**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**MISC. APPLICATION NO. E1301 OF 2020**

**BETWEEN**

**DINESH CONSTRUCTION LIMITED &**

**KPLC RETIREMENT BENEFITS SCHEME ……..…….APPLICANT**

**AND**

**AIRCON ELECTRA SERVICES (NAIROBI) LIMITED ….....RESPONDENT**

**RULING**

**Introduction and Background**

1. In 2009, the Applicant invited tenders for the construction of a project called Runda Park Housing Development on Plot 112/2 in Runda, Nairobi. By a sub-contract dated 8th October 2009, the Respondent was engaged to carry out electrical works for a contract sum of KES 64,551,596.82. In 2016, a dispute arose between the parties in respect of the final account owed to the Respondent which was referred for resolution before a single arbitrator, Festus M. Litiku ("the Arbitrator"). The Arbitrator published his award on 13th November 2020 ("the Award") awarding the Respondent KES. 14,298,310.00 and KES 3,154,968.00 as costs inclusive of VAT and was to be paid within 21 days of publication of the Award failing which, it will attract simple interest of 12% per annum until payment in full.

2. The Applicant has now moved the court by the Chamber Summons dated 17th December 2020 under, inter alia, **sections 32(3)** and **35** of the ***Arbitration Act, 1995*** ("the ***Arbitration Act***") seeking to set aside the Award. The Respondent has also filed the Chamber Summons dated 1st February 2021 seeking to enforce the Award under the provisions of **section 36** of the ***Arbitration Act*** and **Rule 6** of the ***Arbitration Rules, 1997***.

3. The Applicant's application is supported by the grounds set out in the face of the application together with the affidavits of Edwin K. Ruttoh, KPLC Retirement Benefit Scheme's Ag. CEO & Trust Secretary, sworn on 17th December 2020 and 4th March 2021 respectively. It is opposed by the Respondent through the replying affidavit of its director, Mohamed Kermali, sworn on 29th January 2021 and the Notice of Preliminary Objection on a Point of Law dated 1st February 2021.

4. The Respondent's application is supported by the grounds on its face together with the affidavit of Mohamed Kermali sworn on 29th January and the affidavit of Dr. Wilfred Akhonya Mutubwa, a director of the Respondent, sworn on 25th March 2021.

5. The parties have also filed written submissions in support of their respective positions. They agree that the following issues fall for resolution:

(a) Whether the application to set aside the Award is time barred having been brought 3 months from the time the applicant received the Award as provided in **section 35(3)** of the ***Arbitration Act***.

(b) Whether the Award should be set aside on the ground that it is contrary to public policy.

(c) Whether the Award should be recognised and leave granted for its enforcement.

**Whether the application to set aside the Award is time barred**

6. Resolution of this issue turns on the interpretation of **section 35(3)** of the ***Arbitration Act*** which provides as follows:

> *35(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.* [Emphasis mine]

7. The Court of Appeal, in ***Ann Mumbi Hinga v Victoria Njoki Gathara*** **NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR** was categorical that, *"Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award."* In ***Ezra Odondi Opar v Insurance Company of East Africa Limited*** **KSC CA Civil Appeal No. 98 of 2016 [2020] eKLR**, the Court of Appeal reiterated that:

> *[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in* ***Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015*** *"the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient…" while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made.*

8. In both cases I have cited, the Court of Appeal did not settle the question when the Award is "delivered" within the meaning of **section 35(3)** of the ***Arbitration Act*** hence the court is called to resolve the matter which is by no means novel. Both parties have cited cases determined by the High Court which hold that delivery does not mean physical or actual delivery of the Award but notification by the Arbitrator that it is ready for collection. In ***University of Nairobi v Multiscope Consultancy Engineers Limited*** **ML HC Misc Cause No. 083 of 2019 (2020) eKLR**, Tuiyott J., held that:

> *[24] ….. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.*

9. When confronted with the same issue, Okwany J., in ***Lantech (Africa) Limited v Geothermal Development Company*** **ML HC Misc. Appl. No. E776 of 2020 [2020] eKLR** observed as follows:

