REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. E113 OF 2020

BETWEEN

LALJI MEGHJI PATEL & COMPANY LIMITED.....APPLICANT

VERSUS

PRESBYTERIAN FOUNDATION.....RESPONDENT

RULING

1. The **Ruling** herein relates to a **Chamber Summons** application dated **6th July, 2020**, brought under the provisions of **Section 35** of the **Arbitration Act, 1995, Rule 7** and **11** of the **Arbitration Rules 1997** and all other enabling provisions of the law.

2. The Applicant is seeking for orders: -

a) Spent;

b) Pending the hearing and determination of this application, the honourable court be pleased to stay recognition and enforcement of arbitral ward published by Arch. Julius M.F Mutunga on 6th April, 2020 and any consequential orders or directions arising therefrom;

c) This Honourable court be pleased to set aside the Arbitral award published by Arch. Julius M.F. Mutunga on 6th April 2020;

d) In the alternative, to prayer 3 above, this Honourable court be pleased to make such further Orders and directions as it may deem fit respect to all or part of the Arbitral Award published by Arch. Julius M.F Mutunga on 6th April,2020 including but limited to remitting the same for corrective measure and/or reconsideration by the Arbitrator so as to eliminate the grounds for setting aside the award;

e) The costs of this application be provided for.

3. The application is premised on the grounds on its face and an **affidavit** of even date, sworn by the Applicant's Director, **Parbat Premiji Patel**. He deponed briefly that, on **19th January, 2012**, the parties entered into a contract for construction of several blocks of apartments on **L.R. No.MN/1/11518 Bamburi Beach Mombasa**. In the course of the contract execution, the Respondent delayed in making payment to the Applicant as agreed in the contract, which resulted to contractual claims, by the Applicant. However, when parties could not agree on the said claims, the Applicant suspended works on the site as per the terms of the contract. The Respondent never responded to the claims and consequently, the Applicant filed **Mombasa HCCC No.85 of 2017** but the court referred the matter arbitration in accordance to **clause 45.1** of the contract. Its noteworthy that the arbitrator after considering the evidence presented before him the Arbitrator made an award on **31st January, 2020**, which was later published on **6th April, 2020**.

4. The Applicant now avers that it is dissatisfied with the said Arbitral Award and claims that the same was made in contravention of the law and constitutes an illegality. Therefore, the Applicant seeks the arbitrator's award to be set-aside and/or remitted for correction and reconsideration by the Arbitrator for inter alia, reasons that:

a) The award, proceedings and reasons for the decision displays lack of impartiality, unfairness and bias on the part of the Arbitrator which placed the Applicant at a disadvantage and incapacity contrary to Section 35(2) (a) (i) of the Arbitration Act.

b) The award dealt with a dispute not contemplated by and not falling within the terms of reference to arbitration contrary to Section 35(2)(a)(iv) of the Arbitration Act.

c) The Arbitrator went beyond the scope of the reference to arbitration contrary to Section 35(2)(a) (iv)of the Arbitration.

d) The award is in conflict with public policy contrary to Section 35(2) of the Arbitration Act.

e) The award has decided upon matters not referred to arbitration contrary to Section 46 rule 14(a) of the Civil Procedure Rules.

f) The award is imperfect in form and contains errors.

g) That the award left undetermined matter referred to arbitration and determined other matter not referred to arbitration contrary to Order 46 Rule 15 (1)(a) of the Civil procedure Rules.

h) Part of the award is so indefinite as to be incapable of taking effect contrary to order 46 rule 15(1)(b) of the Civil Procedure rule.

5. The Applicant avers that the Arbitrator is guilty of misconduct contrary to **Order 45 rule 16(1) (a)** of the **Civil Procedure Rules** as read together with Section 19 of the Arbitration Act, for disregarding and striking out credible and admissible evidence presented to him by the Applicant. In that sense, the Applicant laments that it was denied a right to a fair hearing and by the arbitrators doings, the Respondent was illegally relieved from its statutory obligation to issue the Applicant with a withholding certificate upon retaining withholding tax from their payments.

6. The Applicant states that the Arbitrator is also guilty of misconduct by failing to appreciate the effects of **Section 2(1)** of the **Evidence Act** on arbitration proceedings, which exclude the strict rules of evidence from arbitration proceedings.

7. It is averred that the Respondent wilfully misled, deceived and fraudulently concealed matters which ought to have been disclosed contrary to **Order 46 rule 16(1) (b)** of the **Civil Procedure Rules**.

8. It is the Applicant's case that the Respondent has attempted to enforce the award in a manner that is contrary **to Section 36** and **37** of the **Arbitration Act as read with Rule 4(1)** of the **Arbitration Rules and the Civil Procedure Rules** by attempting to forcefully enter the site with the aid of goons without any court order.

9. It is also the Applicant's case that the Arbitrator has essentially brought the relationship between the parties to an end by ordering the Applicant to return the material in its possession to the site and additionally directing her to hand over possessions of the site. In so doing, the Applicant states that the arbritrator descended to the scene of re-writing the agreement between the parties and consequently chewed what was meant to be suspension of the contract into a termination of contract.

The Response.

10. The application was opposed through a Replying Affidavit sworn on **23rd October, 2020** by the Respondent's Legal Officer, **Grace Gichuhi**. She deponed that the arbitral proceedings were heard without any objection from the Applicant herein and that the tribunal even visited the site in the course of the said hearing. It then discovered what the Applicant actually admitted, that it had removed the Respondent's materials, enumerated in the list dated **11th October, 2020** and valued at Kshs.59,076,578.00 from the site without authority.

11. Following the admission by the Applicant, the tribunal made an order and directed that the Applicant hands over the Respondent's materials within 14 days from **6th April, 2020** and then handover the site to the Respondent which has not been complied with to date. According to the Respondent, the Applicant has therefore not approached this Court with clean hands.

12. The deponent further deposited that on two occasions between the period of **6th April, 2020** and **19th April, 2020** the Applicant abandoned the site hence exposing it to vandalism. The said vandalism was however reported at the Bamburi Police Station vide **OB Report No.08/19/4/2020**.

13. It is the Respondent's further case that under paragraph 484 of the Arbitral Award, the Applicant was availed an opportunity to seek any interpretation, computation and clarification of the award within the permitted period but this was never done. On **21st August, 2020** the Respondent then applied for the arbitral award to be recognized and enforced by this court, and served the same upon the Applicant on **28th August, 2020**.

14. Therefore, it is the Respondent's case that the instant Application should therefore be dismissed since the Applicant has not demonstrated, inter alia, that;

a) the award and reasons for the decision displays partiality, unfairness, and bias on the part of the Arbitrator so as to place the Applicant at a disadvantage and incapacity contrary to Section 35(2)(a)(i) of the Arbitration Act;

b) that the award deals with dispute not contemplated by and failing within the reference to arbitration and/or went beyond the scope of reference contrary to Section 35(2)(a)(iv) of the Arbitration Act;

c) the award is in conflict with public policy contrary to Section 35(2)(b)(ii) of the Arbitration Act;

d) there was an error apparent on the face of the record;

e) the award left undetermined matters referred to the tribunal and only dealt with other matters that had not been referred to it contrary to Order 46 Rule 15 (1)(a) of the Civil Procedure Rules;

f) the part of the award relating to possession of the site is indefinite and incapable of taking effect contrary to Order 46 Rule 15(1)(b) of the Civil Procedure Rules; and

g) how the Respondent fraudulently concealed matters which ought to have been disclosed.

15. The parties agreed to dispose of the application by way of written submissions with the claimant filing its submissions and list of authorities on **2nd December, 2020,** while the Respondent filed theirs on **20th January, 2021**. The summary of those submissions is as follow;

Submissions

16. **Mr Osundwa,** Learned Counsel for the Applicant reiterated the contents of the Applicant 's **Supporting Affidavit** and submitted that a simple reading of the award shows that the amounts the Applicant was ordered to pay plus interest is contrary to public policy. He termed the award to be inconsistent with the constitution and any other written law. The Counsel relied on the case of **Christ for all Nations –vs- Apollo Insurance Co. Ltd.(2002) E.A 366**, where the Court stated that an award could be set aside under **Section 35(2)(b)(ii)** of the **Arbitration Act** as being inconsistent with the public policy if it is inconsistent with the Constitution of Kenya or to any other written law or contrary to justice or morality

17. The learned Counsel argued that the instant award is illegal and encourages unjust enrichment on part of the Respondent as it purported to amend the law on income tax by relieving the Respondent its statutory obligation to generate and issue withholding tax certificates upon retaining withholding tax from the Applicant 's payments.

