REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS APPLICATION NO. 1 OF 2020

(AS CONSOLIDATED WITH MERU MISC. APPLICATION NO. E078 OF 2020: THE COUNTY GOVERNMENT OF MERU VERSUS LEOPARD ROCK MICO LTD)

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

LEOPARD ROCK MICO LIMITED.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MERU.....RESPONDENT

11TH MAY 2021

Before P.J.O OTIENO JUDGE

(IN CHAMBERS IN THE ABSENCE OF PARTIES)

COURT

1. I have read the letter by Manyonge Wanyama and Associates, LLP dated 9/2/2021, and verified the complaint and request with the record of the court file and I do agree that there is a typographical mistake in the identification of the application the court determined.

2. The record of the file, including the opening paragraph of the decision, are unanimous that the two applications for determination were dated 6/01/2020 and 20/2/2020. The record also reveal that there is no application dated 06/02/2020.

3. I therefore invoke the courts power under section 99 of the Civil Procedure Act, on the application of the counsel for one of the parties, and amend paragraph 34 (b) of the ruling to read-;

> **"(b) The application dated 6/01/2020, and not 06/02/2020, be allowed..."**

4. This order shall be transmitted to National Council of Law Reporting to activate correction as may be necessary.

DATED THIS 11TH DAY OF MAY 2021

PATRICK J.O OTIENO

JUDGE

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-AND-

THE COUNTY GOVERNMENT OF MERU.....RESPONDENT

RULING

1. The court is called upon to determine two applications dated 6/01/2020 and 20/02/2020, each filed by either party. The first of the applications is by Chamber Summons dated 6/01/2020 pursuant to ***Section 36 of the Arbitration Act No. 5 of 1995 and Rule 4 and 8 of the Arbitration Rules 1997*** together with all other enabling provisions of the law. In it, the applicant, Leopard Rock Mico Limited, seeks that the final award by the arbitral tribunal, Calvin Nyachoti, Chartered Arbitrator, dated 19th December 2019 be recognized as binding and be enforceable between the parties herein and a decree be issued in accordance therewith.

2. The grounds upon which the application is grounded are set out in the body of the application and echoed in supporting affidavit of Peter Wanyama, advocate of the High Court of Kenya, sworn on 6/01/2020.

3. The grounds are that as result of the dispute which arose between the parties out of the lease dated 3/10/2008 (hereinafter *"the subject lease"*) the matter was subjected to arbitration pursuant to an arbitration agreement and as ordered by this honorable court on 6/05/2019. The dispute was heard and determined and the sole arbitrator issued the award on 19/12/2019, which award the applicant wishes to have recognized as binding and enforceable and a decree issued therewith.

4. The application was opposed by the respondent vide grounds of opposition dated 15/01/2020. Those grounds argued that the application was filed prematurely considering that the award deals with a dispute not falling within the terms of the reference to arbitration, and therefore, recognition or enforcement of the arbitral award would be contrary to public policy of Kenya.

5. The second application is by summons dated 20/02/2020 brought under ***Section 35 (1) (2) (a) (iv), (2) (b) (ii) and (3) of the Arbitration Act 1995 and Rules 7 and 11 of the Arbitration Rules 1997***. The respondent, who is the applicant, seeks the setting aside of the said arbitral award dated 19/12/2019.

6. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of Irah Nkuubi, Ag. Chief Legal Officer for the respondent, sworn on 20/02/2020. It is contended in that Affidavit that the two parties entered into a lease agreement on 3/10/2008 relating to a tourist lodge known as Leopard Rock Lodge, erected on approximately 40 acres of land belonging to the defunct Nyambene County Council as the landlord. A dispute arose and matter was referred to arbitration where it was heard by Mr. Calvin Nyachoti, chartered arbitrator.

7. The arbitrator is faulted for having relied on the lease dated 16/07/1997 and the contents of the letter dated 1/10/2008 to make his findings instead of wholly relying on the Subject Lease dated 3.10.2008. By doing so, it is contended, the award contained decisions on matters beyond the scope of reference to the arbitration because the arbitrator had no jurisdiction to discuss and consider the contents of the two document. Therefore, the award is in conflict with public policy of Kenya in that the arbitrator ignored and or failed to apply or recognize well settled principles of law.

8. Moreover, the arbitrator gave an award of Kshs. 329,881,985.00/- being costs of the facilities built by the tenant on the lease property without first determining who built the facilities and went ahead to ignore the evidence tendered by the respondent's quantity surveyor. Thus, the award was arbitrary and not based on factual finding.

9. It is important to note that the awarded sum not Kshs. 329,881,985.00/- but Kshs. 329,633,985/- as per the consent order recorded on 14/10/2020 before Gikonyo J.

10. The application to set aside the award was opposed by the replying affidavit of Michael Jean Andre Dechauffour, managing director of the applicant, sworn on 6/03/2020. He deponed that the respondent's application is a delaying tactic meant to deprive him of his litigation

fruits and benefits. That the applicant operated Leopard Rock Lodge in Meru National Park from 2001 to 2018 under a lease instrument executed in 2001. The 2001 lease was replaced with another dated 3/10/2008. When the dispute arose the matter was referred to arbitration and the arbitrator acted in accordance with the Subject Lease and no other instrument. From the arbitrator's analysis, the Subject Lease formed the basis of his decision. As for the letter dated 1/10/2008 it contains the agreement between the parties that led to the execution of the lease.

11. It was asserted that the award in favour of the applicant was based on the valuation report by the firm of Barker & Barton Kenya, LLP, which was jointly approved by the parties during pre-arbitration negotiation in accordance with Clause 2(d) of the Subject Lease. Counsel then argued that the respondent, on 8/03/2019, forcibly took over the lodge from the applicant then failed to maintain the premises and the property depreciated leading the arbitrator to disregard the respondent's report based on valuation done on 11/06/2019. Besides, it was added that the applicant (tenant) acquired the assets and liabilities of Meru Adventure Limited which had commenced building the lodge subsequently completed the development. It was concluded that there was never any error in the award as made and that the arbitrator applied the law in a consistent manner in considering the dispute at hand holistically and by relying on the prevailing legal principles in Kenya.

12. The applications are indeed the flip sides of each other. I say flip side of each other because the reasons for granting an order for enforcement are, in many instances, the same reasons for refusal to set aside. On that basis I will consider and henceforth refer to Leopard Rock Mico Ltd as the applicant and The County Government of Meru, as the respondent

13. This matter was directed to be canvassed by way of written submissions. The applicant submitted that the respondent's allegations that the arbitrator exceeded his scope by relying on the 16/07/1997 lease and the letter dated 1/10/2008 cannot be a ground to set aside the award because the arbitrator did find as a matter of fact that the two leases were a continuum of the dealings between the parties and were inseparable. Thus, the arbitral tribunal did not exercise its jurisdiction beyond its scope of reference. Furthermore, it was asserted that during the hearing of the claim, the applicant adduced evidence of the existence of the lease of 2001 that was backdated to 1997 with the consent of the parties to cover pre - 2001 acquisition issues to ascertain who built the lodge. Nevertheless, the respondent has failed to demonstrate how the arbitrator relied on the letter dated 1/10/2008.

14. The allegation that the award is in conflict with public policy for the arbitrator ignored and or failed to apply and recognize the well settled principles of law is vague. The respondent has failed to explain which principles were breached by the arbitrator in awarding the award which was awarded based on the valuation report that was jointly approved by parties' pre-arbitration negotiation. Thus, the award is consistent with ***the Constitution***, ***the Arbitration Act*** and ***the Foreign Investment Protection Act CAP 518 Laws of Kenya***. Therefore, in the applicants view, there has not been shown any reason to set aside the award which ought to be adopted as a judgment of this court. The applicant relied on **Mahican Investments Limited & 3 others v Giovanni Gaida & others [2005] eKLR**, **Kenyatta International Convention Centre (KICC) v Greenstar Systems Ltd [2018] eKLR**, **Christ for all Nations v Apollo Insurance Company Ltd [2002] EA 366**, **Charles Gatheca v Atlas Copco Cmt & Ct Management Limited & 2 others [2019] eKLR** and **Air East Africa v Kenya Airports Authority Nairobi [2001] eKLR** among other authorities to support their submissions and assertion that the autonomy of the parties in choosing their forum of dispute must be respected and that the arbitrator must remain the master of the acts and the court ought not interfere with the parties choice.

