THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 266 OF 2018

IN THE MATTER OF ARBITRATION ACT, 1995

UJENZI BORA INVESTMENT LIMITED .....CLAIMANT

VERSUS

AFRICA FOREST LODGES LIMITED.....RESPONDENT

RULING

1. The subject of this ruling is the application dated 7th June 2018, filed under the provisions of; section 35 (2)(b)(ii) of the Arbitration Act, (herein "the Act"), Rule 7 of the Arbitration Rules, Article 159 of the Constitution of Kenya, 2010, and all other enabling provisions of the law.

2. The Applicant is seeking for orders that, the final award dated and published on 5th March 2018, by the Arbitrator be set aside and the costs of the application be awarded to it. The application is based on the grounds on the face thereof and the affidavit of the same sworn by the Applicant's director; David Nahinga Ungai.

3. He avers that, the parties herein entered into an agreement for the Applicant to construct; Thabo Falls Lodges for the Respondent. However, the Respondent unlawfully terminated the contract on the basis of report by Centerline Projects Limited, fraudulently procurement. As a result, the parties referred the dispute to Arbitration, and Ms Sylvia Kasanga was appointed as a sole Arbitrator.

4. The Arbitrator, heard the dispute and rendered her decision on 5th March 2018. However, the Applicant is aggrieved on the ground that; the award contravenes the provisions of; Articles 10 and 50 (1)(2)(4) of the Constitution of Kenya, 2010, in that the Arbitrator, relied on evidence not availed or placed before her by either party. That the bill of quantities relied upon by the Respondent in calculating the overpayment was not placed before the Arbitrator.

5. That the Arbitrator descended into the arena of the witness by including assertions that, the receipts produced could not be relied on as they did not indicate where the materials were delivered and the site they belonged, which evidence no party adduced. Further, the Arbitrator acknowledged the existence of a limitation in the CPL report and then proceeded to award a figure that is purported to be in CPL report. That she also made a finding that, the CPL report was not challenged, when the Applicant challenged it, to show how it impended the outcome in regards to computation of overpayment.

6. In addition, the Arbitrator states in the award that, no evidence was placed before her to prove the volume and value of materials on site yet, she admits the existence of sales receipts the Applicant produced. That the Arbitrator, disallowed the Claimant's claim of; USD 29,682.17, on the basis that the Claimant gave false evidence, yet not a single paragraph in the award indicates or demonstrates how and on which items the Claimant gave as false evidence.

7. Further, the Arbitrator alleges that, the Claimant filed a valuation report dated 26th May 2016, despite the same having been filed by the Respondent, in its supplementary list of documents dated 4th July 2018. That, the Arbitrator disallowed works done at the Adventure Centre of USD 185,026.94 on assumption of false documents placed before her. That in the supplementary list of documents, the objectives are listed clearly and none of them included the report dated 26th May 2016. Therefore, it was illogical how the Arbitrator came to the biased conclusion. The Applicant avers that, as a result of the aforesaid, the award is unjust, illogical, dishonest, torturous and against public policy.

8. However, the Respondent opposed the application by filing a replying affidavit dated 2nd August 2018, sworn by its project manager, Patrick Simikin. He averred that, the application is an afterthought and an attempt to deny it the fruit of the final award.

9. That, by a contract dated 24th November 2015, the Respondent engaged the Claimant to provide it with design and building services of; development of Kireita Forest Station in Kiambu. The Claimant was hired to provide consulting services as well as construction works. It was to provide all the necessary competent services for the design, contracting and supervision of the project.

10. A dispute arose between the parties and was referred to an Arbitrator in accordance with the arbitral clause in the contract. The Arbitrator Ms. Sylvia Kasanga delivered her final award on 5th March 2018.

11. It was argued that, the application is time barred by virtue of the provisions of section 35(3) of the Arbitration Act, as it was filed more than three months after the award and no reason is advanced for the delay. Further, the Applicant has failed to provide proof of any of the grounds enumerated that gives a basis for setting aside the final award.

12. The Respondent averred that, the bill of costs relied upon to calculate the overpayment paid to the claimant, were provided as part of its exhibits as evidenced by documents no. (1), (2) and (3) of the Respondents' supplementary list. The receipts and photographs were presented before the Arbitrator by the Claimant. The issue of receipts was covered in the testimony of Elizabeth Ndindi.

13. The Respondent argued that, the award cannot set aside the award on the basis of how the Arbitrator chose to interpret the evidence placed before her. Further, the Arbitrator noted that, the limitation identified by the report do not affect the outcome of the report in so far as the amount of work done as seen on site at that day of the assessment.