> *[33] delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties.*

10. In addition to the aforesaid cases other decisions of the court including ***Transworld Safaris Limited v Eagle Aviation Limited and 3 Others H.C Misc. Application No. 238 of 2003, Mahican Investments Limited and 3 Others v Giovanni Gaida and 80 Others*** **[2005] eKLR,** ***Mahinder Singh Channa v Nelson Muguku & Another*** **ML HC Misc. Application No. 108 of 2006 [2007] eKLR,** ***P N Mashru Limited v Total Kenya Limited*** **ML HCCC No. 47 of 2008 [2013] eKLR,** ***Mercantile Life and General Assurance Company Limited & Another v Dilip M. Shah & 3 Others*** **ML HC COMM No. 550 of 2006 [2020] eKLR** and ***National Housing Corporation v Custom General Construction Limited*** **ML HC Misc. Appl. No. E38 of 2020 [2021] eKLR** affirm the position that "*received*" for purposes of the ***Arbitration Act*** means notification by the Arbitrator that the award is ready for collection. Consequently, once the parties are notified of the award, it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the singed copy of award. Failure of the parties to collect it does not delay or postpone the delivery and the time limited in **section 35(3)** of the ***Arbitration Act*** begins to run.

11. Turning to the facts of the case, the Applicant submits that on the 1st July 2020, the Arbitrator informed parties that the Award was ready for publication and that before it is published each party was advised to meet their portion of the arbitrator's fees. On 16th November 2020, the Arbitrator issued a letter to the parties informing them that, *"…following full settlement by the parties of my outstanding fees and costs and those of the stenographer, I wish to inform the parties that I published the Final Award on the 13th November, 2020. Each party may now collect its copy of the award from my offices"*.

12. Counsel for the Applicant therefore submits that from the foregoing it is clear that the notification communicating that the signed award was ready for collection was made on 16th November 2020. Counsel points out that on 1st July 2020, the Award had not even been published hence the time calculation for purposes of bringing an application ought to start running from 16th November 2020.

13. The Applicant further submits that the Respondent raises this preliminary objection in bad faith because while it moved to settle its portion of the Arbitrators fees late. As at 10th August 2020, the Respondent gave two separate unfulfilled promises to pay in order to run the clock on it by deliberately misleading the parties on its promises to pay ostensibly to buy the 3 months so as to bring this preliminary objection in the event a challenge to the award is mounted. Counsel for the Applicant submits that a party should never be allowed to benefit or be rewarded for delay occasioned by it and cites the decision by Tuiyott J., ***Mason Services Limited v Safaricom Limited*** **ML HCCC No. 264 of 2017 [2019] eKLR**. It would have been different had they indicated to the Applicant to settle the Arbitrators fees in entirety and claim a refund.

14. The Respondent submits that the Arbitrator communicated to the parties on 1st July 2020, that the award was ready for collection and that parties should make payments before collection. In light of the decisions of the court on this issue, Counsel submits that assuming that the publication was made only after the both parties paid their arbitrator fees would be defeating to the arbitral process as parties can take whatever amount of time to make payment. He therefore urged the court to follow those decisions which hold that time is calculated from the date of publication and not the notice after payment of fees and uphold the preliminary objection dated 1st February, 2020.

15. It not in dispute that the Arbitrator notified the parties that the Award was ready for collection on 1st July 2020, hence time begun to run from this date meaning that the Applicant ought to have filed the application to set aside by 30th September 2020. Counsel for the Applicant suggested that by stating that, *"Before I publish this Award"* in the letter dated 1st July 2020, the Award was in fact not ready. I reject this suggestion. Had the parties paid the fee demanded by the Arbitrator, the Award would have been released to them on the same day. I do not think that anything turns on the language used by the Arbitrator particularly given that the issue here is the meaning of "delivery" under **section 35(3)** of the ***Arbitration Act*** which is different for publish.

