REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E125 OF 2019

BROOKSIDE DAIRY LIMITED.....RESPONDENT

VERSUS

LIMURU MILK PROCESSORS LIMITED.....1ST RESPONDENT

LIMURU DAIRY FARMERS CO-OPERATIVE SOCIETY...2ND RESPONDENT

RULING

(1) Before this Court are two (2) applications for determination. The first filed in **Misc E067 of 2019** is dated **22nd March 2019** by which **LIMURU MILK PROCESSORS LTD** and **LIMURU DAIRY FARMERS CO-OPERATIVE SOCIETY** seek the following Orders:-

> **"1. THAT the Arbitral Award given by Mr. Arthur K. Igeria on 23rd January 2019 be adopted as a judgment of this Honourable Court.**
>
> **2. THAT a decree do issue in terms of the said award.**
>
> **3. THAT costs of this application be provided for."**

(2) The application was premised upon **Sections 3A & 31A** of the **Civil Procedure Act, Section 36 of the Arbitration Act, Cap 49 Laws of Kenya** and all enabling provisions of law, and was supported by the Affidavit of even date sworn by **GEORGE CHEGE NJUGUNA** the Chairman of the Applicant entities.

(3) The second application for consideration is the Notice of Motion dated **16th April 2019** filed in **MISC E125 OF 2019** by which **BROOKSIDE DAIRY LIMITED** seek for Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. THAT this Honourable Court be pleased to set aside the award made by the arbitral tribunal, delivered and published on 23rd January 2019 as it relates to:**
>
> **(a) The Arbitrator's award in the sum of Kshs.12,122,500/= to the Respondents "being rent arrears transferred from Buzeki Dairy Limited less the security deposit."**
>
> **(b) The Arbitrator's award in the sum of Kshs.41,580,000/= to the Respondents "being mesne profits for 12 months and 18 days" which amount as calculated at the rate of Kshs.3,300,000/= per month.**
>
> **4. THAT costs of this application be provided by the Respondents.**

(4) The application was premised upon **Sections 7 &35** of the **Arbitration Act, 1995, Rule 7 Arbitration Rules, 1997** and **Article 10(2) (b)** of the **Constitution of Kenya 2010** and was supported by the Affidavit of even date sworn by **JACQUELINE HINGA** the Applicants Group Legal Officer.

(5) Given that both applications relate to the same subject matter i.e the Arbitration proceedings between the two parties conducted by the sole Arbitrator **Mr Arthur K. Igeria**, the two files were duly consolidated and the applications were heard together (under cover of **MISC E125 OF 2019**). The applications were canvassed by way of written submissions **BROOKSIDE DAIRY LIMITED** (hereinafter the Applicant) filed their written submissions in support of their Application to set aside the Arbitral Award on **25th September 2019** and filed submissions in opposition to the Notice of Motion dated **22nd March 2019** on the same date.

(6) **LIMURU MILK PROCESSORS LIMITED** and **LIMURU DAIRY FARMERS CO-OPERATIVE SOCIETY** (the 1st and 2nd Respondents respectively) filed their written submissions on **5th August 2019**.

BACKGROUND

(7) The Applicant is a limited liability Company incorporated in the Republic of Kenya. At all material times the 2nd Respondent was the registered proprietor of the property known as Land **Reference Number 11164/64 Limuru** in which a milk processing plant had been erected and was being managed by the 1st Respondent. (hereinafter the "**suit premises'**)

(8) On or about **26th January 2013** the Respondents entered into a Lease Agreement with **BUZEKI DAIRY LIMITED** (hereinafter "**BUZEKI**") by which the Respondents agreed to lease out the milk processing plant to "**Buzeki**" for a period of ten (10) years.

(9) By a Deed of Assignment dated **31st October 2013**, **Buzeki** with the consent of the Respondents assigned the said lease to the Applicant herein. Pursuant to the Deed of Assignment the applicant took up all the rights and obligations of a tenant and used the suit premises as a milk collecting plant. The Applicant paid to the Respondents a monthly rent of **Kshs.3,300,000** as provided under the lease.

