLANNING ..... RESPONDENT

RULING

1. Before the court are two applications in respect of an arbitral award published on August 3, 2021 ("the Award") by Dr Kariuki Muigua ("the Arbitrator"). The Applicant seeks to enforce the Award while the Respondent seeks to set it aside. In order to deal with the application, an appreciation of the background is necessary.

2. On August 13, 2009, the parties entered into a Contract ("the Contract") where the Respondent engaged the Applicant to construct a Data Recovery Center at Naivasha for a contract sum of Kshs 782,499,814.30 ("the Project"). Following a benchmarking tour to the USA in June 2011, the parties agreed that the scope of works of the Project was to increase and the Project was to be implemented in phases. Disputes arose over the performance and completion of the Contract and the Project as evidenced by the various correspondences between the parties which led to the same being referred to arbitration.

3. The Applicant first laid its claim before Mr Allan W Gichuhi through a Statement of Claim dated April 8, 2019 before the same was amended on November 10, 2020.Mr Gichuhi would later recuse himself from the proceedings and that is how the matter was placed before the Arbitrator. In its claim, the Applicant accused the Respondent of frustrating the completion and handing over of the Project.

It therefore claimed Kshs 167,748,234.00 on account of Idle Resources and Expenses, Loss of Profit amounting to Kshs 3,680,909,970.00 and Release of Kshs 25,792,371.55 being the 5% retention sum.

4. The Respondent filed a Statement of Defence dated February 5, 2021. It denied the Applicant's claim and averred that the last phase of the Project was never awarded to the Applicant and that it was not liable for any loss or expenses claimed by the Applicant.

5. The matter was set down for hearing where both parties presented witnesses in support of their positions. The parties also filed written submissions and their lists of issues for the Arbitrator's determination. On August 3, 2021, the Arbitrator published the award ("the Award"). In the Award, the Arbitrator summarized the issues raised by the parties as follows:Whether under the Contract, the Applicant was contracted to construct and deliver a complete and functional Disaster Data Recovery Centre.Whether there was a breach of contract.Whether the parties were entitled to the reliefs sought in the Amended Statement of Claim and the Statement of Defence.Who was to bear the costs of the arbitral proceedings.

6. On the first issue, the Arbitrator stated that based on the pleadings, documents and evidence including the Contract, the minutes of the site meetings and copies of correspondence of the parties, the Appellant was contracted to construct and deliver a complete and functional Disaster Data Recovery Centre pursuant to the Contract. The Arbitrator found that the purport of the correspondence exchanged between the parties is that the Appellant was instructed to procure electrical equipment for the Project and that after sourcing for the same, it had to make arrangements for inspection of the equipment by the Respondent's officers before it could be brought into the country for installation. The Arbitrator stated that it had not been demonstrated that that the parties executed any agreement varying the terms of the Contract in terms of the limitation of the work which the Applicant could execute. Further, that the Respondent did not prove that it communicated to the Appellant its intention to award the third phase of the Project through a competitive tender process. The Arbitrator held that the intention of the parties all through was that the Applicant would start and complete the Project by delivering a functional Disaster Data Recovery Centre.

7. On the second issue, the Tribunal found that based on the material before it, the Contract entailed completion of the works by the Appellant by delivering a functional Disaster Data Recovery Centre. That the Respondent's conduct of taking over the Project site from the Appellant before completion of the works amounted to a clear repudiation of the Contract as the Respondent did not intimate to the Appellant that it intended to award the Phase 3 of the Project works under the Contract through a competitive tender process. The Arbitrator held that the Appellant initially insisted on continuing with the performance of the Contract until completion as contemplated under the Contract but due to the Respondent's unwillingness to perform its obligations under the Contract, the Appellant accepted the repudiation by handing over the site to the Respondent. The Arbitrator concluded that the Respondent's conduct amounted to a repudiatory breach of the Contract.

8. Following the finding that the Respondent had,through its conduct wrongfully repudiated the Contract, the Arbitrator held that the Applicant was entitled to relief. On the claim for Idle Resources and Expenses, the Arbitrator accepted the evidence that the Appellant was on site during the period which the claim for idle resources was computed and that the claim was proved. The Arbitrator therefore awarded Kshs 164,874,241.00 for the period running from 2014 to June 30, 2018 as pleaded in its Amended Statement of Claim.

9. The Arbitrator found the Applicant's claim for loss of profits amounting to Kshs 3,680,909,970.00 proved through supporting documentation and based on the Uptime Institute standards. The Arbitrator also held that the Applicant has justified the claim for Kshs 25,792,371.55 retained by

the Respondent as it had never been released as admitted in the letter dated August 28, 2015 by the Ministry of Lands, Housing and Urban Development which was the Project Manager and also based on the Certificates and Final accounts.

10. The Arbitrator awarded the Applicant simple interest at the rate of 12% per annum on the sum of Kshs 3,874,450,575.55 from the date of publishing the Award until payment in full. Having succeeded in its claim, the Arbitrator held that the Applicant was entitled to costs of the arbitration. He proceeded to assess and award the Applicant Kshs 57,438,038.00.

11. In conclusion, the Arbitrator issued the following final orders:

    1. The Respondent shall pay to the Claimant forthwith the sum Kshs 3,874,450,575.55;

    2. The sum of Kshs 3,874,450,575.55 shall attract simple interest at the rate of 12% per annum from the date of publishing this award until payment in full;

    3. The Claimant shall forthwith deliver to the Respondent at the project site the electrical installation equipment it currently holds in its storage.

    4. The Respondent shall pay to the Claimant forthwith the sum of Kshs 57,438,038/= being the legal costs incurred in these arbitration proceedings;

    5. The sum of Kshs 57,438,038/= shall attract simple interest at the rate of 12% per annum from the date of publishing this award until payment in full; and

    6. The Respondent shall forthwith refund to the Claimant the fees paid to the Arbitral Tribunal and expenses related to tire arbitration in full as set out in VAT invoices separately delivered to the parties.

12. The Applicant's application is brought by the Chamber Summons dated November 15, 2021 made, *inter alia*, undersection 36 of the *Arbitration Act*, 1995. The application is supported by grounds set out on its face and the supporting affidavit of the Applicant's director Martin Ng'ang'a Kanyingi sworn on November 15, 2021. It is opposed by the Respondent through the Statement of Grounds of Opposition dated December 2, 2021 and the Respondent's replying affidavit sworn on December 14, 2021 by Dr Julius M Muia, the then Principal Secretary of the National Treasury.

13. The Respondent's application is brought by the Chamber Summons dated February 16, 2022 made under section 35(2)(a)(iv), (2)(b)(ii) and (3) of the *Arbitration Act*. It is opposed by the Applicant through the replying affidavit of Martin Ng'ang'a Kanyingi sworn on February 25, 2022.

14. The parties have also filed written submissions in support of their respective positions. Since the Respondent's application calls for the setting aside of the Award, I propose to first deal with it before determining the Applicant's application for recognition and enforcement, if at all.

The Respondent's Application

15. The Respondent contends that arbitral proceedings and claims must flow from the provisions of a lawful subsisting contract, which in the present case does not exist and that the Award was delivered without regard to the applicable express and clear legal provisions governing procurement by public bodies. In particular, the Respondent accuses the Arbitrator of failing to appreciate that contracts for the provision of goods, works and services as may be entered into by public entities are subject to the prevailing procurement laws and that contrary to the applicable law being the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations, 2006. According to

the Respondent, the Award seeks to retrospectively vary a procurement contract beyond the legally permitted limits in favour of the Applicant.

16. According to the Respondent, the Arbitrator's determination has the effect of awarding the Applicant a direct procurement contract, through arbitral proceedings, contrary to the prescribed statutory procedures on how a direct procurement ought to be undertaken and bypassing the provisions on competitive procurement. It submits that the Arbitrator ignored the principles of public finance in Kenya including openness and accountability as well as prudent and responsible use of public resources in addition to sound financial management provided for in Article 201 of the *Constitution* and that he rendered an Award which expressly offends the provisions of Article 227 which requires that the contracting for goods or services be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

17. The Respondent submits that the Award of Kshs 3,680,909,970.00 relating to the claim for loss of profit is against public policy as it was made in blatant disregard of the Constitutional provisions and statutory frameworks governing public procurement contracts in Kenya. That the Arbitrator further awarded a claim for loss of profits and idle resources, without considering the legal requirements as to proof of special damages and that by using a contract which had been fully performed to issue an Award for a different project which had not yet been procured for and awarded, the Award dealt with a dispute not contemplated by or falling within the terms of the reference to arbitration under the contract and matters beyond the scope of the reference to arbitration.