14. The Respondent stated that, the Claimant is misleading the court to allege that, the amount paid to it was contested. That, the Claimant did not contest the amount that the Respondent claimed it paid. The Claimant's witness confirmed that, the Claimant was paid a total of; USD 334,670, therefore the Arbitrator was correct in awarding the same. That, the Arbitrator sufficiently and closely demonstrated why she could not rely on the receipts produced as evidence by the Claimant.

15. Finally, the Respondent argued that, the Claimant has misconstrued the decision of the Arbitrator and for clarity, the valuation report dated 26th May 2016, arose from the testimony of the Respondent's witness, in which she explained that, she was presented with a bill of quantities by the Claimant. That, the claim of bias has not been proved.

16. The parties disposed of the application by filing submissions. In the meantime, the Respondent filed an application dated 2nd August 2018, brought under Section 36(2) of the Arbitration Act & Rules 6, 9 and 11 of the Arbitration Rules, 1997, seeking for orders that, the award be adopted and recognized by court, leave be granted to the Respondent to enforce the same, and the costs of the application be provided for.

17. The Respondent's application is supported by the grounds thereto and an affidavit sworn by Mr. Smikin and opposed by the affidavit sworn by Mr. Ungai. Basically, these two affidavits aver to the same facts as aforesaid stated in the respective affidavits in support or opposition to the application to set aside the award.

18. I have considered the evidence tendered and the submissions and I find that, the main issues to determine herein are whether;

a) The Claimant's application was filed within the time frame set.

b) Whether, the applicant has satisfied the grounds upon which the orders sought can be granted.

c) Who will bear the costs?

19. I have considered the submissions of the parties on the first issue and note that, the Respondent argues that, the relevant date when the period starts to run is the date of notice of the award send to the parties by the Arbitrator. Reference was made to the case of; Transworld Safaris Limited vs Eagle Aviation and 3 others (2012) e KLR, where the court held that, notice to the parties that the award is ready in sufficient delivery. The Respondent thus argues that, the parties herein were notified of the award on 20th February 2018, thereof, the period started running then. The claimant was therefore, supposed to file its application on or before the 20th May 2018. It was filed on 8th June 2018.

20. That even if the court were to consider 5th March 2018, as a date of receipt of the award, the application should have been filed on or before the 5th June 2018. Therefore, the application is statute barred and cannot be sustained. The Respondent relied on the case of; Nancy Nyamira & Another vs Archer Dramond Morgan Ltd (2012) eKLR, to argue that, the time limits under the Act, cannot be extended.

21. However, the applicant submitted that, the award was published on 5th March 2018 but served on 7th March 2018; therefore the application is within time.

22. I have considered arguments of both parties and I find that, the provisions of, Section 35(3) of the Arbitration Act provides that, an application for setting aside an Arbitral award may not be made after three (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.

23. The use of the word "may" indicates that there is discretion afforded to the court to hear the case after the expiry of the time limits. However, this time limit is considered in the light of finality of awards and in looking at the challenge of the award out of time, the court must be satisfied that, there is a reasonable excuse for extending the limit. (see: Redfen Hunter; International Commercial Arbitration para 9-46).

24. The evidence herein reveals that, the Respondent's law firm received the award on 7th March 2018, as evidenced by its stamp on copy produced. Therefore, going by that date, the application herein should have been filed by 7th June 2018. I note that, it is dated 7th June 2018 but was filed on 8th June 2018. It was therefore one day late. That is an inordinate delay, and it is excusable in the interest of justice.

25. I shall now consider the application on merit. The grounds upon which an arbitration award may be set aside are stipulated under Section 35(2) of the Arbitration Act and state as follows:-

(2) An arbitral award may be set aside by the 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.

26. I note from the application, the applicant is relying mainly on Section 35(2)(b)(ii) of the Arbitration Act, that, the award is in conflict with the public policy of Kenya. It is noteworthy that, public policy is one of the grounds mentioned in the New York Convention, section 34 (3) based on which a party can challenge the enforcement of a foreign arbitral award.

27. However public policy is particularly notorious since this defence is incapable of being precisely determined and is entirely dependent upon facts of each case and the particular judge at the time. Thus, it has been held that, 'public policy … is a very unruly horse, and when once you get astride of it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.'(see Richardson v Mellish (1824) 2 Bingham 229 at 25)

28. Despite the pending uncertainty, in most developed arbitral jurisdictions, public policy has been interpreted narrowly by the national courts. This is because the courts of developed jurisdictions generally bear a pro-enforcement attitude towards arbitral awards which they consider to be a stand-alone element of public policy itself. It has been explained that; Interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement. This is termed in international arbitration parlance as "the pro-enforcement bias". Pro-enforcement is itself a public policy.

29. It also suffices to note that, a party challenging an award must prove one of the exclusively listed grounds, in the Arbitration Act. The party must furnish proof of the particular ground invoked. However, on the basis of legislative language, some grounds may be invoked by the court. Such reasons are normally that, the subject matter of dispute is not capable of settlement by arbitration or violates public policy.

