



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 354 OF 2017

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF THE ARBITRATION RULES, 1997

BETWEEN

NAIROBI CITY COUNTY.....APPLICANT

- VERSUS -

THE ILLUMINATOR LIMITED.....RESPONDENT

RULING

1. In the case **Kenyatta International Convention Centre (KICC) v Greenstar Systems Limited Justice Olga Sewe** citing an English case stated:

“The arbitrators are masters of facts.”

2. I will bear the above as I consider the Notice of Motion dated 17th August 2017 filed by **Nairobi City County** (hereinafter called the county).

3. The county by that application prays for the setting aside of the Final Award made by Justice R.O. Kwach, the sole arbitrator. By that award the arbitrator awarded The Illuminator Limited, the respondent Ksh 5 million plus interest at 12% per annum.

4. The respondent’s claim before the arbitrator was for breach of contract by the county for unilaterally repudiating the contract. The arbitrator found the contract was illegal for failing, *inter alia*, to follow the procurement laws. The arbitrator however found that the respondent undertook a pilot project. It was the arbitrators finding that it undertook that pilot project and the county did not provide a defence to that evidence and therefore could not avoid paying for the work done.

5. The County argued before me that it was against public policy as provided under section 35 of the Arbitration Act for the arbitrator to find the contract was invalid then proceed to give an award to the respondent on the basis of *quantum meruit*, as an equitable doctrine.

6. It needs to be stated that the arbitrator made a finding that the respondent’s claim based on the illegal contract could not be awarded. The award, however, was on the actual work carried out. This is what the arbitrator stated in the award.

“Although the claim for loss of expected earnings is not sustainable, that is not the end of the matter. There is irrefutable evidence that Senior officers in the City Planning Department and more specifically Mr Kibinda and the mayor engaged the claimant to undertake a pilot project. The claimant carried out the project and there is evidence to that effect. There is no defence the respondent can advance to avoid paying for the work carried out by the claimant under the pilot project.”

7. The arbitrator finding cannot be faulted. The Country obtained the services of the respondent, in the pilot project, and it was liable to pay for those services. Since the issue of that award was the single issue raised in the application and because I have found it has no basis in law the application does then fail.

8. The Notice of Motion dated 17th August, 2017 is **dismissed with costs**.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020**.

MARY KASANGO

JUDGE