



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS NO. E653 OF 2019

JAMBO BISCUITS(K) LIMITED.....1ST APPLICANT

TRIUMPH DEVELOPMENT LIMITED.....2ND APPLICANT

KILIMANJARO FOODS LIMITED.....3RD APPLICANT

SACHIN DAWA.....4TH APPLICANT

VERSUS

JAMBO EAST AFRICA LIMITED.....1ST RESPONDENT

CATALYST BRITANIA BRANDS LIMITED.....2ND RESPONDENT

HARIT SHETH ADVOCATES.....3RD RESPONDENT

COULSON HARNEY ADVOCATES4TH RESPONDENT

RULING

1. The matter herein is twinned in that the court is determining two applications simultaneously. The first to be filed is a Chambers Summons application dated 4th May, 2020 by counsel for the Applicants seeking the enforcement and recognition of an international arbitral award. Prior to the filing of the Chamber summons, the Applicants filed a Notice of Filing of Partial Award dated 20th December, 2019 and Notice of Filing of Final Award dated 10th March, 2020.

2. The Second application is by the Respondents vide Chamber Summons dated 13th May, 2020. The main prayers are that the arbitral award comprising the partial award dated 14th November, 2019 and the Final Award dated 27th February, 2020 given and made by the Hon. Mr. Oba Nsugbe in LCIA Arbitration No. 173709 between the Applicants and the 1st and 2nd Respondents be set aside and that the cost of the application be borne by the 1st and 2nd Respondents.

Application dated 4th May, 2020 for recognition of the arbitral award.

3. The Chamber Summons application dated 4th May, 2020 is filed by **Jambo East Africa Limited** and Catalyst **Britania Brands Limited** hereinafter the Applicants. It is brought under Article 159 (2)(c) of the Constitution of Kenya, 2010, Section 36 of the Arbitration Act, 1995, Rules 4(2), 6 and 9 of the Arbitration Rules 1997, Section 1A, 1B and 3A of the Civil Procedure Act, Order 46 Rule 18 of the Civil Procedure Rules, 2010 and the inherent powers of the Court. The prayers sought are that:

a. The partial arbitral award dated 4th November, 2019 as read together with the final arbitral award dated 27th February, 2020 (together the Arbitral Award) delivered by Oba Nsugbe, QC, SAN, (sole arbitrator in LCIA Arbitration No. 173709 between the Applicants and the Respondents be recognized as a judgment of this Honourable Court and enforced as a decree of this Honourable Court.

b. Cost of this application be borne by the Respondents.

4. The application is supported by the grounds on the face of it and the Supporting Affidavit of **Paul Kavuma** sworn on 4th May, 2020. It is averred that the Applicants are part of the Catalyst Group of Companies (the Group) made up of several companies including:
- a. Catalyst Principles Partners LLC (CPP), a private equity fund manager incorporated in the Republic of Mauritius;
 - b. Catalyst Manager II Limited (Catalyst Advisor Manager II), a Private Equity Manager incorporated in the Republic of Mauritius;
 - c. Catalyst Management Services Limited, an advisor to CPP and Catalyst Manager II incorporated in the Republic of Kenya (Catalyst Advisor); and
 - d. Catalyst Fund I LLC and Catalyst Fund II LP, Eastern African Focused Private Equity Funds managed by CPP and Catalyst Manager II respectively.
5. That Catalyst manager II has a contractual agreement with Catalyst Fund II LP (The Fund) whereby it provided management services to the fund and makes investment decisions on behalf of the Fund; the fund being one of the investments arms through which the Catalyst Group of Companies makes its investments.
6. That in this case, the Applicants are incorporated in Kenya with the 1st Applicant (Jambo East Africa Limited) as special purpose vehicles for the purpose of acquisition of the 1st Respondents' biscuit manufacturing business (The Business) and specific assets owned by the 1st, 2nd and 3rd Respondents (The transactions) by way of a transfer of a business as a going concern. The fund invested in the business through the Applicants and the Applicants are indirect subsidiaries of the fund.
7. It is averred that the Applicants and the Respondents entered into a Business Transfer Agreement (the Agreement) dated 24th June, 2016 wherein the Respondents agreed to sell and transfer their business to the Applicants as a going concern (The Transaction) on the terms and conditions set out in the agreement annexed to the instant affidavit.
8. That it was agreed by the parties to the agreement that any dispute arising therefrom would be referred to arbitration under the London Court of International Arbitration (LCIA) Rules. The terms for such arbitration were clearly spelt out under Clause 32 of the Agreement which the court needs not duplicate.
9. Further, the transaction was completed on 31st December, 2016 with purchase price paid less sum of Kshs. 281,579,196 as provided in the deed of valuation dated 1st January, 2017 which was held in the Escrow so as to secure the warranties post completion (the retention amount). The retention amount was to be released in two tranches as follows:
- a. One hundred and thirty-one million, five hundred and seventy-nine thousand, one hundred and ninety-six (Kes. 131,579,196) less the amounts payable within five (5) Business Days after the expiry of three (3) months from the completion date; and
 - b. One hundred and fifty million (Kes 150,000,000) less the amounts payable within five (5) Business Days after the expiry of six (6) months from the completion date.
8. It is averred that after completion, the Applicants found that the Respondents not only made misrepresentations as to the financial health of the business but also breached their pre-completion obligations and warranties under the Agreement. On this basis, the Applicants, on 31 March, 2017 issued the Respondents with a notice of claim for the breaches of obligations and warranties. The effect of this notice was that the Retention Amount was not payable to the Respondents.
9. That on 3rd August, 2017, the Respondents referred the dispute to arbitration under the LCIA Rules, seeking the release of the Retention Amount. The Respondents filed a request for arbitration on 3rd August, 2017 and thereafter filed their Statement of Case on 2nd October.
10. On their part, the Applicants filed their response to the Request for Arbitration on 1st September, 2017 and thereafter filed their statement of defence and Cross-claim on 30th November, 2017 disputing the Respondents entitlement to the Retention Amount and made a cross-claim seeking damages, interest and costs for breach of warranties and misrepresentation.
11. The Respondents filed a Reply and Defence to Cross-claim on 15th January, 2018 to which the Applicants responded on 2nd March, 2018. The Respondent's subsequently amended their Reply to the Defence to Cross-Claim on 4th September, 2018 effectively admitting to the breaches of warranties and misrepresentations claimed by the Applicants.
12. The Arbitral proceedings were conducted under the LCIA Rules and Partial Award was delivered on 14 November, 2019. The Partial Arbitral Award conclusively determined all of the substantive issues in dispute, on their merits, save the issue of costs which, upon the request of both the Applicants' and Respondents' counsel, was reserved for later consideration.
13. The Sole Arbitrator's orders in the Partial Arbitral Award were THAT:
- a. The Respondents procure the release of the Retention Amount to the Applicants within 28 days of the Final Award on costs to follow the Partial Award;

b. The Respondents to pay damages in favour of the Applicants in the sum of Kes 1,073,465,000 and

c. The Respondents to pay interest on the sum in (b) above at the rate of 12% per annum assessed at KES 394,927,773.50.

14. The Applicants also issued a release notice to Harith Sheth Advocates and Bowmans Advocates (hereinafter referred to as the Escrow Agents) on 20th January, 2020 seeking the release of the Retention Amount as ordered by the Arbitrator (the 1st Release Notice). The Escrow Agents had been appointed by way of an Escrow Letter, to hold the Retention Amount on behalf of the Applicants and Respondents.

15. The Escrow letter expressly provided that it would be construed in accordance with and governed by the laws of England and Wales.

16. It is deposed that by unequivocally agreeing to the terms of the Agreement and the Escrow Letter, the provisions of English Law pertaining to the finality of partial awards and enforceability of the same thus applied and allowed the Applicant to issue the 1st Release Notice.

17. That in response, Messrs Desai, Sarvia & Pallan Advocates, acting on behalf of the Respondents wrote to the Escrow Agents on 31st January, 2020 claiming that the Final Award on costs had not been made and as such, the 28-day period envisaged in the Partial Award had not yet commenced. The Applicants were copied in the letter.

18. In good faith, and notwithstanding the aforementioned position on the finality of partial awards under English law, the Applicants opted to indulge the Respondents and not take any adverse action (s) against the Escrow Agents for failing to release the Retention Amount.

19. The final Arbitration Award on costs was delivered on 27th February, 2020 in the following terms:

a. The Respondent shall pay to the Applicants the sum of GBP 92,843.10 for the costs of the arbitration;

b. The Respondent shall pay to the Applicants the sum of USD 1,022,868.79 for the legal costs of the arbitration; and

c. The Respondents shall pay to the Applicants the sum of USD 83,754.37 and KES 31,000,000 for the other costs and expenses of the arbitration.

20. Subsequent thereto, the Applicant on 7th April, 2020 issued another release notice to the Escrow Agents seeking the release of the Retention amount (the 2nd Release Notice). As at 7th April, 2020, 38 days had already passed from the date of receipt of the of copy of the Final Award and as such, the 1st and 2nd Respondents sought the release of the Retention Amount.

21. In response, the Respondent, vide their advocates wrote to the Escrow Agents on 15th April, 2020 directing them not to release the Retention Amount on the basis that: (a) they would be filing proceedings to set aside the Partial and Final Awards; and (b) they had been served with the instant interpleader proceedings wherein the Applicant seeks the court's assistance in determining the rightful owners/beneficiaries of the Retention Amount.

22. It is therefore, alluded that from the above, it is evident that the Respondents are well aware of the delivery of the Partial and Final Awards. Nonetheless, since the delivery of the Partial and Final Awards, the Respondents HAVE NOT applied to have either Partial or Final Award set aside and/or challenged it in any way.

23. The Applicants aver that Partial Arbitral Award and the Final Arbitral Award may only be challenged or set-aside by the court of primary jurisdiction being the High Court of England and Wales pursuant to Section 37(2) of the Kenyan Arbitration Act.

24. That furthermore, under the English Arbitration Act,1996, any challenge to an arbitral award must be brought within 28 days of the date of the Award which periods lapsed on 13th December, 2020 and 28th March, 2020 for the Partial and Final Award respectively.

25. For the afore stated reasons, the Applicants in this application pray that the Award be recognized as Judgment of this court.

Reply to the application for recognition of the Award

26. The application was opposed vide an undated Replying Affidavit sworn by Nitin Dawda, the 4th Respondent and a director of the 1st, 2nd and 3rd Respondents.

27. The gist of the affidavit and therefore opposition to the application dated 4th May, 2019 is that both the Partial and the Final Awards are against public policy for the following reasons:

a. It is extremely unjust, punitive, oppressive and unfair to the Applicants and amounts to a gross miscarriage of justice;

b. It amounts to an unlawful deprivation of the Applicants of their property contrary to Article 40 of the Constitution;

c. Its effect is not only to deprive the Applicants of their property valued at over Kenya Shillings One Billion Two Hundred Million but also to further penalize and punish the same Applicants by an additional award of damages, interest and costs against them which

is far in excess of the value of that property;

d. It enables the 1st and 2nd Respondents to unjustly enrich themselves at the expense of the Applicants by allowing the 1st and 2nd Respondents not only to retain all the assets and properties sold to them by the Applicants but also to recover from the Applicants sums well in excess of the agreed purchase price for the same;

e. It completely ignores and fails to give credit for the over Kenya Shillings One Billion Two Hundred Million value of the Applicants' property which was the product and fruit of the deponent's and the 5th Applicants' lifetime of work, effort and toil and represented their entire lives' work;

f. It is a violation of the Applicants' constitutional right to fair administrative and judicial action;

g. It is injurious to the national and economic interest of Kenya as it discourages the creation of a conducive environment for investment in Kenya.

28. It is also alluded that the Award went beyond the scope of the parties' agreement and dealt with matters that were not contemplated in the agreement.

29. Additionally, that this court has jurisdiction to recognize and enforce the Award, which parties have conceded to by filing the instant application in the manner in which it was filed.

30. It is also averred that, if the court recognizes the Award, the Respondents will be greatly prejudiced because they will not only lose their assets valued at Ksh. 1,200,000,000/ but also be forced to pay amounts well in excess of Ksh. 1,6000,000,000/ as ordered in the Award.