30. I have considered all the arguments advanced by both parties in the instant matter, and not that, the Respondent submitted that, the Applicant has not proved the ground of public policy upon which the award may, be set aside. He relied on the case of; Kenyatta International Conference Centre vs Greentar Systems Limited 2018 eKLR, where the court quoting the case of; Christ for all Nations Vs Apollo Insurance Company (200) EA 366, held that for an award to be set aside on the ground that it is in conflict with public policy of Kenya, it must not be either: -

a) Inconsistent to 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.

31. The Respondent also relied on the case of; Holmes Limited vs Suncoat Investment Limited (2008) eKLR, to argue that, the Applicant must prove irregularity on the part of the Arbitrator and/or, the Arbitrator was so obnoxious to the tenets of justice that, the only way to salvage the reputation of the Arbitrator is to set aside the award.

32. Further the allegations of; undue influence must be supported by tangible evidence as stated in the case of; National Cereal and Produce Board vs Erad Suppliers and General Contracts Limited (2014), Eklr. That, court cannot delve into the merits of the decision of the award, as it will amount to exercising appellate jurisdiction which it does not have. The cases of; Kenya Bureau of Standards vs Geochem Middle East (2017), Eklr and Mahican Investment & 3 others vs Giovanni Gaida & 79 others (2005), e KLR, were relied on.

33. However, the Claimant submitted that, the award was obtained by undue influence, and referred the court to the definition of; "undue means" as defined "In re Arbitration Between Grover and Universal Underwriters Insurance Company, 80 N.J 221 ((1979), as; to connote, where the Arbitrator decides the dispute on mistaken legal rule and the mistake appears on the face of the award or by the statement of the Arbitrator, or the Arbitrator has mistaken of fact, that is apparent on the face of the award itself, or is admitted by the arbitrator himself.

34. The Applicant has submitted that; the Arbitrator was unduly influenced and biased by making improper finding that, the Claimant presented false evidence during the arbitral proceedings, which then led the Arbitrator to conclude that, the claimant was dishonest and hence dismissed its claims on that basis and then relied purely on the CPL report, produced by the Respondent's.

35. In considering the entire matter and in particular the averments by the Applicant has read through the entire final award and I note from the Arbitrator's decision as follows: -

a) At paragraph 9.3.5, the Arbitrator states "The Respondent further points out that according to the assessment conducted by CPL only 12.45% portion of the preliminaries were done as at the time of assessment. He asserts that the Claimant is only entitled to a maximum of USD63.24 as reported in the CPL report" However, at paragraph 9.3.8, she concludes that, the claim for preliminaries is unwarranted and therefore disallowed it.

b) At paragraph 9.4.8; the Arbitrator states that, "It is the oral testimony of the Claimant, that it approved the engagement of CPL to conduct the verification exercise, but it is rather strange that the Claimant did not avail himself in person for the assessment exercise and went on to dispute the contents of the said report when presented in the meeting of 10th June 2016. It is sufficient to point out the limitations encountered in the preparation of verification report were due to the Claimant's lack of cooperation''

c) At paragraph 9.4.10; the Arbitrator states inter alia that: "It is clear that the Valuation of 26th May 2016, by the Claimant was inflated and dishonest. I find it also very suspect that Claimant would present false evidence before the Arbitrator. It is for this reason then that I can only rely on the report from CPL that establishes the amount of work done on the Adventure Center.

d) At paragraph 9.4.14; the Arbitrator states, in the last bullet that, "there was bad faith on the part of the Claimant in presenting to the Respondent a valuation that was not representative of the status on site and presenting false evidence to the Arbitrator"

e) At paragraph 9.7.3; the Arbitrator states that, 'I dealt earlier with the issue of false evidence Presented to the Tribunal by the Claimant on some of these items. I maintain that I cannot therefore rely on the evidence presented to me by the claimant on this particular claim and

f) At paragraph 9.8.3; the Arbitrator states that, ''I am therefore forced to rely on the CPL report as the record of the Materials on site that were seen and accounted for in the report. The limitation arising from the inability to access the site stores is due to the Claimant's absence. In the Claimant's oral testimony, I did not hear an honest reason for his lack of attendance of an exercise that he consented to and that was so critical''.

36. It is clear from the above paragraphs that, indeed the Arbitrator dismissed the substantial part of the Claimant's claim on the findings that, it presented false evidence including the "Change of scope of works, valuation and pending invoices" dated 26th May, 2016, which the Arbitrator attributed to the Claimant as stated at paragraph 9.4.10 as aforesaid. The Respondent admits that, the report was presented by its witness who explained that, she was presented with a bill of quantities by the Claimant. However, the Arbitrator does not say so in the final award.