The Applicant's Response

18. The Applicant opposes the application to set aside the Award on the ground that what the Respondent is attempting to do, is to ask this Court to re-evaluate the evidence tendered before the Arbitrator soas to come to different conclusions which amounts to an appeal which is not permitted under the *Arbitration Act*.

19. The Applicant contends that the issues of procurement laws and regulations and Phase 3 of the Project, were all presented before the Arbitrator and that the Arbitrator went through the analysis of the evidence touching on Phase 3 of the Project and made his determination. It submits that despite the Arbitrator's findings on all the issue regarding the Contract, Project and procurement, the Respondent still insists that there never existed any procurement contract for phase 3; that procurement laws were never followed; that the Arbitrator acted in disregard of the procurement laws, and from this follows the argument that therefore, the Award is contrary to public policy, and that that there was no basis for the Arbitrator to deal with the dispute relating to phase 3. In the Applicant's view, the Respondent has simply refused to accept the Arbitrator's findings.

20. The Applicant emphasizes that the Arbitrator addressed and dealt every issue framed by the parties including whether the Phase 3 of the Project constituted a separate contract. That the Arbitrator found as a fact that there was one operational Contract dated August 13, 2009 which finding was within the mandate of the arbitrator to make. The Applicant submits that the Arbitrator's findings on the issues cannot be interfered with even if he was wrong, though its stance is that the Arbitrator was correct in his analysis and findings.

21. The Applicant denies that it was directly procured to carry out works under Phase 3 and that this was in keeping with the common intention and understanding that the Applicant was to complete all the works under all the phases so as to fulfil the Contract dated August 13, 2009 and that the Arbitrator took all these into account and made a finding. According to the Applicant, the phasing of the Project was to make sure that the Applicant did not fall foul of the procurement laws, but it had nothing to do

with the Respondent having to tender again. The Applicant further states that variation was never an issue before the Arbitrator and that flowing from this issue, the Arbitrator made the finding that,"It has not been demonstrated to this Tribunal that the parties executed any agreement varying the terms of the Contract dated August 13, 2009 in terms of the limitation of the work that the Claimant could execute."

22. The Applicant points out the Respondent has never been able to explain how Phase 1 works amounted to completion of works under the Contract so that it can be said that the Applicant delivered a fully functional Disaster Data Recovery Centre as contemplated under the Contract.

23. The Applicant rejects the argument that the Award is not reasoned and submits that this is not a ground for setting aside under Section 35 of the *Arbitration Act*. It adds that the remedy in this case is for the Arbitrator to give reasons but there is no such application before the Court and the fact that the Arbitrator has expressed his findings in one paragraph does not make the Award unreasoned. The Applicant states that the Arbitrator analysed all the material placed before him by the parties before he made his findings on the claims made, including loss of profit and idle resource claims.

24. In conclusion, the Applicant submits that the Respondent has failed to demonstrate that the Award dealt with matter not contemplated under the reference to arbitration and that the Award should be set aside on the ground that it violates the public policy of Kenya.

Analysis and Determination

25. The main issue for determination is whether the Award ought to be set aside and if the answer is in the negative, whether it ought to be recognized and enforced as an order and decree of the court. It is common ground that the court's jurisdiction in determining whether an award should be set aside is circumscribed by section 35 of the *Arbitration Act* which provision material to the Applicant's case provides as follows:

> 35. Application for setting aside arbitral award
>
> (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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> .....
>
> (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
>
> (b) the High Court finds that—
>
> (i) .....
>
> (ii) the award is in conflict with the public policy of Kenya.

26. The Respondent's application is predicated on the grounds that the Award dealt with a dispute not contemplated by or falling within the terms of the reference to arbitration under the Contract and

matters beyond the scope of the reference to arbitration. The Respondent also attacks the Award of Kshs. 3,680,909,970.00 relating to the claim for loss of profit on the ground that it is against the public policy of Kenya as it was made in violation of the *Constitution* and statutory framework governing public procurement contracts in Kenya.

27. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, this court is guided by what the Court of Appeal stated in *Synergy Credit Limited v Cape Holdings Limited* NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR 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.

28. The same principle was expressed by the court in *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* ML HC Misc. Application No. 129 of 2014 [2015] eKLR which stated that the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law. The dispute resolution clause as captured under Clause 37 of the Contract provides in part that, "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 entire works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an arbitrator within thirty days of notice. The dispute shall be referred to arbitration and final decision of a person to be agreed between the parties....." It is therefore clear that the arbitral clause encompasses any kind of dispute between the parties during or after completion of the works or upon termination.

29. The Respondent stated that the issue of a dispute not contemplated by or falling within the terms of the reference to arbitration under the Contract and matters beyond the scope of the reference to arbitration is borne out of the claim that the Arbitrator used, "a contract which had been fully performed to issue an Award for a different project which had not yet been procured for and awarded".

30. I have gone through the Award and note that in Respondent's List of Issues, it did invite the Arbitrator to determine, *inter alia*, whether the initial contract of August 13, 2009 was terminated by performance and whether the Applicant was awarded a contract for Phase 3 of the Project. In his summation of the issues raised, the Arbitrator determined whether under the said Contract, the Applicant was contracted to construct and deliver a complete and functional Disaster Data Recovery Centre. In doing so, the Arbitrator considered the Respondent's argument that the Project was split up into three phases comprising of three separate contracts and that the contract for Phase 3 was yet to be awarded or not awarded to the Applicant. Ultimately, the Arbitrator held that the Applicant was contracted to construct and deliver a complete and functional Disaster Data Recovery Centre pursuant to the Contract which in effect meant that there were no separate contracts for the Project.

31. The aforementioned finding disposes of the Respondent's argument that the Arbitrator dealt with matter outside the scope of the reference. At this stage it is important to note that the determination

of whether the Arbitrator was right or wrong, was within the scope of his authority to decide based on the material presented by the parties. In any case, the determination was based on issues framed by the parties hence there is no basis to interfere with the Award on this ground. It is also clear that the dispute between the parties was within the scope of the arbitration clause as contemplated by the parties.

32. The second ground for impugning the Award is on the ground that it violates the public policy of Kenya. The Respondent has rightly relied on the oft cited decision of Ringera J., (as he was then) in *Christ for All Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366, where the learned judge explained the scope of public policy as a ground for setting aside an arbitral award as follows:

> I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with *the constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality....."

33. The public policy exception connotes a matter broader than the narrow interest of the parties and ought to be interpreted in a manner that does not open the door for unnecessary court intervention. In this respect I agree with the court's dictum in *Mall Developers Limited v Postal Corporation of Kenya* ML Misc No 26 of 2013 [2014] eKLR 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.

34. The thrust of the Respondent's case is that the work on Phase 3 of the Project ought to have been competitively sourced in accordance with the procurement law hence the finding that the Applicant was to proceed with Phase 3 without going through a competitive process was against procurement laws. I agree with the Respondent that the court has held in various decisions including *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* ML HCCC No.352 of 2014 [2019] eKLR that all parties to a contractual agreement must comply with all the provisions of the relevant procurement laws and regulations to obtain any benefit from the procurement contracts they entered into and where there is an infraction of the public procurement law, the court will not validate the transaction by granting relief.

35. The question before the Arbitrator was whether the Applicant flouted procurement laws in respect of Phase 3 of the Project. In proving that it was instructed to proceed and perform works in Phase 3 of the Project, the Applicant produced correspondence between it and the Respondent which the Arbitrator accepted as satisfactory and proof that no other contract was to be executed in respect of Phase 3 and that the Applicant had the green light to proceed with works on that Phase. From the correspondence, what apparently changed over the course of implementing the Project was the scope of works and not the Contract. The parties throughout kept exchanging correspondence on various aspects of the Project including requesting for documents such as drawings and architectural designs of the Project, extending the completion date of the Project, approving various shop drawings and electrical boards for the Project, attending pre-shipment factory inspections for Transformers and Automatic Voltage Regulators for the Project among others. The parties also corresponded and the Applicant indicated that the Project was completed on September 30, 2014 and that the defects liability period lapsed on March 30, 2015. In the Respondent's letter dated July 2, 2015, the Respondent did not contest that the Project was complete but then raised issues of defects which it required the Applicant to make good

before handing over the Project. The Respondent further intimated in a subsequent letter dated July 15, 2015 that final payments were to be made once the defects were attended to. In all these exchanges, the Respondent did not indicate that the contract for the Project was split into three and that the Applicant required to bid afresh to be awarded the contract for the final phase.