For the respondent, submissions were made to the effect that their grounds for setting aside the award are set out under ***Section 35 of the Arbitration Act***. They seek to have the award set aside on the grounds that the arbitrator exceeded the scope of his reference and made a decision which contravenes the public policy of Kenya. The dispute between the parties arose from the Subject Lease. Therefore, the arbitrator was bound to interpret the lease and made a determination of the issues in dispute based on the terms and conditions of the lease which gave him jurisdiction. They fault the arbitrator for venturing beyond his scope of authority by relying on the lease dated 16/07/1997, otherwise entered in January 2001 but backdated to 16/07/1997, to make his findings. He faulted the award or having placed heavy reliance the 2001 lease and letter dated 1/10/2008. For that reasons, it was contended that the arbitral award is contrary to public policy as it was made in disregard for settled law.

15. What is more, for the respondent, the arbitrator gave a colossal sum of money as compensation for the built structure without addressing who built the same. In finding that the respondent is to pay was arbitrary in the absence of a clear finding on who built the structures under 2008 lease. Consequently, it is averred that there are sufficient reasons to have the award set aside and not enforced or recognize.

16. The respondent relied on the decisions in **Kenya Tea Development Agency Limited & 7 others v Savings Tea Brokers Limited [2015] eKLR**, **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Ltd [2017] eKLR**, **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd [2001] eKLR**, **Michael Waweru Ndegwa v Republic [2016] eKLR**, **Cape Holdings Limited v Synergy Industrial Credit Limited [2016]eKLR** among other case law to support their position that the award is a good candidate for setting aside.

The issues of determination

17. As said at the onset, the twin issues of whether to have the award enforced or set aside are two sides of a single coin. Whether to enforce or set aside an arbitral award the court must in all events endevour to find out and determine if the order being made would further the choice the parties made in opting for arbitration over litigation and if such an order would meet the ends of justice in resolving the dispute between the parties. The author of ''**The Black's Law Dictionary, Tenth Edition, at page 125''** defines arbitration as:

> ***"A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute."***

This is embodied under ***Section 32A of the Arbitration Act*** which provides that the arbitral award is final and binding upon parties to it and no recourse is available against the award otherwise than in the manner provided by the Act. In **Mahican Investments Limited & 3 others v Giovanni Gaida & others [2005] eKLR** P. J Ransley J held as follows:

"A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties. This reasoning also applies to the award of damages that was solely in the jurisdiction of the Arbitrators to determine. The courts will not and cannot interfere with such an award."

18. The arbitral award being final and binding the recourse available against an award may be by an application of having it set aside. To have an award set aside by the High Court a party must demonstrate and prove to the satisfaction of the court at least one the grounds stipulated under ***Section 35 of the Arbitration Act***. The statute enumerates the grounds an applicant must establish to merit setting aside to be that;- *a party to the arbitration agreement was under some incapacity; or, that 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, 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, 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 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 the making of the award was induced or affected by fraud, bribery, undue influence or corruption; the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya. (Emphasis provided)*

19. It is the respondent's claim that the arbitral award contains decisions on matters beyond the scope of the reference to arbitration and the award is in conflict with public policy. According to the respondent is that the arbitrator placed heavy reliance on the lease dated 16/07/1997 and the letter dated 1/10/2008 instead of the Subject Lease. This court, presided over by Gikonyo J in **Kenya Tea Development Agency Limited & 7 others v Savings Tea Brokers Limited [2015] eKLR** held and found that in determining whether an arbitrator went beyond his boundaries and outside the parameters of the parties' agreement, a good starting point is ***Section 29(5) of the Act*** which stipulates:

"In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction."

In this case, Clause 3(c) of the Subject Lease states:

"Save as hereinbefore otherwise provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1968 of any statutory enactment in that behalf for the time being in force;"

20. The Subject Lease was entered into on 3/10/2008 and was for a term of twenty – five (25) years from 1/01/2009. It was set to expire in 2034. However, the lease ended due to termination by the respondent leading to the claim by the applicant in the sum of Kshs. 525,881,985/- as compensation.

21. According to the applicant's submissions, Langwenda Safari Limited had put up accommodating camps *('bandas'*) which were destroyed paving way for the construction of the Leopard Rock Lodge. By an agreement dated 19/12/2000 one Michael Jean Andre Dechauffour and his wife paid sum of Kshs. 52 Million to cover the indebtedness of the Meru Park Adventure Limited to International Finance Corporation (IFC) in respect of a loan facility advanced for construction of Leopard Rock Lodge. By virtue of the said payment Michael and his wife took over the entire assets of Meru Park Adventure Limited in the Leopard Rock Lodge and continued to operate the lodge under the name Leopard Rock Mico Limited.