16. While it paid the portion of its fee on 30th August 2020, the Applicant places blame on the Respondent for running the clock by making various requests; first it requested for the ETR on 27th July 2020, it then wrote the Arbitrator to promising to settle the fee in a few days and it was only until 13th November 2020 that it paid the portion of its fees. In this respect the Applicant urges the court to follow the decision in ***Mason Services Limited v Safaricom Limited*** **(Supra)**.

17. In ***Mason Services Limited v Safaricom Limited*** **(Supra)**, the learned Judge upheld the position that, *"parties will be taken to have received the award once they receive notice of the date when the award is ready for collection"* but went on to state that, *"I think an exception to the rule is where the applying party demonstrates that the other party has frustrated the collection of the award and that the delay in collection of the award can be laid at the feet of the respondent. Only then can the date of actual collection of the award be construed to be the date of receipt of the award."*

18. The finding by the learned judge that there is an exemption to the time limit for filing the application to set aside the award, in my view, contradicts the express language of **section 35(3)** of the ***Arbitration Act*** and the interpretation placed on it by the decisions I have cited. Delivery of the award is a matter exclusively in the hands of the Arbitral tribunal and accepting the position expressed in ***Mason Services Limited v Safaricom Limited*** **(Supra)** would imply that the delivery of the award may be in the hands of one party when in fact, the award is available to both parties and any party who wishes to collect it has the right to collect and pay the full arbitrators fee and seek a refund later from the other party.

19. The application to set aside was filed on 18th December 2020. It is therefore out of time.

**Whether the Award should be set aside for being contrary to public policy**

20. The Applicant submits that whereas finality of the award is a hallmark of the Arbitration process, **section 35** of the ***Arbitration Act*** delineates circumstances under which an arbitral award can be set aside and in this case the application is premised on **section 35(2)(b)(ii)** thereof on the ground that Award is in conflict with public policy.

21. The thrust of the Applicant's case is that the claim before the Arbitral tribunal was for special damages arising out of an alleged KES 10,415,034.93 additional sums spent on the purchase of copper cables at the London Metal Exchange. The Applicant disputed this claim on the ground that it was not founded on the contract. In its view, the Arbitrator was supposed to determine whether this amount was payable in accordance with the pleadings and the evidence presented. The Applicant submits that to the contrary, the Arbitrator dedicated a single page in its determination and allowed the claim simply on the basis that the same ought to have been allowed as per the assessment of the project Engineer.

22. The Applicant submits that the Award is unjust and legally flawed as it is contrary to established legal principle that a claim for special damages must not only be pleaded but also specifically proved as has been held in a plethora of decisions of the Court of Appeal including ***Charles Sande v Kenya Cooperative Creameries Limited*** **NRB Civil Appeal No. 154 of 1992 (UR)** and ***Coast Bus Services Limited v Murunga Danyi & 2 Others*** **NRB CA Civil Appeal No. 154 of 1992 (UR).** In light of these decisions, the Applicant submits that the Respondent's claim ought to have been strictly proved by way of evidence on the delay in completion of works, exact period the delay ran, exact dates when the copper cables were ordered, pro-forma invoices for the same, invoices, delivery notes and receipts for the alleged purchases and importantly the price indices from the London Metal Exchange to demonstrate the variance of the prices. All these items of evidence, the Applicant submits, were missing in the Arbitrator's decision.

23. Counsel for the Applicant submitted that Arbitrator failed in his legal duty to decide the questions submitted for determination in accordance with the right of the parties and apply some fixed and recognizable system of law. Counsel cited ***David Taylor and Son Ltd v Barnett Trading Co*** **[1953] 1 W.L.R. 562, 568** to support this position.

24. The Applicant concludes by asserting that if the Award is left to stand yet there was no shred of evidence placed proving the special damage claim, it would not only lead to loss of public funds but pave way for unjust enrichment of the Respondent and make a mockery of a well-established principle in our legal system.

25. The Respondent submits that the Applicant has failed to establish ways in which the Arbitral Award has violated the principle of public policy. It contends that the Arbitrator was presented with all the relevant material evidence and facts adduced before him by the parties whereupon he exercised jurisdiction properly and duly considered the pleadings and evidence before rendering the Award.