18. It is **Mr. Osundwa's** submissions that the Applicant was denied a right to a fair hearing when the Arbitrator unilaterally struck out credible and admissible evidence which were suspension notices and correspondence between and among the parties as well as the project consultants.

19. Counsel further submitted that there was no logical basis as to why the Applicant was required to forfeit the monies which were used for the purpose for which they were paid for, in favour of the Respondent. In **Mr. Osundwa's** view there was fraudulent concealment which misled the Arbitrator to believe that the payment received by the Applicant constituted all pending interest payment when on the contrary there were outstanding interest payment to be settled by the Respondent as at the time the dispute was referred to arbitration.

20. On the other hand, **Mr. Mbaka**, Counsel for the Respondent as well reiterated the contents of the Respondent's **Replying Affidavit** and submitted that no evidence had been produced by the Applicant to demonstrate that the Arbitrator was either not impartial, involved in any fraud, was in conflict of public policy or that the award dealt with a dispute that had not been contemplated by the agreement between the parties or beyond the scope of the reference.

21. The learned Counsel submitted that Courts should facilitate the principle of finality of arbitration by limitation of judicial intervention, since interference of the awards is a negation of the legislative intent of the Arbitration Act. Nevertheless, the grounds for setting aside/challenging an award are set out in ***Section 35*** of the **Arbitration Act** and the Applicant needs to provide this Court with acceptable evidence that the award ought to be set-aside. Counsel invited the court to consider the cases of **Nyutu Agrovet Limited –vs- Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-vs-Kenya Branch (Interested Party) [2019] eKLR**, where the Court stated thus:-

"… that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the Arbitrators' award shall be final, it can be taken that as long as the given award subsists, it is theirs."

Determination

22. I have carefully considered the application, the affidavits in support and in opposition and submissions by the parties. I find that the main issue for determination is whether the Applicant has made out a case for setting aside the Arbitral Award as provided for under **Section 35** of the **Arbitration Act** which stipulates 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 Sub-Sections (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.

3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under Section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other Action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

23. The need for finality in an arbitral award is coded under **Section 32A of the Arbitration Act** which provides that the arbitral award is final and binding upon parties to it and no recourse is available against the award otherwise than in the manner provided by the Act. In the spirit of the statute, the courts are thus reluctant and very cautious when called upon to interfere in the outcome of arbitration proceedings. In the case of **Mahican Investments Limited & 3 Others –vs- Giovanni Gaida & Others [2005]eKLR,** P. J Ransley J held as follows:

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

24. To have an arbitral award set aside by the High Court, a party must demonstrate and prove to the satisfaction of the court at least one of the grounds stipulated under **Section 35** of the **Arbitration Act**.

25. In the instant case, the Applicant avers that the arbitral award contains decisions on matters beyond the scope of the reference to arbitration, and further that the impartiality on the part of the Arbitrator placed it at a disadvantage and incapacity. The Applicant view the award to be in conflict with public policy and decided upon matters not referred to arbitration.

26. I will consider the concerns by the Applicant in the order articulated under paragraph (25) above. And therefore begin on addressing;

Whether the arbitrator dealt with Matters beyond the scope of the reference to arbitration

27. As earlier indicted, the Applicant's claim is that the arbitral award contains decisions on matters beyond the scope of the reference to arbitration. This is so because, according to the Applicant, the Arbitrator ordered it to return materials in its possession to the Respondent whilst the contract had not been terminated but had merely been suspended. Further, the Arbitrator ordered the handing over of the site to the Respondent whilst the scope of arbitration only related to parties entitlements and claims following the suspension of works.

28. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Court of Appeal in the case of **Synergy Credit Limited –vs- Cape Holdings Limited, NRB CA Civil Appeal No.71 of 2016 [2020] eKLR,** observed as follows:

"In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in Ministry of Defence of the

Islamic Republic of Iran v. Gould, Inc. (supra), the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings."