31. That in the circumstances, it would be unjust and unfair to allow the application as a result of which it is urged that the same be dismissed.

Application to set aside the arbitral award

32. The Applicants in this application are **Jambo Biscuits (K) Limited, Triumph Development Limited, Kilimanjaro Foods Limited Nitin Dawda and Sachin Dawda** whilst the Respondents are **Jambo East Africa Limited, Catalyst Britania Brands Limited** (both applicants in the application dated 4th May,2019), **Harit Sheth Advocates and Coulson Harney Advocates**.

33. The application is predicated on the grounds on the face of it and an affidavit of Nitin Dawda who is named as the 4th Applicant on the title of the cause sworn on 13th May, 2020.

34. The 1st and 2nd Respondents aver that the award should be set aside on the same grounds enunciated in opposing the application for recognition of the Award at paragraph 27 herein above.

35. It is further alluded that the award went beyond the scope of the arbitration hence was in breach of the agreement between the parties. In addition, that the 1st and 2nd Respondents' demand the release of Escrow Funds pursuant to the award is going beyond the scope of the parties' agreement. In this regard, nothing stops the release of the funds because the 4th Respondent has agreed to the release of the same whilst the 3rd Respondent is being pressurized to do so despite the fact that the award has not been enforced or recognized as binding in Kenya and is being challenged by the Applicants.

36. That according to the 1st and 2nd Respondents, the funds should be released to Jambo Africa Limited which is a company domiciled in Mauritius as well as its Bank Account. That this implies that the funds would leave the jurisdiction of the court and will thus become unrecoverable if the award is set aside as sought. And as such, the Award would be rendered nugatory. That furthermore, the Escrow Funds are currently earning interests and the 1st and 2nd Respondents will not suffer any prejudice if the funds continue to be held by the 3rd and 4th Respondents.

Grounds of Opposition to setting aside the Award

37. In opposing the application to set aside the Award, the 1st and 2nd Respondents filed Grounds of Opposition dated 29th Mary, 2020. They are that:

a. Respectfully, this Honourable court does not have jurisdiction to hear and determine the application by virtue of the existence of an arbitration agreement between the parties which ousted the jurisdiction of this Honourable court.

b. In view of the above, this Honourable court cannot arrogate itself jurisdiction which it does not have and the Applicants cannot purport to confer upon this Honourable court the said jurisdiction.

c. In any event, the Applicants have not proven the requirements under section 35 of the Arbitration at, 1995 for this Honourable Court to grant orders setting aside the London Court of International Arbitration partial and final awards dated 14th November, 2019 and 27th February, 2020 respectively.

d. The application is therefore vexatious, devoid of merit and an abuse of this Honourable Court's processes and the same ought to be dismissed with costs.

SUBMISSIONS

38. The two applications were canvassed by way of written submissions and orally highlighting them. Each party filed two sets of submissions. With respect to the application dated 4th May, 2020 (for recognition of the Award), the Applicants were represented by Anjarwalla & Khanna LLP Advocates and Learned counsel, M/s Macharia argued the application. The parties' first set of submissions is dated 4th June, 2020 and a 2nd set titled Supplementary Written Submissions 28th September, 2020. The submissions dated 4th June, 2020 are in support of the application dated 4th May, 2020 and in opposition to the application dated 13th May, 2020. Those dated 28th September, 2020 are pursuant to a court order of 1st September, 2020 and Respondents' further submissions dated 15th September, 2020.

39. Parties in the application dated 13th May, 2020 (to set aside the Award) filed submissions dated 5th June, 2020 and Further Written Submissions dated 15th September, 2020 both of which are in opposition to the application dated 4th May, 2020 and in support of the application dated 14th May, 2020.

40. For ease of reference I shall refer to the respective submissions in the analysis and determination of the ruling. Further, I shall also deal with each application separately.

ANALYSIS AND DETERMINATION

Application dated 13th May, 2020.

41. I have deduced that the issues for determination are whether the application should be struck out as it was filed outside the limitation of time and whether this court has jurisdiction to set aside the Award.

42. On whether the application was time barred, counsel for the Applicant, Ms. Macharia submitted that the application ought to have been filed within 28 days of its reading. That having regard that the Partial Award was delivered on 14th November, 2019 and the Final Award on 27th February, 2020, the application ought to have been filed on or by 12th /13th December, 2019 and 29th March, 2020 respectively. Consequently, that there was a delay of five (5) months and about one month and three weeks respectively and so the application was time barred and ought not to be entertained.

43. Counsel for the Respondents did not specifically respond to this submission save to state that since Applicants had submitted to the jurisdiction of this court, then the application for setting aside the Award must equally be entertained. My view is that the court cannot adequately answer this question before it addresses itself to whether it has jurisdiction to set aside an international award.

Whether this court has jurisdiction to set aside an international award

44. There is no doubt from both rival parties that the Award (comprising Partial Award dated 14th November, 2019 and Final Award dated 27th February, 2020) is an International Award. This is attested by the fact that the parties to the Agreement consented that the applicable law to the proceedings shall be the law of England and Wales. This is contained under Clause 33 of the Business Transfer Agreement dated 24th June, 2016 between Jambo Biscuits (K) Limited, Triumph Development Limited, Kilimanjar Foods Limited, Nitin Dawda & Sachin Dawda on the one hand and Jambo Africa Limited (Mauritius) on the other. The Clause reads as follows:

“This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.”

45. Nevertheless, Section 3(3) of the Kenyan Arbitration Act, 1995 cements what constitutes International Arbitration as follows:

a. the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;

b. one of the following places is situated outside the state in which the parties have their places of business—

i. the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or

ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c. the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.”

46. It is submitted that, the Respondents in the application having submitted to the jurisdiction of this court, follows that the court must consider the grounds set out under Section 37 of the Kenyan Arbitration Act which are identical to those spelt out under Section 35 of the Act for setting aside an arbitral award.

47. According to the Applicants therefore, by virtue of the Respondents' filing the Application for recognition of the Award in this court, the issue of jurisdiction is rendered moot.

48. In the Further submissions, the Applicants add that both Section 35 of the Kenyan Arbitration Act (hereafter the Act) and Article 1 of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) do not expressly prohibit or strip away the jurisdiction of the courts in contracting States to determine applications for setting aside foreign awards.

