REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 579 OF 2014

COMROAD CONSTRUCTION & EQUIPMENT LIMITED..... PLAINTIFF

-VERSUS-

IBERDROLA ENGINEERING & CONSTRUCTION COMPANY....DEFENDANT

RULING

1. These proceedings bring into focus whether, and if so when, a misapprehension of evidence or an error in law by an Arbitrator in an Award is sufficient cause for it to be set aside as being against Public Policy. The Notice of Motion the Court is asked to decide is dated 25th June 2019 and the substantive prayer seeks the setting aside of the Arbitral Award (the Award) delivered by Mr. John Ohaga (**the Arbitrator or Arbitral Tribunal**) on 5th March 2019.

2. Comroad Construction & Equipment Limited (Comroad or the Plaintiff) contends that the award is in conflict with Public Policy of Kenya in so far as it is inconsistent with decided law/principles, regarding unpleaded issues that are nevertheless brought to the attention of a Court or Tribunal during hearing, the evidentiary threshold in respect of proof of special damages, general damages in regard to breach of contracts and the legal effect of certificates of compliance issued by statutory institutions. The Court is also told that the award amounts to an unjust enrichment of Iberdrola Engineering and Construction Company (Iberdrola or the Defendant), again an affront to public policy.

3. Comroad and Iberdrola entered into a contract dated 3rd September 2013 for Comroad to undertake construction of a proposed power substation known as 220/60KV at Ngong (the Ngong contract). A second contract of 14th March 2014, of similar nature, was to be undertaken at Athi River (**the** Athi River contract). At arbitration, Comroad's case was that sometimes in October 2014, the community liaison committee formed by the Iberdrola forcefully ejected its Chief Engineer from the site and the progress of the work stopped. Comroad eventually terminated both contracts and alleged breach on the part of Iberdrola. Iberdrola on the other hand blames Comroad.

4. In the Award, the sole Arbitrator found and held that Comroad had failed to prove its claim for special damages and that Iberdrola was entitled to the sum of Kshs.3,756,645.50/= on its counterclaim. This award aggrieves Comroad.

5. The Application is brought under the auspices of Section 35 of the Arbitration Act No. 4 of 1995 (the Act) which provides:-

> (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
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> (2) An arbitral award may be set aside by the High Court only if—
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> (a) the party making the application furnishes proof—
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> (i) that a party to the arbitration agreement was under some incapacity; or
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> (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
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> (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.

6. The basis for the Application is that every aspect of the award is in conflict with the Public Policy of Kenya.

7. Public Policy in the context of the Arbitration Act was discussed by Ringera J in **Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A 366** :;

"…Public policy is a broad concept incapable of precise definition…. An award can be set aside under Section 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 any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

8. Adding his voice to the matter Onyancha J on Glencore Grain Ltd v TSS Grain Millers Ltd [2002] eKLR observed:-

"…… the contract will be detrimental to a country because it is illegal by express provision of a country's legislation. It will also be so illegal in the loose meaning because it is either void or morally wrong or is contrary to the principles expressed hereinabove in relation to a country's public policy. It is within those meanings that Lindley, Lord, Justice, in reference to such acts, contracts or arbitral awards, which he believed were against the public policy of England, stated in Scott vs Brown [1892] 2 K.B, 724 at 728.

"No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."

9. At the very least for an award to be said to be in conflict with Public Policy it must be shown to have an element of illegality or its enforcement would be injurious to public good or offensive or repugnant to members of the public on whose behalf the powers of the state are exercised (Deustsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Company [1987] 2 All ER 769.)

10. A striking feature of the application before me is that it does not elaborate how the award offends Public Policy. But on this there is a marked improvement in the submissions by the Applicant. This is what I turn to examine.

11. It is argued that the Arbitrator found that Iberdrola was justified to terminate the contracts because of delay occasioned by Comroad and its non-compliance with NSSF and NHIF regulations. Comroad assails the Arbitrator for finding that the contract was extended by parties without any specific time limits yet again blaming the Plaintiff for the delay. This is said to be a contradiction.

12. Would the Arbitrator's misapprehension of facts be said to be a conflict with Public Policy? The answer to this would be in a passage in the decision of Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR where the Court said:-

The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation.

To illustrate the point we will cite two United States cases. The first one is the Supreme Court's decision in *Hall Street Associates, L. L. C., Petitioner vs Mattel, Inc 552 U. S. – (2008)*. In this case the Court struck down an arbitration agreement that allowed the courts to overturn an arbitration award that contained legal errors or factual findings that were not supported by *"substantial evidence"*. The Court recognized that where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the Federal Arbitration Act ("FAA") policy of allowing flexibility to the parties clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced court review of arbitration awards the Court said, "opens the door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process". The court viewed that as unacceptable outcome especially in light of what it saw as clear language in the text of the "FAA" restricting judicial review to the grounds specifically listed in the statute. The court held that the goal of flexibility must yield to:-

> **"a national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway."**

The lesson of *Hall Street* is that by entering into an arbitration agreement a party necessarily gives up most rights of appeal and challenge to the award in exchange for the virtue of finality of the award.