29. It is therefore important when determining whether the Arbitrator in the instant case went beyond the matters under reference, to examine terms of the Agreement between the parties in relation to arbitration which is contained at Clause 45.2 of the agreement. Part of the agreement between the parties stipulates as follows:

45.1 In case any dispute or difference arises between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, such a dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty (30) days of the Notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties…

45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith ,including any matter or thing left by this contract to the discretion of the architect, or the withholding by the Architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to termination of contract.

45.3 Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue-giving rise to the dispute.

45.4 Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without them.

30. To my mind, by virtue of the Agreement, the Arbitrator was given the power by the parties herein to deal with any matters in dispute as between them, including disputes in relation to the nature of the agreement between the parties and such other matters as the Arbitrator saw fit to deal with under the Agreement. In my view, the dispute herein concerned the interpretation of Clause 29 of the Agreement on the suspension of works by a contractor and the same falls squarely within the purview of the Arbitration Clause.

31. However, the Respondent through the statement of defence and counter-claim averred that the claimant was very slow in execution of the works without any contractual reasons and eventually abandoned the site, withdrew labour, equipment, and materials that had already been paid for contrary to sub-clause 34.13 of the agreement. Further, the Respondent averred that the Applicant was in breach of contract for failing to adhere to timelines agreed for completion of the project.

32. At this juncture, my view is that the determination of the identified issue is limited to establishing whether the matters in dispute were well within the purview of the arbitrator. My finding is in the affirmative. If this Court was to make a finding as proposed by the Applicant on whether the dispute between the parties was one of suspension of works by contractor or on completion of the whole contract, the same would be tantamount to an appeal of the arbitral award which under the provisions of Sections 10 and 39 of the Arbitration Act, this Court has no power to do so. See the case of **Allan Michael Gilham & Anor –vs- Bel Air Investments Ltd [2013] eKLR.** The application cannot therefore succeed on this front. That finding leads me to the second issue that has been raised by the Applicant, which is;

Whether the alleged lack of impartiality on the part of the Arbitrator placed the Applicant at a disadvantage and incapacity

33. I will begin by considerig the case of **Dorothy Seyanoi Moschioni –vs- Andrew Stuart & Another [2014] eKLR**, wherein the Court had the occasion to deal with this particular issue. **Gikonyo J** held as follows;

"I would imagine that, incapacity in the sense of Section 35 of the Arbitration Act would include the state of being a minor or of unsound mind or such other physical incapacity which is recognized by law as disabling or depriving legal capacity. I do not think, therefore, the incapacity envisioned under Section 35 of the Act would include difficult situations or circumstances that a person finds himself or herself in..."

34. In view of this, **Section 35** of the **Arbitration Act** uses very specific words, that is ***" that a party to the arbitration agreement was under some incapacity".*** Thus, it is clear that the capacity in law refers to the ability of a contracting party to enter into legally binding relations. But not difficult situations that a party might face. If the court find that a party does not have the capacity in terms of Section 35, then subsequent contracts may be invalidated.

35. In the circumstances of the instant case, it has not been shown that the Applicant suffered incapacity by virtue of being of unsound mind and or being under the age of majority. What I understand to be the Applicant's contention is that it faced some difficulties but whatever the case may be difficulties cannot be construed to be incapacity as I have explained herein above. Accordingly, the ground alleging incapacity fails and is hereby rejected. I will now proceed to the root issue.

Whether the award was in conflict with public policy

36. The Applicant averred that the Arbitrator was enjoined by **Section 19** of the **Arbitration Act** to treat the parties "with equality" and to give each party a fair and reasonable opportunity to present its case. However, on **9.10.2019**, the Arbitrator issued orders for direction No.7, which totally disregarded and struck out credible and admissible evidence in the form of exchanges of correspondence between the parties and project consultants. The evidence, according to the Applicant was crucial in helping the tribunal arrive at a reasoned determination. The Applicant further faulted the Arbitrator and stated that he refused to consider and refer to witness statements and other documentary evidence that had been presented by the Applicant. He (the Arbitrator) also granted the Respondent an unfair advantage by finding that the Applicant

was in breach of the contract by failing to finance the project contrary to Clause 3.4 of the contract which vested that obligation upon the Respondent instead.

37. I have considered those arguments by Applicant, especially the allegation that in reaching his award, the arbitrator disregarded credible evidence which was suspension notices and correspondences between the parties inter se, and among the project consultants. This way, the Applicant submitted that they were denied a right to fair hearing. Having done so, I arrive at the conclusion that the arbitrator confined himself and the pleadings placed before him to the rules of evidence which is not the practice in arbitration proceedings.

