



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS CIVIL APPL. NO. E445 OF 2019**

**INSTALACIONES INABENSA SA.....CLAIMANT/APPLICANT**

**V E R S U S**

**KENYA ELECTRICITY TRANSMISSION CO. LTD..RESPONDENT**

**RULING**

1. Before this Court are two Applications for determination. The first is the Chamber Summons dated **20<sup>th</sup> November 2019** by which **KENYA ELECTRICITY TRANSMISSION CO. LIMITED (KETRACO)** (hereinafter referred to as “**KETRACO**”) sought for orders that:-

**“1. SPENT**

**2. This Honourable Court be pleased to set aside the Arbitral Award of the Arbitrators, Arch. Stanley Kebathi (Presiding), Justice (Rtd) Joseph G Nyamu and Dr. Kariuki Muigua (The Tribunal) dated 30<sup>th</sup> July, 2019 and published on 26<sup>th</sup> August, 2019.**

**3. This Honourable Court do make further or other order (s) and/or give direction(s) as it may deem just in the circumstances.**

**4. That the costs of this application be provided for.”**

2. The Summons which was premised upon **Sections 19, 35(1) 92)(a) (iv), 35(2) (b) (ii) and 35(3)** of the **Arbitration Act, 1995** and **Rules 7 and 11** of the **Arbitration Rules 1997** as read together with **Article 159(2) (c), 201 and 227** of the Constitution of Kenya. It was supported by the Affidavit dated **19<sup>th</sup> June 2017** sworn by **DUNCAN MACHARIA**, the Company Secretary of **KETRACO**.

3. The second application was the Chamber Summons dated **27<sup>th</sup> November 2019** filed by **INSTALACIONES INABENSA S.A**, seeking orders:-

**“1. That the final Arbitral Award dated 30<sup>th</sup> July, 2019 and filed herein on 30<sup>th</sup> September 2019 be recognized as binding and be enforced by this Honourable Court.**

**2.THAT costs of the application be met by KETRACO.”**

4. The Summons was premised upon **Section 36** of the **Arbitration Act of 1995** and **Rule 6** of the **Arbitration Rules 1997** and **Section 3A** of the **Civil Procedure Act**. It was supported by the Affidavit of **MIGUEL ANGEL MASERAS GUTIERREZ** dated **27<sup>th</sup> November 2019**.

5. The two applications were canvassed by way of written submissions. The Respondent (**KETRACO**) filed its written submissions on **11<sup>th</sup> March 2020**, whilst the Claimant (**INSTALACIONES INABENSA S.A**) filed its written submissions on **29<sup>th</sup> June 2020**. Thereafter the Respondent filed further written submissions in response to the Claimants submissions dated **29<sup>th</sup> May 2020**.

**BACKGROUND**

6. The Respondent (**KETRACO**) is a State owned Corporation, which was incorporated on **2<sup>nd</sup> December 2008**, under the **Companies Act Cap 486** (now repealed). The Claimant is a foreign owned company registered in Spain which deals in Industrial Engineering, construction, maintenance and infrastructure services for inter alia the energy, transport and communication sectors.

7. On **16<sup>th</sup> April 2013** following a tender process the parties entered into two Engineering Procurement and Construction (**EPC**) contracts both dated **16<sup>th</sup> April 2013** (hereinafter “**the Contracts**”) as follows:-

**i. KETRACO/P/007/2012 – Lot A for the construction of 400KV the Lessos Tororo electricity transmission line and**

**ii. KETRACO/P/013/13 LOT B – for the extension of an existing substation at lessos.**

Aside from their values the contracts had more or less identical terms and conditions.

8. On **25<sup>th</sup> April 2016** the Respondent purported to terminate the contracts which led to a dispute between the parties. In line with **Clause 8.2** of the Contracts the dispute was referred to Arbitration. The parties appointed **Arch STANLEY KEBATHI (C.Arb)**, **Hon. Justice JOSEPH G. NYAMU (C. Arb)** and **DR. KARIUKI MUIGUA PHD (C. Arb)** as Arbitrators in the matter. Copies of the Arbitration Agreement are annexed to the Supporting Affidavit of **Miguel Angel Maseras Gutierrez** dated **27<sup>th</sup> November 2019** (Annexure **MAMG “1”**).

9. Following Arbitration the Joint Arbitrators unanimously found and held that the Respondents had breached the contracts between the parties. The Arbitral Tribunal published their Final Award dated **30<sup>th</sup> July 2019** on **26<sup>th</sup> August 2019**. The Award was made in favour of the Claimants as follows:-

**“(i) EURO 30,887,820.39 plus interest of EURO 6,477,870.77 which interest continues to attract further interest of 12% per annum from the date of the Award until payment in full.**

**(ii) Legal costs of Kshs. 102,165,744.20 and interest thereon at 12% until payment in full.**

10. In addition the Respondent was condemned to shoulder the arbitrator’s costs amounting to **Kshs. 83,520,000.00** plus administrative costs of **Kshs. 2,000,000.00**. A certified copy of the said Final Award was filed by the Claimant and was registered on **30<sup>th</sup> September 2019**. The Claimant then filed an application seeking enforcement of the Arbitrators Award. The Respondents however filed an application seeking to have the Arbitral Award set aside. I propose to deal with each application individually.

#### **i. Chamber Summons dated 20<sup>th</sup> November 2019**

11. By this application the Respondents seeks to have the Arbitral Award set aside. The Respondent submitted that the Award ought to be set aside as the same unjustly enriched the Claimant at the expense of Kenyan Taxpayers and as such said Award went against the Public Policy of Kenya. That the Award was contrary to **Article 227(1)** of the **Constitution of Kenya, 2010** which required that contracts entered into by State organs and Public entities must be utilized in a cost effective manner. That the Award was also contrary to **Article 201** of the Constitution which provided that public money be used in a prudent manner.

12. The Respondent further submitted that the Arbitral Tribunal did not treat the parties with equity as it considered only the evidence of the Claimant (**Instalaciones**) and showed open bias towards the said Respondent. As such the Respondent alleges that the hearing before the Tribunal was not fair and accordingly violated **Article 60** of the **Constitution of Kenya**.

13. On their part the Claimant submitted that his was purely a commercial dispute between contracting parties, and **was not** a matter of Public Finance. The Claimant submitted that the Award published on **26<sup>th</sup> August 2019** was final and that therefore the High Court had no jurisdiction to interfere with the same given that the parties did not reserve any right of appeal to the High Court. Finally the Claimant denied that the Award as published was against the Public Policy of Kenya.

14. **Section 35** of the **Arbitration Act 1995** provides for the circumstances under which an Arbitral Award may be set aside. **Section 35** provides as follows:-

**“(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 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 provisions 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”

15. The key question this Court has to determine is whether the Award published on 26<sup>th</sup> August 2019 went against Public Policy of Kenya. **Black’s Law Dictionary (7<sup>th</sup> Edition) 1999** defines ‘Public Policy’ as follows:-

“(1) Broadly, principles and standard regarded by the legislature as fundamental concern to the state and the whole society.

(2) More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.”

16. This concept of public policy was expounded upon by **Hon. Justice Aaron Ringera** (as he then was) in the case of **CHRIST FOR ALL NATIONS –VS- APOLLO INSURANCE CO. LTD [2002]EA** where it was held:-

“Although public policy is a most broad concept incapable of precise definition .... An award could be set aside under Section 35 (2) (b) (iii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:-

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.”

17. In **CONTINENTAL HOMES LTD –VS- SUNCOAST INVESTMENTS LTD [2018]eKLR** the Court held that:-

“In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.” [own emphasis]

18. In the case of **GLENCORE GRAIN LTD –VS- TSS GRAIN MILLERS LTD [2002]I KLR 606**, the learned Judge at page 77 held that:-

“A contract or arbitral award will be against the public policy of Kenya in my view 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. 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.” [own emphasis]

19. **KETRACO** (the Respondent) argued that the Award as published contravened Public Policy in that same was excessively high and that ‘**KETRACO**’ being a public entity ought not be compelled to pay out such a large sum to the Claimants as this would amount to a gross misuse of public funds and hence a breach of public policy which requires that tax payers money be used prudently. It is alleged that the Arbitral Award is unconscionable and that if the same is paid this would unjustly enrich the Claimants at the expense of the Kenyan taxpayers. Infact the Respondents do not mince their words in describing the Arbitral Award as “**a rip-off and plunder of scarce public, resources, nicely and intelligently packaged as an Arbitral Award.**”

20. Although the law as supported by case law permits that an Arbitral Award may be set aside in certain specified circumstances it must, however, be remembered that Courts have always upheld the concept of **finality** of Arbitral proceedings and been very reluctant to interfere

with findings and/or Awards made by Arbitral Tribunals especially where the right of Appeal has not been reserved.

21. In ANNE MUMBI HINGA –VS- VICTORIA NJOKI GATHARA [2009]eKLR it was held that:-

**“One of the grounds relied on to invite the superior courts intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State’s powers are exercised – see the case of *Deutsche Schachtbau vs Shell International Petroleum & Company Ltd (1990) 1AC 295, Court of Appeal*. There is nothing whatsoever indicating that the award before us, fell under any of the above definitions of public policy, so as to warrant a challenge under the public policy exception.**

**In the arbitration agreement there is an implied agreement between the parties to carry out the ultimate award.**

**The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled 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 the Act are wholly exclusive except where a particular provision invites the court’s intervention or facilitation.” [own emphasis]**

22. I do agree with the Claimants submission that this was purely a commercial transaction to wit a contract voluntarily entered into by two parties. This was not a matter of Public Finance. **Clause 8.2** of the contracts provided for Arbitration in the event of a dispute between the contracting parties. There has been no demonstration of a patent illegality perpetrated by the Joint Arbitrators in their conduct of the Arbitral proceedings. In the circumstances I do not agree with the Respondents allegation that the Award breached Public Policy in any way.

23. The Respondent went onto claim that the Arbitral Tribunal was biased against it and that they were not accorded a fair hearing before the said Tribunal. It is alleged that the Arbitral Tribunal relied only on documents provided by the Claimant as the basis for the Award made. The Arbitral Tribunal gave each side an opportunity to present its case. Thereafter the Tribunal carefully analysed the evidence adduced by the parties. They gave reasons for the decision reached. There was in my opinion no tangible evidence of bias against the Respondent by the Arbitral Tribunal.

24. I have carefully perused the submissions filed on behalf of the Respondent. They have carefully analyzed the evidence before the Tribunal pointing out the areas in which they felt the Arbitral Tribunal erred in its findings and / or favoured the Claimant. In effect the Respondent is inviting this Court to re-examine the evidence placed before the Arbitral Tribunal and to reach a different decision. The Respondent is asking the Court to interrogate the merits of the amounts awarded to the Claimant and to reduce the Awards. The Court declines that invitation. This is not an appeal against the decision of the Tribunal. In any event the proceedings indicate that both the Claimant and the Respondent were accorded equal opportunity to state their case before the Tribunal.

25. It has been held severally that an alleged misapprehension of evidence or an error in law is not sufficient cause to set aside an Arbitral Award and as being against Public Policy. In **COMROAD CONSTRUCTION & EQUIPMENT LIMITED –VS- IBERDROLA ENGINEERING & CONSTRUCTION COMPANY [2014]eKLR** it was held:-

**“Arbitrators are masters of the facts in disputes they are called upon to decide and it cannot, generally, be said that a misapprehension of facts by them is against Public Policy. As to the Law, the scheme of Arbitration is that an Arbitral Tribunal will sometimes fall into error but the parties will, ordinarily, have to live with such error/s for the greater good that the process brings a final close to the dispute. A line has to be drawn as to when a misapprehension of facts and error in law can be said to be unacceptable and as being contrary to Public Policy. A survey of the decision cited earlier indicates that the red line is already drawn. A misapprehension of facts or error of law in an Arbitral award can only be said to be against Public Policy if the misapprehension, or error leads to an outcome that is patently illegal or unconstitutional, or its enforcement is injurious or offensive or repugnant to general public of Kenya or inimical to the national interest of Kenya.” [own emphasis]**

26. In **NATIONAL OIL CORPORATION OF KENYA –VS- PRISKO PETROLEUM NETWORK LIMITED [2014]eKLR**, Justice F. Gikonyo held thus:-

**“... And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case *KENYA OIL COMPANY LIMITED & ANOTHER v KENYA PIPELINE COMPANY [2014] eKLR, MORAN v LLOYDS (1983) 2 ALL ER 200* and *DB SHAPRIYA & CO. v BISHINT (2003) 3 EA 404*, where there is judicial consensus that;**

**“All questions of fact are and always have been within the sole domain of the Arbitrator.....the general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator.” [own emphasis]**

27. Similarly in the case of **NYUTU AGROVET LIMITED –VS- AIRTEL NETWORKS KENYA LIMITED [2019]eKLR** it was held that:-

**“In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts’ perspective, the parties to an arbitration do not have a right to a ‘correct’ decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process. In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.” [emphasis added]**

28. This Court will not be drawn into making a determination upon the findings of fact made by the Joint Arbitrators. I find no evidence that the Award published on 26<sup>th</sup> August 2019 contravened Public Policy. The Applicant has failed to point out any patent illegality in the Arbitral Award. The fact that the Respondent does not agree with or is aggrieved by the findings of the Tribunal does not mean that the Award can be declared as being against Public Policy. In the CHRIST FOR ALL NATIONS case (supra) Hon. Justice Ringera clearly stated:-

**“... an error of fact of law or mixed fact and law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the Public Policy of Kenya. On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all ...” [own emphasis]**

I therefore find no merit in the Chamber Summons dated 20<sup>th</sup> November 2019 and I decline to set aside the Arbitral Award dated 30<sup>th</sup> July 2019 and published on 26<sup>th</sup> August 2019.

ii. **Chamber Summons dated 27<sup>th</sup> November 2019**

29. This was the application filed by the Claimant seeking for the enforcement of the Arbitral Award. It is trite law that where parties expressly agree to submit a dispute to arbitration, it is fully intended that any Award flowing from that Arbitration process will be final and binding on the parties. Section 10 of the Arbitration Act provides that:-

**“Except as provided in this Act, no Court shall intervene in matters governed by this Act.” [own emphasis]**

30. In the case of ANNE MUMBI HINGA –VS- VICTORIA NJOKI GATHARA [supra] the Court of Appeal held as follows:-

**“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act”.**

31. In NYUTU AGROVET LIMITED –VS- AIRTEL NETWORKS LIMITED [2015]eKLR this position was reiterated thus:-

**“Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here.**

**When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference is all about.”**

32. Having declined to set aside the Award I am obliged to allow the application for enforcement of the same.

33. Finally this Court makes the following orders:-

i. **The Chamber Summons dated 20<sup>th</sup> November 2019 is hereby dismissed in its entirety.**

ii. **The Chamber Summons dated 27<sup>th</sup> November 2019 is hereby allowed as prayed.**

iii. **Costs of both Applications are awarded to the Claimant.**

Dated in Nairobi this 12<sup>TH</sup> day of FEBRUARY, 2021.

.....

MAUREEN A. ODERO

**JUDGE**