13. Parties chose to have their disputes resolved by way of Arbitration. Arbitration is an avenue for dispute resolution that places the finality of the process that ends with the Award at very center. Arbitrators just like any tribunal hearing and determining disputes fall into error from time to time. The error could be a misapprehension of facts or law. Yet by choosing to place their dispute in the hands of a dispute resolver whose award is invariably final, parties on their own volition and deliberately, choose to live with errors of fact or law that the Arbitral Tribunal may commit. Such commission of error will not, ordinarily, be said to be an affront to Public Policy.

14. A second criticism which also falls for the same reason is the Arbitrators holding that the existence of compliance certificates issued by NSSF and NHIF on 7th October 2014 and 9th December 2014 respectively was not evidence of compliance. This Court take the view that there is nothing inconsistent with holding that mere production of certificates of compliance is not evidence of compliance. This is because, even as appreciated by Counsel for Comroad , a certificate of compliance is only *prima facie* evidence of compliance.

15. The Sole Arbitrator gave reasons for the view that he returned as follows:-

> 356. From the evidence before the Tribunal, it is clear that on several occasions the Claimant failed to remit the NSSF and NHIF deductions. This is clear breach of the provisions of the NSSF and NHIF Acts.The Tribunal finds the excuse by the Claimant that some of the employees declined to be registered as being untenable. It was the sole responsibility of the Claimant to register its employees.
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> 357. In conclusion, the Tribunal finds that the Claimant has failed to prove that it has paid its contributions to NSSF and NHIF every month until termination of the contracts on 1st December,2014.The fact that the Claimant produced its compliance certificates does not demonstrate that the Claimant had been in compliance throughout.

16. This finding is not counter statute because factual evidence will on occasion displace the first appearance evidential value of certificates of compliance issued by these two statutory bodies.

17. On the question of pleading, it is conceded by Comroad that the claim for VAT refund needed to be specifically pleaded, particularized and proved. Comroad however seems to concede that while it pleaded the claim, the pleadings were short on particulars. That said, it makes the argument that such deficiency was removed by the evidence it led before Tribunal at trial. An argument that because of this, the matter was subsequently left for consideration by the Arbitral Tribunal.

18. I am too sure that Comroad has accurately characterized the finding of the Tribunal in this regard because the Tribunal findings on the question of Tax refund was on the basis of evidence received and not the deficiency or otherwise of the pleadings. See paragraphs 276 – 289 of the Award which I do not consider necessary to reproduce in their entirety. However, paragraphs 287, 288 and 289 read;

> 287. The Respondent alleges that the Claimant did not issue the invoices on time. It is trite that he who alleges must prove….
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> 288. I find and hold that the Respondent has failed to prove the allegation that the invoices were not submitted on time.
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> 289. It is true as rightly put by the Respondent, that tax exemption is issued by KRA. However, the obligation to obtain the same lay with the Respondent. The Respondent having failed to obtain VAT exemptions and the Claimant having paid for VAT on the items bought, I find and hold that the Respondent is liable to pay the Claimant the refund of the VAT as paid and proved by the Claimant.

19. Finally, I turn to the issues revolving around General Damages. Comroad submits that while the Arbitral Tribunal agreed that General Damages were payable to it, it did not grant those damages on the basis that the Defendant was not in breach of the contract and no General Damages could arise.

20. I must agree with the submissions by the Respondent's counsel that the argument by the Applicant seeks to misrepresent the holding in the Award. In this regard paragraphs 433 and 434 of the Award speak for themselves:-

> 433. In addition, the Claimant has prayed for general damages. The Building Contract Dictionary defines general damages as monetary compensation payable to a claimant by the defendant as a consequence of the defendant having infringed a legal right of the claimant and that they are awarded to compensate a claimant for damages as the law presumes to result from the breach of any

right or duty.

> 434. General Damages are therefore available in these circumstances to the Claimant if the Respondent was in breach of the contract by terminating the Ngong and Athi River Contracts. Having determined that the termination was justified and lawful, I hold that no general damages can from a justified and lawful termination.

Therein lies the simple reason why the Tribunal did not make an Award of General Damages in favour of Comroad.

21. In the end this Court holds that the Application before it is yet another vain and tortured attempt to latch on the Public Policy argument to defeat an Arbitral Award. Arbitrators are masters of the facts in disputes they are called upon to decide and it cannot, generally, be said that a misapprehension of facts by them is against Public Policy. As to the Law, the scheme of Arbitration is that an Arbitral Tribunal will sometimes fall into error but the Parties will, ordinarily, have to live with such error/s for the greater good that the process brings a final close to a dispute. A line has to be drawn as to when a misapprehension of facts and error in law can be said to be unacceptable and as being contrary to Public Policy. A survey of the decisions cited earlier indicates that the red line is already drawn. A misapprehension of facts or error of law in an Arbitral award can only be said to be against Public Policy if the misapprehension or error leads to an outcome that is patently illegal or unconstitutional, or its enforcement is injurious or offensive or repugnant to the general public of Kenya or inimical to the national interest of Kenya.

22. The Notice of Motion of 25th June 2009 is dismissed in its entirety with costs to the Respondent.

Dated, Signed and Delivered in Court at Eldoret this 28TH Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: