REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO.454 OF 2019

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISION.....APPLICANT

-VERSUS-

JOHN OMOLLO NYAKONGO (T/A H.R GANJEE & SONS).....RESPONDENT

R U L I N G

1. As expected in most arbitration proceedings, the court is called upon to determine two applications each filed by either party. The applicant seeks to have the award set aside while the respondent seeks that the award be enforced.

2. The first application is by a notice of motion dated 6/12/2019 and expressed to be pursuant to ***Articles 10 and 159 (1) and (2) of the constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Section 35 (2) and 10 of the Arbitration Act No. 5 of 1995 and Rule 7 of the Arbitration Rules 1997*** together with all other enabling provisions of the law. In it, the applicant, IEBC, seeks inter alia stay of enforcement and/or execution of the award made by Dr.Kariuki Migua (sole arbitrator) and published on 31/12/2018; review, varying and/or setting aside of the award made by sole arbitrator herein; and, in the alternative, setting aside orders No.5, 6 and 7 of the arbitral award.

3. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of Douglas Bargorette, the applicant's legal services manager, sworn on 6/12/2019.

4. It is contended in that affidavit that the two parties entered into contract dated 12/08/2011 where the applicant appointed the respondent as a contractor for the purpose of the completion of an office block and a multi-purpose hall at a cost of Ksh. 2,848,261.69. Subsequently, a dispute arose and the respondent filed **Mombasa H.C Civil Case No.61 of 2015** against the applicant seeking payment of Kshs. 7,165,486.17 and interest thereon plus costs. The current applicant, while asserting the party autonomy on choice of forum, filed an application dated 22/05/2015, under certificate of urgency, and sought orders of stay of the proceedings in H.C Civil Case No.61 of 2015 together with and order that the matter be referred to arbitration in accordance with clause 37.1 of the contract. The application was successful in that the proceedings were stayed and reference to arbitration ordered.

5. Arbitral proceedings commenced in 2016 when the respondent lodged a memorandum of claim against the current applicant. In that Memorandum of Claim, the respondent founded his claim on an alleged breach of the contractual obligations by the applicant under the contract. The sum of Ksh. 45,968,386.45 plus interests thereon and costs were sought. That claim was resisted by the applicant who filed a Memorandum of Response, which amended twice thereafter to introduce a counter-claim and asserted that there had been no fault or breach on his part and urged that the claim be dismissed because the outstanding certificates were contested. The tribunal then went through the motions and delivered its award in the aggregate sum of kshs 12,759644.64/=

6. It is on account of the said award that that the applicant now faults the arbitrator, Dr.Kariuki Muigua, for having ignored the well-established doctrine of privity of contract and arrogated himself jurisdiction not conferred upon him under the arbitral agreement. By doing so, it is contended, the award issued by the arbitrator is in conflict with public policy of Kenya. Therefore, it is asserted, the award amounts to unjust enrichment as it condemns the applicant to pay monies arising from overdraft facilities extended to the respondent as working capital without the applicant's knowledge and/or consent. In addition, the arbitrator is accused of having made findings on matters which were not contractually provided for by the parties including subsuming himself the role of the project manager, thereby making the award inimical to the national interests and was contrary to both the prudent use of public finances under article 201(d) of the constitution and the principles of justice and morality.

7. The application was opposed by the replying affidavit of John Omollo Nyakongo, the respondent herein, sworn on 29/07/2020. He deponed that the application has not met the threshold under Section 35(2) for the grant of the order sought. The respondent maintained that he had, in order to perform the contract, arrange working capital and incurred further costs and liabilities as a result of the applicant's failure to settle the payment certificates as and when they fell due. He took the very firm position that the arbitrator had the power to make the award in the sums disclosed because the same flow from the rights and liabilities arising from the contract and were the natural consequences of the breach by the applicant.

8. It was argued that the agreements between the respondent and his financiers were not the subject matter of the arbitral proceedings and therefore the issue of privity to contract did not arise.

9. The applicant filed a further affidavit sworn by its legal services manager on 14/09/2020 reiterating the contents of its application and the supporting affidavit thereto.

10. **The second application** is by the respondent also brought under certificate of urgency dated 7/01/2020 and invokes the provisions of Sections 32A, 35 (3) and 10 of the Arbitration Act No. 4 of 1995; Sections 1A,1B and 3A of the Civil Procedure Act together with all other enabling provisions of the law. In it, the respondent, John Omollo Nyakongo, seeks that the applicant's application dated 6/12/2019 be struck out as it offends the provisions of Section 32A and 35(3) of the Arbitration Act.