49. On the part of the Respondents, the fact that in the agreement parties agreed that any dispute shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules, 2014 (LCIA Rules) and that disputes arising from the Agreement shall be governed by and construed with the law of England and Wales, automatically strips off jurisdiction of courts in contracting States.

50. It is added that these proceedings were conducted in Kenya merely to mitigate costs for parties in travelling to London, which accords with Article 16.2 of the LCIA Rules- in this case, parties applied the "*geographical convenience*" principle. In a nutshell, therefore, it is submitted that the application for setting aside the award ought to have been filed in the High Court of England and Wales.

51. It is finally submitted that the Applicants were time barred under Section 70(3) of the English Arbitration Act, 1996 to challenge the Award, 28 days having elapsed since the making of the Award.

52. The court agrees with the Applicants that there is no express provision barring this court from entertaining an application for setting aside an Award. Section 35 of the Act which deals with the setting aside of arbitral awards reads:

1. Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

2. An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

i. that a party to the arbitration agreement was under some incapacity; or

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya."

53. Again, Section 3 on interpretations defines an Award as:

" arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award"

54. It is clear that with no express definition of what constitutes either an international or domestic award, it can safely be concluded that the award referred to under Section 35 is both international and domestic. But the intrigue in this case is that the arbitration was conducted outside the jurisdiction of this court. The question thus, is whether this court can set it aside. In the case of *C v D (2007), EWHC 15* it was held thus:

"The seat of Arbitration brings in the law of that country as the curial law and it is analogous to an exclusive jurisdiction clause. Not only is there an agreement to curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, so that by agreeing to the seat, the parties agreed that any challenge to an interim or final

award is to be made by the courts of the place designated as the seat of Arbitration”

55. The above decision addresses the seat (*lex loci arbitri*) as the legal home of arbitration which determines the legal system of law to be applied in the arbitral proceedings. It is expected that parties in the agreement should agree on the law applicable in the arbitration proceedings. That law then becomes the law applicable in an application for setting aside the award. In sum, parties can only apply for the setting aside of international award in the jurisdiction of the arbitration or under the law the parties agreed governs the arbitration proceedings. In this case, parties contracted in the Agreement that the seat (juridical) of the arbitration was London and the law governing the arbitration proceedings was that of England and Wales.

56. My research in this area drives me to conclude that, it is internationally agreed that International Arbitral Awards should be set aside at the seat of arbitration. In the case of **Kundan Singh Construction Limited V Tanzania National Roads Agency [2012] Eklr**, the issue for consideration arose out of arbitration proceedings conducted in the Stockholm Chamber of Commerce in Sweden. The Applicant filed an application seeking to set aside part of the award or in the alternative, the award be remitted to the arbitrators to decide the same by applying Tanzanian law which the parties to the arbitration specifically agreed would govern the arbitral proceedings. The Respondent filed a Preliminary Objection contending that **Kenyan Courts have no jurisdiction to set-aside an International Arbitral Award. Havelock, J (as he then was) upheld the PO stating as follows:**

“Accordingly and going back to the principles enunciated in Sulamerica, I find that the law governing the substance of the dispute (the Lex Causae) is that of the United Republic of Tanzania and that the law governing the arbitration proceedings (the Lex Arbitri) is that of Sweden. Further, I find that the Contract as between the parties specified Sweden as the juridical seat of the arbitration. Obviously there is nothing to stop the parties agreeing that the seat of arbitration may be in a different national jurisdiction from that of the governing or applicable law of the Contract. In view of the transcript of the hearing proceedings in Paris, France exhibited to the Replying Affidavit of Engineer Mgani dated 22 June, 2012 as "ES 2", it seems that this is one of the rare cases where there is the third option being the Lex fori being French law. However it is also clear from the Award itself that the place and the seat of Arbitration is Stockholm, Sweden. Thus, despite the Contract applying Tanzanian law, I find and hold that the proper law of the Contract in which the arbitration is embedded is the law of Sweden which in terms of the NYC is the law of the primary jurisdiction and, to my mind, the Swedish courts are the appropriate authority under which the Applicant herein should be applying to set-aside the Award if it be so minded. That said, I have no doubt that the Applicant is correct in its submissions that Section 35 of our Arbitration Act (Cap 49, Laws of Kenya) allows and provides for the setting aside, on the grounds therein detailed, of both domestic and international awards. What the Applicant has overlooked is the application of the law which the parties themselves have chosen in relation to the arbitral proceedings and for remedies as to the challenge of the Award made thereunder. As above, I find that Sweden is the country of the primary jurisdiction in relation to these proceedings not Kenya, which only has a secondary jurisdiction role in terms of recognition and enforcement of arbitral awards. Accordingly, I uphold the Respondent's Preliminary Objection dated 22 June, 2012 and I dismiss the Applicant's Application dated 24 April, 2012 with costs to the Respondent.”

59. In **Tanzania National Roads Agency v Kundan Singh Construction Limited [2014] eKLR: Civil Appeal 38 of 2013**, was an appeal filed in the Court of Appeal against the decision of Havelock J. hereinabove. The Court of Appeal held that the Appellant had no right of appeal against the said ruling as parties had expressly agreed on the applicable laws in their arbitration agreement. It then upheld the High Court's decision that Sweden is the country of the primary jurisdiction in relation to the arbitration in this case and that Kenya only had a secondary jurisdiction in terms of recognition and enforcement of the arbitral award.

60. The rationale expressed is that parties made a choice of law which they should abide by, unless otherwise they have provided in the agreement. This does promote efficiency and convenience to the parties. Furthermore, the law that addressed the issues in the dispute is best placed to address matters arising therefrom as, in this case grounds for the setting aside. This of course promotes confidence in the Tribunal.

61. Consequently, I defer with the Applicants' submission that, because the Respondents filed the application for recognition of the award in this court, they had submitted to this court's jurisdiction to set aside the award. On the contrary, as afore stated, the parties in the agreement having agreed to the juridical seat of arbitration are bound by that law in the application for setting aside the arbitral award.

62. In the foregoing, before I pronounce myself on the final order relating to the merit of the application, it is paramount that I know address the question of whether the application was filed within time.

Whether the application dated 13th May, 2020 was filed within time, and if not which orders the court should issue.

63. In restating that the arbitral proceedings were governed by the law of England and Wales means that the Award is subject to the English Arbitration Act, 1996. Section 13 of the Act provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.

64. Section 54 of the Act provides for the date of award to be the date of delivery and/or signing in the absence of a date agreed upon by parties. Further, **Section 55** provides for notification of award to be the day when the same is served upon parties. **Section 67** of the Act provides for challenging of an arbitral award. **Sections 68 and 69** provide for challenging an arbitral award on the basis of serious irregularity and on point of law. In both instances, leave of court has to be sought.

65. Section 70 (3) of the Act provides that any application or appeal must be brought **within 28 days** of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process. However, the courts on being supplied with excusable reasons can allow applications for extension of time.

66. In **Squibb Group Ltd v Pole 2 Pole Scaffolding Ltd [2017] EWHC 2394 (TCC)**, the English Technology and Construction Court considered an application to extend time to appeal against an award and for permission to appeal on a point of law under Section 69 of the

Arbitration Act 1996. The court also considered an application to set aside a court order granting permission to enforce the award and for a stay of the application for permission to enforce.

67. The English Technology and Construction Court (TCC) refused to grant an extension of time for appealing an award and refused permission to appeal under Section 69 of the Arbitration Act 1996 (AA 1996). Applying *Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283 (Comm)* (Terna Bahrain), O'Farrell, J refused to grant the extension. While some of the delay had arisen as a result of the Applicant's failure to pay the arbitrator's fees, no explanation had been provided to excuse that delay. **The time for appealing the award ran from the date of the award, not the later date of publication. The court found that the delay of 84 days was substantial compared to the yardstick of 28 days provided for in section 70(3) of the AA 1996.** Furthermore, O'Farrell J noted that any further delay in enforcing the award would cause irreparable prejudice to the Respondent, which was a small company in comparison to the Applicant.

68. In any case, O'Farrell J found that the merits of the application were weak. Even if an extension of time was granted, it was unlikely that permission to appeal would be granted.

69. The position adopted by Warsame, J (as he then was) in *Mahinder Singh Channa vs. Nelson Muguku & Another High Court Miscellaneous Application No. 108 of 2006 [2007] eKLR* was that:

“A party to an arbitral proceeding cannot be allowed to derogate from the requirements under the Arbitration Act. When a party submits his cause of action to an arbitrator then if he wishes to challenge the decision or the award, he must approach the High Court using the correct gate or formula and non-compliance with the requirements of the Arbitration Act by a party clearly ousts the jurisdiction of the High Court. Time limit and the period for seeking the intervention of the High Court is prescribed under section 35(3) and the period is limited to 90 days after the lapse of the date on which the party received the arbitral award. If the aggrieved party does not file the application or proceedings before the High Court within the appropriate 90 days, the court has no opportunity or jurisdiction to determine the dispute. A party who fails to file his application within the 90 days and when no leave is sought and obtained, then he shall be deemed to have waived the right to object...Publication is something which is complete when the arbitrator becomes *functus officio* but so far as the time for moving under the statute is concerned, it is the notice that matters. It is wholly untenable that the time would not begin to run for a wholly indefinite period if neither side takes up the award. There it would lie in the offices of the arbitrator for months or even years and when finally taken up, the party would be able to say, the period has only just started to run and the fact that he could have had his award by walking round the corner at any moment from the date upon which he received notice of its availability cannot be held against him. Such a construction of the rule appears to be entirely unreasonable. It has never been applied and there is no reason to hold that it applies now...As the parties in this matter were aware that the award was published and this information was supplied to the applicant after it made an inquiry as to the effective date of publication of the award, the letter stating that the award had been issued cannot change the earlier factual and legal position. Any other interpretation or holding would result in dilatory tactics that would defeat the arbitral process denying it of the virtues associated with it such as speed and cost effectiveness...In this case the award was delivered to the parties on 25th August and not 16th November, 2005. The award was ready in August, 2004 and it cannot be understood why it would remain on the shelves of the arbitrator for one year and 5 months when the parties made inquiry as early as August, 2004. The position of the applicants is not tenable and it is an attempt to salvage what was lost through their own negligence and/or laxity which negligence or laxity cannot be cured by the misplaced letter of the arbitrator dated 16th December, 2005...Therefore the applicant is out of time in bringing the present application which is without doubt outside the 90 days or 3 months prescribed and/or allowed under section 35(3) of the Arbitration Act. As the application was filed contrary to the provisions of section 35(3) of the Arbitration Act, it is filed without leave and therefore the court has no jurisdiction to entertain the same.”

70. In its first arbitration-related judgment to date, the Singapore International Commercial Court has held in *BXS v BXT [2019] SGHC(I) 10* that it has no power under Singapore law to extend the time limit in Article 34(3) of the Model Law for filing an application to set aside an arbitral award. Anselmo Reyes IJ held that on its face, Article 34(3) is a written law that appears to impose a mandatory limit, which therefore circumscribed the court's power to amend time limits. The Plaintiff's application to set aside was accordingly struck out as being out of time.

71. *A v D (HCCT 52/2020)* the High Court in Hong Kong refused to grant an application to have time extended for filing an application to set aside an arbitral award noting that the Applicant had failed to do so upon the communication being done and having the window to do so between the 21st day of March, 2020 and the 28th day of August, 2020 citing the same position in *Dubai International Real Estate v Al Almadiyah Contracting and Trading [2018]HKCFI 613*.

72. In the case of *University of Nairobi v Multiscope Consultancy Engineers Limited [2020] Eklr*, Tuiyot, J. whilst grappling with whether an application to set aside the award was filed within time had this to say;

“..... although not raised by the parties, I have had to ponder why limitation of time is imposed on a setting aside application and not that for recognition or enforcement (Section 37 of The Act). And it is instructive that the UNCITRAL Model Law on International Commercial Arbitration from which our statute heavily borrows is similar in this respect. It has to come down to, again, the finality and expeditious principles of Arbitration. Arbitration is a binding dispute resolution mechanism contracted by parties. It is expected that parties will accept the answer an arbitral tribunal gives to a dispute they place before it. If, however, any party is aggrieved then it should raise its grievance at once so that it is addressed in speedy fashion that it is not inimical to expeditious disposal of the dispute. For that reason, setting aside motions are time bound.”

73. It is clear that courts world over have pronounced themselves that the obligation of a party seeking to set aside an arbitral award must strictly adhere to timelines provided by the law. The justification in the common law is as well spelt by my learned senior brother Tuiyot, J; that parties willingly subjected themselves to the arbitration proceedings and it is expected that they shall abide by the outcome of the award. There cannot be good enough reason, unless in exceptional circumstances, that if a party is not satisfied with the award, should not file the application to set aside the award within time.

74. In the present case, the Applicants sat on the Award until after 5 and close to two months respectively without seeking redress, apparently against an award they were dissatisfied with. They surely were guilty of laches. And as earlier stated, there is reason why time frame is set for applying to set aside an award. That because parties voluntarily subjected themselves to the arbitration proceedings, it is deemed they must abide by the outcome of the award.

75. The intrigue here is that the Applicants did not even seek leave for extension of time to file the application, a latitude that the law gladly allows. It follows that the application dated 13th May, 2020 having been filed out of time ought not to be entertained. Although no preliminary objection was raised to it before it was argued, the manner in which the Respondents argued it and Applicants responded to this aspect of submission was on a preliminary point of law as opposed to arguing substantive merit of the application. In the circumstances the best approach to its finality is to strike it out as opposed to dismissing it.

76. The sum total of my analysis is that the said application was not properly filed before the court the time to lodge it having elapsed. Consequently, the same is struck out with no orders as to costs.

Application dated 4th May, 2020

77. The main prayer in this application is that the Partial Arbitral Award dated 14th November, 2019 as read together with the Final Award dated 27th February, 2020 (together the Arbitral Award) delivered by Oba Nsugbe, QC, SAN 9Sole Arbitrator) in LCIA Arbitration number 173709 between the Applicants and the Respondents be recognized as a judgment of this honourable court and enforced as a decree of this honourable court. It is also prayed that the costs be borne by the Respondents.

78. Having recognized that the Award herein is international, I find that the onerous duty of this court is to determine whether this court has jurisdiction to recognize an international award and if so, whether the Applicant have satisfied the conditions for recognition and enforcement of the Award.

79. Although the rival parties have submitted to the jurisdiction of this court, it is important to highlight the applicable law. The award being International in nature is governed by the **Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958** commonly referred to as the **New York Convention**. Article I(1) provides that:

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

80. Article 111 in part reads:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.....”

81. Article 2(6) of the Kenyan Constitution provides that. **“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”** By virtue of Kenya being a signatory of the New York Convention means that the Convention is applicable in Kenya. Furthermore, Section 36(2) of the Kenyan Arbitration Act, 1995 provides that:

“An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.”

82. It follows that the application dated 4th May, 2020 is properly before this court. The Applicants only need satisfy the conditions for recognizing and enforcing the award as set out under Section 37 of the Arbitration Act, 1995.

83. Section 36 on recognition and enforcement of an award provides:

“36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

(2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish-

(a) the duly authenticated original arbitral award or duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.”

84. Grounds for refusal of recognition or enforcement contained in Section 37 are by and large similar to those for setting aside an award contained in Section 35 save for one ground. For purposes of this ruling, I find it prudent to only restate Section 37 which is relevant. It

reads:

“(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that-

(i) 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, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

vii) The making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.”

85. Article V of the New York Convention on the other hand is a replica of Section 37 of the Arbitration Act, 1995. It reads as follows:

“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

86. Applying the doctrine of reciprocity, Section 37(1)(a)(vi) of the Act which is the equivalent of Article V(1)(e) of the New York Convention recognizes the courts of "the country in which, or under the law of which" an award was made as the courts where an application to set aside or suspend an award may appropriately be made; and Section 37(2) which is equivalent of Article VI of the Convention permit a court in any other country where recognition or enforcement of the award is sought to adjourn, if it considers it proper, pending resolution of any such application.

87. In appreciating the above law, the noble thing to do is to consider the grounds on which it is argued that the Award should be set aside. It is argued that ***the Award is against public policy.***

88. Under this head, the Applicants argue that the award allowed the Respondents to unjustly enrich themselves at the Respondents' expense and further penalized them in ordering that they pay damages and costs to the Respondents. It is argued that this is demonstrated by the fact that under the Business Agreement dated 24th June, 2016 the Applicants sold their business assets to the Respondents at a cost of Kshs. 1,200,000,000/-. Under Clause 4.1.1, the business was sold as a going concern comprising the following:

- a. Goodwill
- b. Fixed assets as is
- c. the moveable assets (as is)
- d. the benefit (subject to clause15 (the Business Contract) of the Business Contracts
- e. the stock
- f. the business information
- g. the records of rights of the sellers relating to or connected with, or belonging to or required or intended for use in, the business or in the properties or which are not otherwise described in the clause 4.1 but not the items listed in clause4.4
- h. the right to carry on the business under the Business names, and
- i. the Properties.
- j. the third party rights
- k. all (if any of other assets, property promotes efficiency in International arbitration by enhancing trust of the parties in the arbitration process.

89. That under Clause 5.2.1 the purchase price of 1.2 Billion was apportioned as follows;

- Intellectual Property Rights - Ksh. 100,000/-
- Motor Vehicles - Ksh. 17,158,473/-
- Other assets - Ksh. 1,182,741,527/-

90. It is submitted that the transfer of the business after sale went on well until just before the transfer of the Escrow Funds to the Applicants, that the Respondents made a claim against the Applicants under the warranties that culminated into the Award.

91. Under the Partial Award dated 14th November, 2019 the following orders were issued:

- a. That by reason of the fact that the Claimants are in breach of their completion Obligations, the Respondents have no outstanding obligations to the Claimants in respect of the payment of the Purchase Price or any part of it.
- b. That the Respondents are entitled to the Retention Amount in diminution of their losses.
- c. The Claimants procure the release of the retention amount to the Respondents within 28 days of the Final Award on costs to follow this final Award at the request of the parties.
- d. Damages in favour of the Respondents in the sum of Ksh. 1,073,465,000/ representing the difference between the warranted value and the actual value of the business upon sale.
- e. Interest on damages of Ksh. 1,073,465,000/in the sum of Ksh. 394,927,773.50 at the rate of 13%.

92. The issue of costs was dealt with in the Final Award dated 27th February, 2020 with the following orders:

- a. The Claimants shall pay to the Respondents the sum of pounds 92,843.10 for the costs of the arbitration.
- b. the Claimants shall pay to the Respondents the sum of USD 1,022,868.79 for the legal cost of the arbitration.
- c. The Claimants shall pay to the Respondents the sum of USD 83,754.37 and Ksh. 31,000.000/ for the other costs and expenses of arbitration.

93. The Respondents blamed this on the comparative valuation methodology (CVM) adopted by the arbitrator in calculating the losses. They argued that CVM produced an absurd commercial result which is effectively a massive windfall for the Applicants and bears no relation to the actual losses that the Applicants may have suffered.

94. According to the Applicants however, the Respondents' contention that they benefitted from a windfall or that the award was punitive, unjust and commercially unreasonable has no basis whatsoever. They argued that the Respondents have not proved illegality in the Arbitral Award, shown that it is injurious to the public good or that it is wholly offensive to a reasonable informed member of the public so as to prove that it is in breach of public policy. The Applicants further argued that it is not permissible for a party to reopen the Tribunal's findings of fact or law under the guise of public policy.

95. The Applicants submitted that the following facts clearly emerge from the face of the Partial Award:

- a. the Applicants agreed to purchase the entire assets and properties of the Respondents' business at a purchase price of KES 1.2 billion. The purchase price was agreed following a due diligence exercise by the Applicants advisors on the affairs of the Respondents business. The Applicants advisors relied on financial information received from the Respondents in conducting the due diligence exercise.
- b. after completion of the transaction, the Applicants undertook a forensic investigation into the business and discovered that the Respondents had misrepresented the financial health of the business and breached their pre-completion obligations and warranties under the agreement.
- c. the Respondents admitted in their pleadings before the Arbitral Tribunal that they misrepresented the financial performance of the business prior to completion. The Arbitral Tribunal made factual findings confirming this material misrepresentation.
- d. the Arbitral Tribunal made a factual finding that the Respondents were guilty in breach of warranties and misrepresentation.
- e. the parties submitted as an issue for determination the principles and methodology for quantifying damages for the loss suffered by the Respondents. Both parties made extensive legal and factual submissions to the Arbitral Tribunal on the methodology for quantifying damages, after considering the parties contractual agreement, expert testimony, expert reports and case law on quantification of damages, the Arbitral Tribunal applied English Law (as contractually agreed by the parties and found in favour of the Applicant, holding that the damages are to be quantified based on the difference between the true value of the asset and the price paid.
- f. the Applicants note that while they provided a loss quantification expert, whose testimony was duly cross examined to provide evidence on the quantification of damage the Respondents did not provide any expert to challenge the quantification of the Applicants expert or quantify the damages to be paid to the Applicants as a result of their gross misrepresentation and fraudulent actions.
- g. after hearing and assessing witness testimony and reviewing the evidence on record, the Arbitral Tribunal made a factual finding that the true value of the business or the value received by the Applicants was only KES 126.5 million compared to KES 1.2 billion paid to the Respondents.
- h. the Arbitral Tribunal found in favour of the Applicant that the contractually agreed definition of losses also included consequential losses such as legal fees and professional costs incurred by the Applicant.

96. The Applicants argued that in view of the above factual findings of the Arbitral Tribunal against the Respondents, it was evident that their assertions that the LCIA International Arbitral Award conflicts with public policy is just a clever way of seeking to re-argue the issue of quantum of damages contrary to the express provisions of the New York Convention Arbitration Act. They therefore urged this Court to categorically reject such disingenuous conduct on the part of the Respondents by taking a firm stance in support of the principles of party autonomy and finality of arbitral awards.

97. Public policy has no precise definition due to the broadness of the concept. The Black's law Dictionary defines public Policy as follows:

“Policy: The general principles by which a government is guided in its management of public affairs.

Public Policy: Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is “contrary to public policy.”

98. In **Royal Exchange PLC v Patrick Nyaemba Tumbo [2019] eKLR Muigai, J.** noted that:

“Public Policy is a very fluid concept and encompasses different standards in society at different periods of time. However, its content can be reduced broadly to; ‘State’s notions of morality and justice.’”

99. In **Christ For All Nationals v Apollo Insurance Co. Ltd [2002] 2 EA 366 Ringera, J** (as he then was) stated as follows: -

“Although public policy is a most broad concept incapable of precise definition....an award could 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 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”

100. In **Glencore Grain Ltd v TSS Grain Millers Ltd [2002] eKLR**, it was held:

“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 clear 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 contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.”

101. Flowing from the above decisions, my opinion is that the final orders issued by the arbitral tribunal were indeed against public policy. This is so because the award violated the Respondents’ right to own property under Article 40 of the Constitution. In so holding, I find solace in the sentiments of Ogola J. in **Evangelical Mission for Africa & another v Kimani Gachuhi & another [2015] eKLR** which largely spoke to the case at hand. The judge stated as follows when determining the issue of an award that was alleged to be against public policy:

“The Award to the extent that it enriches the Respondents unjustly is against the social-economic ethos of the Republic of Kenya. The value of the land since the Agreement was entered into ten years ago has escalated beyond comparison. What was bought at Kshs.64,000,000/= could as well be Kshs,800,000,000/= now. The question that this court asks is – Was there no other way to reach an acceptable solution to both parties’ problem? As I said earlier, the spirit of arbitration is to find solutions to the parties. Both parties need not necessarily accept the decision, but even the losing party should see some sense of justice in the Award. In the case at hand, the injustice visited on the Claimants makes them justified to feel cheated out of their property, which they had paid for, and partly developed pursuant to effective possession.

Our Constitution at Article 10 thereof sets out national values which all decision makers in the country are obligated to observe while performing a public duty. Those values, when it comes to judicial officers and arbitrators must necessarily import the duty to do justice in deciding disputes. A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration.

If an Award, like the one at hand, involves a contract executed under which parties had acquiesced, and secured certain rights; under which the Claimants had build and is running an international primary school, which is to be destroyed and the pupil made destitute; under which the value of the contract subject matter has escalated beyond ten times the contract value; under which the school infrastructure is to be destroyed, and under which one party stands to be unjustly enriched and the other correspondingly made poorer; if the Award pricks the conscience of the society, and the Award cannot rationally be explained, we have to go back to the values contained in our Constitution to see if the Award can stand the test given in the Constitution.”

102. The Court quoted the Indian case of **Murlidhar Agarwal and Another – Vs – State of U.P. and Others [1974] 2 SCC 473**, in which the Indian Supreme Court observed that:

“Therefore, in our view, the phrase public policy of India, used in section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice...(page 202) Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void”.

103. My considered view is that the Arbitrator did not apply the principles of reasonableness and fairness in arriving at his decision. He did not consider that, apart from losing in terms of the value of business enterprise, he had ordered that the Respondents pay so much damages that the circumstances did not create a conducive environment for them to operate. This was tantamount to taking away the entire business altogether, thereby negating the tenets enunciated under Article 40 of the Constitution on the right to own and protect property; in this case to operate a business.

104. I have pondered to ask how the Respondents were capable of operating in circumstances that even the business they have is nowhere near the cost of the damages penalized against them. Simply stated, the arbitrator was giving a matching order to them; shut your doors and leave. Nothing could have been more unjust than that. Whilst restating the words of Ringera, J(as he then was), the award was **“Inimical to the national interest of Kenya and Contrary to justice and morality”**. It completely stripped off a conducive environment for operating a business for the Respondents, therefore restricting economic growth of the country. I cannot say more under this head.

105. The Respondents further argued *that the Arbitrator dealt with matters beyond the scope of arbitration*. They submitted that in the Partial Award, the arbitrator applied the Comparative Valuation Methodology (CVM) in assessing damages whereas this method is not mentioned anywhere in the Agreement as the agreed method for valuation of assets. They argued that there was not a single objective piece of evidence to support the award of damages based on the CVM method. As such, it was their view that the arbitrator exceeded the scope of the agreement and by extension his jurisdiction in as far as the issue was concerned.

106. In Response, the Applicants submitted that they filed expert evidence from a Mr. Ibrahim, a loss quantification expert who provided substantive justification as to why the most appropriate methodology in calculating the loss was the CVM methodology. They argued that the Respondents elected not to file any evidence whatsoever on the market value of the Business and thus the said Mr. Ibrahim's evidence remained largely contradicted.

107. A perusal of the Business Transfer Agreement does not reveal whether parties agreed on any particular method for calculating losses. From the partial award however, it appears that this issue was left to the arbitrator to make a determination on. The arbitrator was presented with two methods namely the CVM and Net Assets Valuation Methodology (NAV). After evaluating the evidence presented before him, the arbitrator determined that the appropriate methodology for quantifying the Applicants' loss was CVM and not NAV.

108. Clause 32.2 of the Business Transfer Agreement gave the arbitrator the powers to determine any dispute arising out of the contract. It states thus:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules (the Arbitration Rules), which Arbitration Rules are deemed to be incorporated by reference into this clause.”

109. Since the appropriate methodology was not agreed upon beforehand, I believe that the determination of the same was left to the arbitrator and he cannot therefore be faulted for going outside his scope by doing so.

110. However, this does not preclude the Respondents from challenging the recognition and enforcement of the resultant award if it falls within the grounds provided for under Section 37 of the Arbitration Act. Consequently, I am not satisfied that the Respondents have proved that the Arbitrator went beyond the scope of the parties' agreement.

111. It is further alleged by the Respondents that the arbitral Tribunal *dealt with issues that were beyond reference to arbitration*. The Respondents argued that the Arbitrator awarded the Applicants costs of GBP 92,843/- which was outside the scope of reference as parties agreed under Clause 32.8 of the agreement that the arbitration costs shall be shared equally between the parties. They argued that by doing so, the Arbitrator acted without jurisdiction.

112. It is not disputed that both the Partial Award dated 14th November, 2019 and the Final Award dated 27th February, 2020 which the Applicants seek to be recognized and enforced were issued by a sole arbitrator namely Oba Nsugbe QC, SAN. Clause 32.8 of the Business Transfer Agreement states as follows:

“Where there is a single arbitrator, his fees and expenses shall be borne by the Parties in equal shares and where there is a board of arbitrators, each party shall bear the fees and expenses of the arbitrator appointed by him. The fees and expenses of the umpire shall be borne by the parties in equal shares.”

113. On this, I agree with the Respondents that the arbitrator had no powers to order the Respondents to pay the arbitration costs because this issue had been agreed on by the parties in their agreement. To this end, the Final agreement dated 27th February, 2020 which specifically dealt with costs cannot be recognized and enforced in this court because the issue of costs was not contemplated for reference to arbitration.

114. I associate myself with the authority cited by the Respondents namely Kenya Sugar Research Foundation v Kenchuan Architects Ltd [2013] eKLR, where Havelock J. (as he then was) stated as follows:

“In determining the role of an Arbitrator, Mustill & Boyd's Commercial Arbitration 2nd Edition at page 641 and Halsburys Laws of England Vol. 11 4th Edition Paragraph 622, offer some critical analysis and guidance as the learned authors state that:

“An Arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialized branch of law of agency. (Emphasis added). He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from the Contract amounts not only to a manifest disregard to his authority or misconduct on his part but may be tantamount to a malafide action.

In Associated Engineering Co v Government of Andhra Pradesh (1991) 4 SCC 93 (AIR 1992 Sc. 232), the Supreme Court of India held that:

“1. The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to Arbitrate in terms of the contract. He has no power apart from what the parties had given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

2. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part but it may be tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.”

115. Consequently, in view of the foregoing, the court declines to recognize the Award comprising both Partial and Final Awards. What this means is that the application dated 4th May, 2020 is dismissed with each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD MARCH, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Macharia and Mr. Ikoha for the Applicants.
2. Mr. Sarvia for the Respondents.