36. All the evidence points to the fact that the Contract executed on August 13, 2009 between the parties stemmed from an award to the Applicant for the construction and completion of the entire Project. In fact, some clauses in the Contract which prove that this point. For instance, the recital provided that:

> Whereas the Client is desirous that the Contractor executes the Proposed Disaster Data Recovery Centre at Naivasha hereinafter referred to as "the Services" and client has accepted the tender submitted by the Contractor for the execution and completion of such works and remedying any defects therein for the contract price ofKshs.782, 499,814.30 (Kenya Shillings Seven Hundred and Eighty-Two Million, Four Hundred and Ninety-Nine Thousand, Eight Hundred and Fourteen and Thirty Cents). [Emphasis mine]

37. If at all the Respondent intended that the Applicant only executes and completes part of the Project, nothing could have been easier than for it to state so in the Contract. There is no dispute that that the award leading to the Contract was in compliance with the procurement laws and procedures and that there was no procurement irregularity in implementing the Project in phases under the same Contract. If anything, and I agree with the Arbitrator, the phasing was done to actually comply with procurement procedures and it was an administrative decision borne out of convenience and easing implementation. Further, the decision to phase the Contract was also done by the Respondent after appreciating that the scope of the works would change following their benchmarking trip and I find and reiterate that this had everything to do with how the Project would be implemented and not how it would be contracted.

38. In considering whether an Award is contrary to public policy, the court is called upon to exercise its own independent jurisdiction. It is not bound by the findings of the arbitral tribunal. In this case, I have considered the evidence before the court and I do not find any merit in the Respondent's assertion that Phase 3 of the Contract was an entirely separate contract which was to be sourced competitively. Like the Arbitrator, I am constrained to find that the intention of the parties all through was that the Applicant would start and complete the Project by delivering a functional Disaster Data Recovery Centre and that there was no intention to award the third phase of the Project through a competitive tender process. Since the Applicant did not flout any procurement law and procedure in being awarded the Contract which provided that the Applicant was to deliver a complete Disaster Data Recovery Center, I fail to see how the Award violates the public policy of Kenya. It is now clear that the Respondent has failed to make a case for setting aside the Award.

39. Turning to the Applicant's application for recognition and enforcement of the Award, section 32(A) of the *Arbitration Act*, an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the *Arbitration Act*. The High Court, under section 36 of the *Arbitration Act*, has the power to recognise and enforce domestic arbitral awards and the court can only reject such an application on grounds set out under section 37 of the *Arbitration Act*. The grounds for rejecting an award mirror those for setting aside the Award under section 35 of the Act. Since I have already dismissed the grounds for setting aside the Award, I do not find any valid and substantive reason to refuse the application since neither the Arbitration Agreement nor the Award and their contents are disputed. In the circumstances, the Applicant's application for recognition and enforcement of the Award is allowed.

Disposition

40. For the reasons I have set out above, I now make the following orders:

    a. The Respondent's Chamber Summons dated February 16, 2022 is dismissed.

    b. The Applicant's Chamber Summons dated November 15, 2021 is allowed on terms that the Award dated August 3, 2021 made by Dr Kariuki Muigua the Sole Arbitrator, be and is hereby recognized and entered as a judgment of this court and that leave be granted to the Respondent to enforce the Award.

    c. The Applicant is awarded costs of both applications assessed at Kshs 200,000.00.

DATED and DELIVERED at NAIROBI this 21st day of DECEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Mr C. Namachanja instructed by Namachanja Mbugua and Company Advocates for the Applicant.

Mr Kiarie instructed by Office of the Attorney General for the Respondent.