26. Counsel for the Respondent submits that the Arbitral tribunal was entitled to reach the conclusions it did. He pointed out that the specific amount of KES. 10,415.093 was pleaded and the Tribunal considered evidence tendered by the parties, specifically the evidence from the

project engineer, which the Respondent was afforded an opportunity to rebut. Guided by the law, principles of equity and on the basis of *quantum meruit*, the Tribunal rightfully awarded the Applicant the said costs. In the circumstances, the Award in favor of the Respondent, is final and therefore this court has no jurisdiction to alter the Award.

27. The Respondent also submits that it is only the process of the Arbitration and conduct of the Arbitrator that can be challenged in an application to set aside an Award and not the merits of the arbitral award. Counsel cited ***Talewa Road Contractors Limited v Kenya National Highway Authority*** **ML HC Misc. Civil Appl. No. 535 of 2018 [2019] eKLR**, ***DB Shapriya and Co. Ltd v Bish International BV*** **[2003] 2 EA 411** and ***Kenya Shell Ltd v Kobil Petroleum Limited*** **NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR** to submit that however erroneous the findings of the arbitral tribunal may, they are not subject to court's intervention and where the tribunal has made a decision, even if does not sit well with either of the parties, it is final under **section 10** of the ***Arbitration Act*** unless either party can satisfy that court that, it ought to be lawfully set aside.

28. The Respondent maintains that the Applicant has in fact failed to provide any specific ground within the confines of **section 35** of the ***Arbitration Act***.

29. Both parties accept that the meaning of the term public policy for purposes of **section 37(1)(b)(ii)** of the ***Act*** was elucidated in ***Christ for all Nations v Apollo Insurance Co. Ltd*** **[2002] EA 366**, which was quoted with approval by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited*** **(Supra)**, Ringera, J., stated as follows:

> *An award could be set aside under page 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.*

30. Although framed broadly, public policy, as a ground for setting aside an arbitral award, must be narrow in scope and assertion that an award is contrary to the public policy of Kenya cannot be vague and generalized. A party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then must show which part of the award conflicts with that public policy. This point is also illustrated by the decision of the court in ***Mall Developers Limited v Postal Corporation of Kenya*** **ML Misc. No. 26 of 2013 [2014] eKLR** where the court observed that:

> *Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.* [Emphasis mine]

31. The same point was emphasized in ***Continental Homes Ltd vs Suncoast Investments Ltd*** **MLD HC Misc. Appl. 62 of 2016 [2018] eKLR** as follows:

> *[63] In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.*

32. I understand the Applicant's case to be that the Arbitrator awarded special damages contrary to the established principle that special damages must be pleaded and proved. I reject the argument that the mere failure to follow precedent or indeed misinterpret the law would invite interference by the court. Indeed, Ringera J., made this point in the ***Christ for All Nations Case*** **(Supra)**, as follows:

> *[I]n my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to an arbitration must learn to accept an award, warts and all, subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act.*

33. Closely related to this issue, it that the arbitrator is the master of facts and the court must resist the temptation to become an appellate court. In ***Kenya Oil Company Limited & Another v Kenya Pipeline Company Limited*** **NRB CA Civil Appeal No. 102 of 2012 [2014] eKLR**, the Court of Appeal cited with approval the following dicta by Steyn LJ., in ***Geogas S.A v Trammo Gas Ltd (The "Baleares")*** **1 Lloyds LR 215**:

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

34. In this case, the Respondent claimed KES. 10,415,034,93 as compensation for change of copper cables at the London Metal Exchange. The Applicant responded disputing the claim. In the Award and in relation to this aspect of the claim, the Arbitrator stated that the claim was the subject of discussion in several fora including the Project Consultants as well as the Respondent's Board of Directors. He referred to the recommendation of the Consultant Electrical Engineer who recommended the amount was supported by the Project Architect. The Arbitrator pointed out that the claim was evaluated by the Project Quantity Surveyor who recommended that the claim was not contractual. In coming

to the conclusion that the claim was due on a *quantum meruit* basis, the Arbitrator gave weight to the recommendation of the Electrical Engineer who was an agent of the Applicant in addition to the change in circumstances which affected the cost of cables.