22. In 2001 a formal lease was signed between the applicant and Nyambene County Council (predecessor of the respondent) in respect of the land housing the lodge. The said lease was with the consent of both parties backdated to 1/01/1997 to cover the assets of the lodge that the applicant acquired from Meru Park Adventure Limited. From 2001 to 2008 the applicant invested heavily in Leopard Rock Lodge and turned it into an ultra-modern lodge and hotel. On 1/10/2008 the Nyambene County Council and the applicant agreed to execute a new lease which was done on 3/10/2008. However, the lease did not run full term for applicant was evicted in 2018, on the grounds that certain plans for buildings in the lodge were not approved. Barker & Barton LLP, a quantity survey firm, was retained to value the lodge. They valued the building and fixtures at the lodge at Kshs. 329,633,985/-. PricewaterhouseCoopers (PwC) valued the loss of investment at Kshs. 175,831,000/- and the applicant at trial produced an inventory and the value of moveable assets at Kshs. 20,417,000/-. It was total of Kshs. 525,881,985/- being pleaded. In the arbitral award, the applicant was awarded only Kshs. 329,633,985/- being costs of facilities built, Kshs. 7,436,5000 cost of assorted movable assets together with interest at 14% p.a from 8th March 2019 till payment is made in full plus costs of the proceedings. The dispute now before me is whether in making that award, the arbitrator went beyond his mandate and boundaries by placing reliance on the lease dated 16/07/1997 and letter dated 3/10/2008 as opposed to the lease of 03.10.2008.

23. In his award the arbitrator stated and I quote:

"364. I have perused and appreciated the history of this matter as well as the 2001 and 2008 leases. I note that materially, the two leases are duplicates as regards contracting parties, their obligations, lease period of 25 years, termination procedure etc. the difference is that the subject lease is more elaborate and larger. …

365. During the proceedings, I understood that the difference in the two leases came about because both parties were desirous of altering existing monetary relations. Therefore, before the 2001 lease (backdated to 1997) which was set to expire in 2022 expired, parties deemed it wise to abandon that lease so as to contract anew under the 2008 lease with somewhat varied terms.

366. This begs the question, why not leave the old lease to subsist and serve its purpose before entering into a new lease upon expiry? What informed the sudden transition?

…

370. I have not seen any evidence that shows that the 2001 lease was cancelled. I see on record, the 2001 lease, parties negotiations and agreement as captured in the letter of 1st October 2008 and the 2008 lease duly executed two days later. Could this suggest all these documents are quoting Mr. Wanyama's words, 'in continuum'. I believe so.

…

372. In sum, I without a doubt concur with the Respondent's position which is settled law that, a contract is sacrosanct and ought to entertain extrinsic factors. From the foregoing, I however find it impossible to dissociate the history of the matter especially the 2001 lease and letter of 1st October 2008 from the subject lease as they have heavy influence in contextualization and understanding of the subject lease and parties' obligations. Indeed, the instruments and correspondence is to be considered in the nature "amendments/addenda" to the subject lease. Indeed, there is clearly an intention for the Parties to be bound by the letter of 1st October 2008 as it was signed by representatives of both the Claimant and the Respondent." (emphasis provided)

24. The arbitrator, as the master of fact, found that the 2001 lease and Subject Lease, based on the history of the matter, are duplicates with the only difference being the monetary terms. He found no evidence that the 2001 lease was cancelled. Further, he found it impossible to separate the 2001 lease and the letter of 1/10/2008 from the Subject lease as they have heavy influence in contextualization and understanding of the Subject Lease and parties' obligations.

25. To make an informed decision the genesis of parties' relationship had to be understood. It was important and wholly appropriate for the arbitrator to go back, understand and elaborate the existence of the parties' relationship. In consequence, the arbitrator committed no error to consider the leases as an amendment/addenda to each other. I do find that no demonstration has been made to the satisfaction of the court that the Arbitrator exceeded his mandate, power and jurisdiction as to invite an interference by the court in the award

26. On whether award is in conflict with public policy in Kenya, the law is settled that *a contract or arbitral award will be against the Public Policy of Kenya if it is immoral, illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word illegal here would hold a wider meaning than just "against the law". It would include contracts or acts that are void. "Against Public Policy" would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive*[1].