37. Be that, as it may, the Claimant is not without fault. To start with, as much as the Claimant alleges that, the Arbitrator demonstrated "bias, and undue influence" by use of the terms "false evidence and dishonest" the Claimant descends into the same arena and uses very strong words against the Arbitrator in the application, affidavit in support and more so, in the submissions.

38. This is evident inter alia at the following paragraphs: -

a) At grounds 2 and 6; of the grounds; in support of the application, the Claimant states that, "the Arbitrator misconducted herself…"

b) At paragraph 6; of the supporting affidavit it is averred inter alia that; "the award is unjust, illogical, and dishonest and tortious ....."

c) At paragraph 9; of the supporting affidavit; it is averred inter alia that; "the award is unjust, self-contradictory, an affront to common decency, immoral and offends our national sense of what is right and wrong and……"

d) At paragraph 4; of the submissions the Claimant states that "the intentional and baseless assumption of the Arbitrator, that the Claimant produced false evidence…."

40. It is also noteworthy that, the Arbitrator faults the Applicant's conduct, and states that, she relied heavily on the CPL report by due to the Claimant's fault. In that, she states at paragraphs; 9.4.8, referred to above that, the Claimant failed to avail himself for the verification of the exercise by CPL; and at paragraph, 9.8.3 he is blamed for lack of an honest, for the reason for failure to attend the exercise. The principles of equity states inter alia that; "He who goes to equity must go with clean hands" and "Equity aids the vigilant and not the indolent".

41. Be that as it were, it is clear that, the Arbitrator relied heavily on the CPL report but admits that it had limitations. She notes as follows; Given the limitations of the CPL report highlighted in the report, does the report meet the threshold required to help verify the amount of work done on the Adventure Center? My answer to this would be yes. The WT07 elaborately explained that her analysis of the work measured on site was assessed based on the original BQs measurements and rates. WT07 also did defend the position that there was no need to open up the works and that an extrapolation of the BQs was sufficient. She further expounded on how she calculated the Variations and change in floor areas. However, the Arbitrator acknowledges that the Claimant challenged that report as stated at paragraph 9.14.4 "The Claimant further insists that the Limitation of the CPL report were very compelling and it would be impossible to arrive at a conclusion that the Claimant was overpaid by USD238,031.65."

42. Be that as it were the Arbitrator states at paragraph 9.14. 9 ''However, the WT07 did put it across to the tribunal that the purpose of highlighting the limitations was to give the Claimant and the Respondent an opportunity to address these limitations and seek a way forward. That her understanding of CPL appointment was not for the purpose of a termination but rather for the parties to forge forward. Identifying the limitations meant that the parties would then address to fine tune the findings. She gave an example that for materials on site, since the stores were closed, the parties would then have gone ahead and verified what was in the stores.

43. In my considered opinion, by virtue of the content of the paragraph above, it is clear that the CPL report was not conclusive, yet it was heavily relied on to disallow the claimant's claim and allow the respondent's counterclaim. In view of the same, and in view of the fact that, the claimant has been blamed for presenting false evidence based inter alia on a valuation report dated 26th May 2016, it would be unjust for the final award to stand.

44. However, before I make the final orders I observe that, the objective of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without necessary delay of expense. One of the fundamental features of arbitration is final and binding determination of the parties' rights and obligations. Thus, the parties accept that, not only will arbitration be the form of dispute settlement, but also that they will accept and give effect to the arbitration award. Implied in the agreement to arbitrate is the acceptance that, strict rules of procedure and rights of challenge to the award are excluded, subject to very limited, but essential. The decision of arbitrator is final and binding.

45. The court cannot therefore deal with the issue raised. To allow the Applicant an opportunity to be heard on the issues raised and more particularly, the veracity of the CPL Report I shall allow the application to set aside the award on condition that;

(a) The applicant who had an opportunity to participate in the verification exercise and who failed to do so, giving rise to the circumstances herein, shall deposit 50% of a sum of USD 206,074.05 awarded to the respondent in an interest earning account in the names of the lawyers of both parties within thirty (30) days of the date of this order;

(b) The claimant shall pay the costs awarded in the final award being full costs for the claim and 50% for the counterclaim within the same period stated in (a) above;

(c) The claimant shall pay the respondent the costs of this application

46. I have also considered the application seeking for enforcement of the final award and I find that, save for the order given herein, conditionally setting aside the award, the said application meets all the requirements of the law. In that regard, if the claimant does not meet the conditions set above, within the time frame stated, the orders will stand vacate forthwith without further reference to court and the subject application shall stand allowed with costs to the respondent.

47. Those then are the orders of the court.

Dated, delivered and signed in an open court this 29th day of April 2020.

G.L. NZIOKA

JUDGE

In the presence of;

Delivered by email

No appearance for the claimant

Mr. Kuyo for the respondent

Aswani/DR……Court Assistant