38. The above findings are buttressed with reference to **Section 2(1)** of the **Kenya Evidence Act,** which provides as follows:-

> ***"This Act shall apply to all judicial proceedings in or before any court other than a Kadhis court, but not to proceedings before an arbitrator"*** *(underlining added)*

39. This is the position that has been followed by courts including the court in the case of **Gooodison Sixty One School Limited –vs- Symbion Kenya Limited [2017] eKLR,** where it was stated thus:-

> ***"24. A word in respect of the last principle. In court litigation, the law of evidence – also known as the rules of evidence – which encompasses the rules and legal principles that govern the proof of facts in a legal proceeding, the quantum, quality, and type of proof needed to prevail in litigation, is paramount. In arbitration, strict application of the rules of evidence is obviated. Section 2(1) of the Kenya Evidence Act provides.***
>
> ***"This Act shall apply to all judicial proceedings in or before any court other than a Kadhis court, but not to proceedings before an arbitrator" (underlining added)***
>
> ***Any hard-boiled litigation lawyer would find it intolerable to proceed with a hearing whose parameters are not circumscribed by the law of evidence. Such a trial could well be labelled unconstitutional for not providing adequate safeguards to an involved party, and that is understandable in a normal litigation. But this is one of the distinctions that underscore the difference in approach to dispute resolution between arbitration and litigation, and also the reason that any person can be an arbitrator who is able to abide by the rules of natural justice."***

40. There is nowhere in the Arbitration Act where the procedure to be followed by an arbitrator on admissibility of evidence is provided for. It is expected that before the hearing begins the arbitrator as the sole Judge should come up with the rules and procedures to govern the arbitration proceedings with regard to the quality and quantity of evidence to be presented before him/her or in the alternative, let the parties to choose rules of procedure to guide them during the hearing. Nevertheless, the arbitrator is expected to apply the principles of natural Justice over and during the hearing.

41. In weighing the circumstances of the present case, there is no evidence that the arbitrator gave the parties an opportunity to come up with the rules of procedure to guide them during hearing and/or that the arbitrator settled on some rules and procedures of presenting evidence that was prior communicated to the parties so as to guide him during the hearing.

42. In my view, it was a trial by ambush for the Applicant to be faced with an objection on admissibility of the documents which are described to be marked as "on a without prejudice basis" when he (the Applicant) expected that without any set rules of procedure, those documents would be admitted in evidence. At paragraph 41 of the award, the Arbitrator directed that all documents marked "on a without prejudice basis" should not be relied on and at paragraph 230 and 231, the Arbitrator refused to rely on suspension of works notice issued by the Applicant on 10.10.2014.

43. To this end, I wish to reiterate that unless the parties had agreed to be guided by the **Rules of Evidence Act, Cap 80**, which provides that documents made on a without prejudice basis are not to be admitted in evidence, the arbitrator was duty bound to admit every piece of evidence presented before him and weigh its probative value. Secondly, it is the finding of this court that it was against the rules of natural justice for the arbitrator to reach a conclusion of not relying on those documents without giving the parties a right to reply.

44. The above finding then leads me to the conclusion that the Applicants right to a fair hearing was violated and in the circumstances the award was inconsistent with the provisions of **Section 2(1)** of the **Evidence Act** by confining the evidentiary threshold to the rules in the law of Evidence. Had the arbitrator considered that piece of evidence, he may or may not have reached a different finding but the underscore is that he should have considered every bit of evidence presented before him unless parties had agreed otherwise.

The last issue for determination is on **Whether there was misconduct on the part of the arbitrator**

45. On this issue, I find guidance on the Court of Appeal case of **Nyangau-vs- Nyakwara (1985)eKLR,** adopting the decision in **Williams –vs-Wallis & Cox [1914] 2 KB 478,** wherein Lush J, stated that: -

> ***"Misconduct is not necessarily personal misconduct. If an Arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, "misconduct" in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside"***

46. Further, in the case of **Kenya Pipeline Company Limited –vs- Kenya Oil Company Limited & Another [2015] eKLR,** the Court held thus:

" As such it is clear that the party alleging bias has the onus to prove it. The allegations should be supported by cogent proof either by direct evidence or must be clearly inferred from a set of facts".

47. I have read through the arbitral award that has been furnished to this Court, even though a record of the arbitral proceedings has not been furnished to this Court. I note that an interesting finding in that award is at paragraph 109 wherein the arbitrator makes a finding that it was the responsibility of the claimant to finance the works progressively and further that the contractor was expected to have financial capacity to ensure works are carried out regularly and diligently. In reaching this conclusion, the arbitrator was guided by **Clause 16.0**, on the performance bond of the agreement which reads as follows:-

" that before commencing works the contractor shall provide one surety who must be an established bank or insurance company to the approval of the employer…for the due performance of the contract until the certified date of practical completion"

48. Any reasonable person in the arbitrator's position can clearly point out that the arbitrator did not give due regard to clauses 3.4 and Clause 34.5 of the agreement which provides on the obligations of employer and payments respectively. On the obligations of the employer, Clause 3.4 of the agreement provides:

"Make adequate financial arrangements to ensure that all payments to the contract under these conditions are made within the periods and in the manner stipulated in the contract and shall provide such evidence to the contractor on request."

49. Further, on payment, **Clause 34.5** of the agreement provides:

"the contractor shall, on presenting any interim payment certificate to the employer, be entitled to payment therefore within fourteen days from presentation"

50**.** Before I discuss the above two Clauses, I find it necessary to go through a persuasive excerpt in the case of ***Associated Engineering Co. – vs- Government of Andhra Pradesh (1991) 4 SCC 93 (AIR 1992 Sc. 232),*** wherein 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 vitiated the award."

51. In as much as I agree with the finding of the arbitrator that the contractor was expected to finance the project, a scrutiny of the two Clauses as duplicated in the paragraph above, the contractor was expected to be paid for work done and material on site and it was the responsibility of Respondent to pay make interim payment on certificate presented by the Applicant within 14 days. Additionally, in the same agreement, at **Clause 34.7** of the agreement provides as follows:-

"The payment of interest for late payment of certified sums shall not relieve the Employer from his obligation to honour payment certificates when due."

52. On the part of the Arbitrator at **paragraph 109** of the award, his finding is as follows:

"…the Respondent's delay in making payments on certificates did not affect the claimant's ability to complete the works within the contract completion date as it was their responsibility to finance the works progressively as was provided in the contract as outlined here before."

53. Further**,** at **paragraph 320** of the award, the arbitrator held thus:-

"this issue provided in the contract and the contractor was expected to finance the project and get paid for work done and or materials on site"

54. In my view, and from those two excerpts, the Arbitrator rejected and/or lightly interpreted the **provision 34.7** of the **agreement** by failing to appreciate that the Respondent had an obligation to make the interim payments on certificates within 14 days. The arbitrator also did not appreciate that the interest for late payment of certified sum did not relieve the Respondent from its obligation to honour payment of certificates when due.

55. In the circumstances, it is my finding that the arbitrator failed to consider the terms of the agreement by striking a balance between the

Applicant's duty to perform and complete the project within the stipulated period of time and the Respondent's duty to pay the interim certificates within 14 days. Paragraph 320(e) of the award, was therefore not the correct interpretation of the intendment of the parties. It is my view that the delays by the Respondent in financing the project had a negative impact on the rate of completion of works, and therefore it was improper for the Applicant to be solely blamed for the delay in the completion of the project.

56**.** In the end, it is my finding that;-

> ***a) the Arbitrator reached an unfair and a partial finding which guided his conclusion that the Applicant was in breach of the contract by refusing and/or failing to complete the project within the contract period.***
>
> ***b) Further, that the arbitrator strictly applied the strict rules of evidence to arbitration proceeding notwithstanding the provisions of Section 2(1) of the Evidence Act and the rules of natural justice, thereby arriving at an award as a whole that is in conflict with public policy and infringed on the Applicant's right to a fair hearing.***

Those two are perfect grounds to warrant setting aside of an award and so be it in this case.

57. I therefore, refer the dispute back to the Arbitrator for fresh consideration in accordance with this Ruling. Parties shall agree on when the fresh consideration of the award should be done by the Arbitrator.

58. Each party shall bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 23RD DAY OF APRIL 2021.

D. O. CHEPKWONY

JUDGE