27. By making reference to the 2001 lease and the letter dated 1/10/2008 to establish the intention of the parties, the arbitrator was examining and analyzing the evidence availed to the tribunal, did not go against the established position of the law on party autonomy and the binding nature of contracts on the parties and the inhibition on the court against interference with such autonomy. I find nothing immoral, illegally untenable or unacceptable to Kenyan law and public policy on the rule of law. To the contrary, I do hold that the arbitrator was well within his scope, authority and jurisdiction in the reference and did not go against any public policy.

28. It must be born in mind that the jurisdiction of the court under sections 35 and 36 of the Act is never appellate to entitle the court to review the proceedings and to come to own conclusions. That jurisdiction is confined to the court seeking to find if the parties' covenants, choices and anticipations as captured in the contract have been respected and observed in accordance with the Kenyan law. For that reason, it is not open to the court to differ and seek to reverse the arbitral tribunal merely because in its opinion a different conclusion should have been made on the acts availed. The law here is that arbitration is now constitutionally underpinned as a dispute resolution mechanism which the court must, not only respect when it meets the law, but also promote. The window for interference is very narrow and limited to that circumscribed by the Act and no more.

29. However, even if I was to review the evidence and come up to own conclusions, I find the answer and resolution to the parties dispute to be well captured by Clause 2 (c) and (d) of the Subject Lease read together with Clause 1(u) which state:-

"2. The Landlord hereby covenants with the Tenant as follows:

c) To allow the Tenant to build such structures (subject to the prior approval of the Landlord) on the Premises as the Tenant shall determine necessary for purposes of carrying out its business as a Tourist Lodge;

d) To pay the cost of any facilities built by the Tenant including Value Added, at the expiry of the Lease, the cost of which will be ascertained by a Quantity Surveyor and an Investment consultant approved by both parties;"

In the award it is stated as follows:

"394. In any event, whether or not the Claimant itself or Meru park Adventures Limited built the structures may be a moot point if you consider that it was established at the hearing that the Claimant acquired the lodge for value from Meru Adventures Limited, the previous operator. .....

400. Based on all the foregoing however, I make a finding that the approvals for the construction of various structures was indeed granted by KWs, the head lessor herein with the full knowledge and acquiescence of the Respondent and accordingly, the Respondent, having been made aware of such dealing, having signed three subjective leases, having received and continued to

receive rent from the Claimant is estopped by conduct from claiming that the Claimant did not seek its approval or even further that the Claimant did not build the lodge just because no approval was sought from or granted by it."

30. In the case of **Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] eKLR** the Court of Appeal made reference to the English case of **Geogas S. A v Trammo Gas Ltd (The "Baleares")** where Lord Justice Steyn had this to say:

> ***"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. 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 arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."***

31. An award that is within the jurisdiction of the arbitrator to determine will not and cannot be interfered with by the court as the purpose of arbitration is to bring finality to disputes. The subject Lease clearly gave the arbitrator jurisdiction to determine the issue. A court will not interfere even if it is a misinterpretation of a contract for it were to interfere the court would place itself in an appellate position which it ought not to. See **Mahican Investments Limited case (Supra)**.

32. The respondent's assertion that the amount awarded was in violation of public policy has not been proved or demonstrated. It is not a basis to set aside the award merely because the respondent is dissatisfied with the findings of the arbitrator in terms of who built the lodge.

33. The upshot and conclusion from the foregoing findings is that the court finds no reason to set aside the award with the concomitant finding that if it cannot be faulted then there is nothing to hold back the enforcement of the award as a judgment of the court.

34. Accordingly, therefore, I find the following orders recommending themselves to me to be made:

a) **The application dated 20/02/2020 be dismissed with costs.**

b) **The application dated 6/02/2020 be allowed as follows:**

> **i. THAT the final award by the sole arbitrator, Calvin Nyachoti, Chartered Arbitrator, dated 19/12/2019 in the sum of Kshs 329,633,985, being the cost of facilities built by the applicant and Kshs 7,436,500, being the cost of movable assets, making an aggregate award of Kshs 339,070,485 be recognized as binding and enforceable between the parties herein and a decree be issued in accordance therewith.**

c) **The costs of these proceeding are equally awarded to the applicant.**

Dated, signed and delivered by *Microsoft Team,* this 22nd day of January 2021

Patrick J. O. Otieno

Judge

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[1] Onyancha J in the case of **Glencore Grain Ltd –vs- TSS Grain Millers Ltd (2002) I KLR 606**.