35. I set out the aforesaid summary merely to show that contrary to the Applicant's assertion, the claim was pleaded and the Arbitrator considered the evidence before him in line with his jurisdiction to consider the facts, evidence and law. Whether the Arbitrator got it right or wrong is not a ground for intervention less so on the basis of public policy. I adopt the words of the court in ***Mahan Limited v Villa Care*** **ML HC Misc. Civil App. No. 216 of 2018 [2019] eKLR** that:

> *[9] It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that the decision of the Arbitrator would be final and binding on them .It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they are happy to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act.*

36. I find and hold the Applicant has not made out a case for setting aside the Award as being contrary to public policy.

**Whether the Award should be enforced**

37. The Respondent states that the Award should now be enforced as it has complied with the provisions of **section 36(3)** of the ***Arbitration Act*** which state as follows;

*36. Recognition and enforcement of awards*

> *(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—*
>
> > *(a) the original arbitral award or a duly certified copy of it; and*
> >
> > *(b) the original arbitration agreement or a duly certified copy of it.*

38. The Applicant objects to the application on the on the basis that it is contrary to **sections 32B(1)**, **36(1**) and **37** of the ***Arbitration Act*** and is therefore incompetent and premature on account that the Award published on the 1st July 2020 is incomplete as no taxation and eventual costs have been awarded and incorporated in the award. Counsel cited the case of ***Kenfit Limited v Consolata Fathers*** **NRB CA Civil Appeal No. 229 of 2006 [2015] eKLR** where the Court of Appeal held that, *"the High Court can only recognise and enforce a final award by an arbitrator if the award does not reserve any matter for consideration by the arbitration or any other person."*

39. In response, the Respondent contended that it had provided the original arbitral award dated 13th November 2020 and an original arbitrator's award on final costs dated 18th March, 2021 therefore the Preliminary Objection was misplaced.

40. While I accept that I am bound by the decision of the Court of Appeal in ***Kenfit Limited v Consolata Father*** **(Supra)**, I hold that the decision was *per incuriam* as the court's attention was not drawn to **section 3(1)** of the ***Arbitration Act*** which states that, *"*"*arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award."* This means that any award whether interim or otherwise is an award and may be enforced as it is an award under **section 36(1)** of the ***Arbitration Act***. Further, **section 36** does not qualify what kind of award may or may not be enforced. As a practical matter, it is inconceivable that an arbitral tribunal can issue interim or partial awards during the proceedings to resolve specific issues but which cannot be enforced until the final award. Just like the court may issue a preliminary decree, the ***Arbitration Act*** does not foreclose the issuing of interim awards that may be enforced as the arbitral proceedings continue.

41. The aforesaid notwithstanding, the Award and the additional award on costs have been furnished to the court and their contents are not in dispute. Since I have already dismissed the Applicant's application seeking to set aside the Award, I do not find any reason to reject the application for recognition and enforcement.

**Conclusion and Disposition**

42. I have found that the application dated 17th December 2020 was filed out of time and even if I were to accept that it was properly filed, the Applicant has not established the Award is contrary to public policy. In the circumstances, the application dated 17th December 2020 is dismissed.

43. The Respondent's application dated 1st February 2021 is allowed on terms that the Final Award published by Festus Litiku dated 1st July 2020 together Award of Costs dated 18th March 2021 be and is hereby recognised as binding and leave be and is hereby granted to the Respondent to enforce it as a decree of this court.

44. The Applicant should bear the costs of both applications.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED** and **DELIVERED** at **NAIROBI** this **21st day of MAY 2021.**

**JOHN M. MATIVO**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mumia instructed by Mwaniki Gachoka and Company Advocates for the Applicant.

Dr Mutubwa instructed by Mutubwa and Company Advocates for the Respondent.