11. The grounds upon which the application is grounded are set out in the body of the application and echoed in supporting affidavit of John Omollo Nyakongo, the respondent herein, sworn on 7/02/2020.

12. The grounds are that as result of the dispute which arose between the parties out of the contract dated 12/08/2011 the matter was subjected to arbitration pursuant to an arbitration agreement in the contract. The dispute was heard and determined and the sole arbitrator issued the award on 31/12/2018. The applicant having been notified of the entry of the award on 5/01/2019 filed his application 12 months later which delay was unreasonable. It was the deponent's assertion that the applicant's application is defective and ought to be struck out as it was filed contrary to Section 32 (A) and 35 (3) of the Arbitration Act (*hereinafter referred to as the Act)*. The court is said to lack jurisdiction to hear and determine the applicant's application for having been filed contrary to the aforementioned provisions of the Act. After protracted submissions by both sides on how the second application could be dealt with, the court directed that it be treated as an opposition to the earlier application and that the two be heard together.

13. As directed by the court, the matter was canvassed by way of Composite written submissions filed by both sides and highlighted before the court. In this determination I will refer to Independent Electoral and Boundaries commission as the applicant while Mr john Omolo Nyakongo as the respondent.

14. For the applicant, submissions were made to the effect that its grounds for setting aside the award are set out under Section 35 of the Arbitration Act. On the challenge that the application was brought outside the statutory time limit, the applicant contends that the award by the arbitrator was made and published on 31/12/2018 but the same was received by the applicant on 18/09/2019, hence its application to set aside the arbitral award was filed within the timelines envisaged under Section 35(3) of the Act having been filed on 9/12/2019.

15. On the substance and merit, It faults the arbitrator for arrogating himself a jurisdiction not conferred upon him under the arbitral agreement. In doing so, it is averred that the arbitrator made a decision beyond the scope of the agreement between the parties which amounts to a nothing but nullity and that the court has the requisite jurisdiction to hear and determine the applicant's application. For the above reasons, it was contended that the arbitral award is contrary to public policy as it was made in total disregard to settled law.

16. The applicant relied on **Law Society of Kenya v Kenya Revenue Authority& anor (2017) eKLR, Kenya Tea Development Agency Limited & others v Savings Tea Brokers Limited [2015] eKLR, Kenya Pipeline Company Ltd v Kenya Oil Company Ltd & another(2012) eKLR, Nyangau v Nyakwara (1985) eKLR, Kenya Shell Ltd v Kobil Petroleum Ltd(2006) eKLR, William Muthee Muthoni v Bank of Baroda(2014) eKLR** among other case law to support its position that the award is a good candidate for setting aside.

17. For the respondent, submissions were offered that the applicant's application should be struck out as it was filed outside the limitation period prescribed under Section 35(3) of the Act. He urged the court to hold and find that delivery of the award occurred on 5/01/2019 when the parties were notified that it was ready for collection. The allegation that the award is in conflict with public policy for the arbitrator ignored and/or failed to apply the well settled principles of law was submitted to have been vaguely made in that no explanation was made on which principles were breached by the arbitrator in awarding the award. Therefore, in the respondent's view, there has not been shown any reason to set aside the arbitral award. The respondent relied on **P.N Mashru Ltd v Total Kenya Ltd(2013)eKLR, University of Nairobi v Multiscope Consultancy Engineers Ltd(2020)eKLR, Heva Fund LLP v Katchy Kollections Ltd(2018)eKLR, Agricultural Finance Corporation v Lengetia Ltd & anor (1985)eKLR,Sandhoe Investments Kenya Ltd v Seven Twenty Investments Ltd(2015)eKLR** among other authorities to support his 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 facts and the court ought not interfere with the parties' choice.

18. I am of the view that the two applications are flips sides of a coin and that decision in one would impact and decide the other. With such appreciation and based on the directions given on the 27.5.2020, I will start with the first application to be filed and treat the second application for what it is, an opposition to it.

19. The issue for determination in the application dated 6/12/2019 is whether it has met the threshold under Section 35 of the Act for setting aside an arbitral award.

20. 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.*

21. The need for finality of an arbitral award is coded 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 the spirit of the statute, the courts are thus reluctant and very cautious when called upon to interfere in the outcome of arbitration proceedings. 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 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."***

22. 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 of 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.*

23. It is the applicant'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. The court in **Kenya Tea Development Agency Limited & 7 others v Savings Tea Brokers Limited [2015] eKLR** held that in determining whether an arbitrator went 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."**

24. In this case, the parties covenanted at clause Clause 37.1 of the contract in these terms:

> **"In case any dispute or difference shall arise between the employer and the project manager on his behalf and the contractor, either during the progress or after the completion or the termination of the 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 30 days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties."**

25. The court must in addressing the applicant's grievances pose the question of what dispute was intended for arbitration and if what was ultimately arbitrated was within or without the parties' contemplation. I note the language used was '*any dispute or difference'*. That expression, to my mind discloses that the parties chose that all disputes and differences would be subjected to arbitration. It is thus not clear to court what part of the determination was outside the arbitration clause and agreement as to invite the very drastic remedy of setting aside the award and negating on the parties 'chosen forum and resources spent so far. I find no merit on that ground.

26. The other ground advanced to upset the award is contention that the award amounts to unjust enrichment as it condemns the applicant to pay monies arising from overdraft facilities extended to the respondent as working capital without the applicant's knowledge and/or consent. I am of the view that the respondent was forced to obtain overdraft facilities from Eco and Chase banks and incurred other costs as a result of the applicant's failure to settle the payment certificates as and when they fell due. I take it that the parties in setting timelines for settlement of certificates appreciated that there is always cost and value for money dictated by period such money if unfairly withheld. Therefore, I see no justification to fault the arbitrator in the exercise of his powers to award the sum of Ksh.5,594,784.84 plus interest thereon as the same flows from the rights and liabilities arising from the contract.

27. The arbitrator, as the master of facts, found no evidence that the contract had been terminated. Further, he found that the respondent had discharged his contractual obligation and was entitled to the reliefs sought. It is not this courts mandate to review and reevaluate the evidence in this proceedings. The court isn't exercising appellate jurisdiction but is confined by the strictures in the Act, generally espousing the justification for arbitration as a consensual process.

28. I do find that no demonstration has been made that the arbitrator exceeded his mandate, power and jurisdiction as to invite an interference by the court in the award.

29. On whether the award is in conflict with public policy in Kenya, i chose to be persuaded by the decision of **Onyancha J** in **Glencore Grain Ltd –vs- TSS Grain Millers Ltd (2002) I KLR 606** for the proposition that "an for arbitral award will be against the Public Policy of Kenya, if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. The word illegal 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.

30. I find nothing immoral, legally 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 of his authority and jurisdiction in the reference and did not go against the public policy.

31. 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."*** *(emphasis given)*

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

33. The applicant'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 applicant is dissatisfied with the findings of the arbitrator. Nevertheless, the applicant has failed to demonstrate how the arbitrator exercised jurisdiction beyond the scope of reference.

34. On the timeliness of filling the application, it is contended that the arbitral award having been made and published on 31/12/2018 but the same was received by the applicant on 18/09/2019, the application dated 6/12/2019 and filed on 09.12.2019 was filed within the timelines envisaged under Section 35(3) of the Act. It is not disputed that the parties herein were notified by the arbitrator of the entry of the award on 5/01/2019 vide a letter dated then. It is also admitted by the applicant that the award was published on 31/12/2018. The applicant has not explained why it waited up to 9/12/2019 to file its application.

35. In **Transworld Safaris Ltd v Eagle Aviation Ltd (2003) eKLR** the court held that a notice to the parties that an award is ready for collection is sufficient delivery since any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality. Additionally, there is no provision in the Act for extension of time to file an application for setting aside an arbitral award and therefore strict compliance with the 3 months' timeline is imperative and sits well with the principle of finality of arbitration and the constitutional dictate that legal disputes be determined expeditiously. I am therefore convinced that the applicant inordinately delayed in filing its application which delay is inordinate and inexcusable.

36. Under section 35 and 36 of the Act, the jurisdiction of this court is never appellate to entitle the court to review the proceedings and come to its own conclusion. It is not open to this court to differ and seek to reverse the arbitral award merely because in its opinion a different conclusion should have been reached. Arbitration is now constitutionally underpinned as a dispute resolution mechanism and the court must not only respect the process when it meets the law, but also promote. The principle of party autonomy decrees that a court ought never to question the arbitrator's findings of fact.

37. The upshot from the foregoing findings and conclusions is that the application dated 6/12/2019 is dismissed with costs on the twin findings that it was filed out of time and fails to meet the statutory thresholds for setting aside and award. It therefore follows and becomes axiomatic that the application dated 7/01/2020 be allowed. The costs of the proceedings here are awarded to the respondent who has emerged successful.

Dated, **signed** and **delivered** at **Mombasa** this **26th** day of **February 2021**

Patrick J O Otieno

Judge