(10) The Applicant also took over some of the equipment previously utilized by **Buzeki.** According to the Applicants they were not utilizing the entire premises and some of the equipment was in deplorable condition, and the monthly rent payment became unmanageable thus on or about **28th February 2014** the Applicant issued to the Respondents a 12 month termination notice in line with **Clause 3.8.4** of the lease. This 12 month Notice was to run from **1st March 2014** and the lease was due to eventually terminate on **29th February 2015**.

(11) Upon receiving the termination notice the Respondents through a letter date **8th March 2014** invited the Applicant to negotiate new terms with a view to reviewing the lease. The parties did engage and renewed the lease for a further period of three (3) years at a monthly rent of **Kshs.650,000**. Upon termination of the old lease on **29th February 2013** the Applicant took up possession of the suit premises from **1st March 2015** upon the new re-negotiated terms. The Applicants position is that it would not have continued to occupy the premises were it not for the new re-negotiated terms agreed upon.

(12) The applicants claim that the Respondents failed to execute the new lease without any justification and/or explanation and also claim that the Respondents failed to supply to the Applicants 10,000 litres of milk daily as had been agreed. The Applicants contend that on account of the Respondents failure to execute the lease, the tenancy became a periodic tenancy under **Section 57(1) (c)** of the **Land Act 2012**.

(13) By a letter dated **26th February 2016**, the Applicant purported to terminate the periodic tenancy and eventually vacated the premises on **18th March 2016**. A dispute arose between the parties and pursuant to **clause 3.9** of the lease dated **26th January 2013** that dispute was referred to Arbitration. The parties jointly appointed **Mr Arthur K. Igeria** as a sole arbitrator to hear and determine the dispute.

(14) Upon conclusion of the Arbitral proceedings the sole arbitrator rendered his decision by way of the Award made and published on **23rd January 2019**. The said award read as follows:-

> **14. NOW, I MR ARTHUR K. IGERIA, HAVING CAREFULLY CONSIDERED THE PLEADINGS, ORAL AND DOCUMENTARY EVIDENCE ADDUCED BY THE PARTIES HEREBY AWARD AND DIRECT IN FULL AND FINAL SETTLEMENT OF THE ISSUES AS FOLLOWS:-**
>
> **14.1 Claim for Kshs.12,122,500/= only being rent arrears transferred from Buzeki dairy Limited to the Respondent and the sum being less the security deposit; This amount is awarded to the Claimants in full.**
>
> **14.2 Claim for Kshs.41,580,000/= being the mesne profits for 12 months and 18 days; This amount is awarded to the Claimants in full.**
>
> **14.3 Claim for Kshs.32,207,672.44 and Kshs.942,169/= being costs of replacement of damaged or missing machines/equipment and costs of stocks utilized by Buzeki; These claims are dismissed in their entirety.**
>
> **14.4. Claim for Kshs.58,487/= being water and electricity bills arrears. This claim is dismissed in its entirety.**
>
> **14.5 That the Respondent pays the interest at the rate of 14% being the current court rates from the date of this Award until payment in full, on the rent outstanding under the Lease being the sums awarded herein.**
>
> **14.6 That the Respondent does pay the costs of this Arbitration (to be agreed upon or to be taxed if not agreed) as well as the Arbitrators fees together with VAT on or before publication of this Award."**

(15) The Applicant herein (who was the Respondent in the Arbitration proceedings) being aggrieved by the Award as published filed their application seeking to have the said Award set aside. On the other hand the Respondents herein (who were the Claimants in the Arbitration proceedings) pray that the Award be enforced by this Court.

ANALYSIS AND DETERMINATION

(16) I have carefully considered the written submissions filed by both parties. I will first proceed to analyze and determine the Notice of Motion dated **16th April 2019** seeking to set aside the Arbitral Award.

(i) Notice of Motion dated 16th April 2019

(17) By this application **Brookside Dairy Limited** (the Applicant) seeks to have the Arbitral Award which was published on **23rd January 2019** set aside on the following grounds: -

> **(a) The Arbitral Award is in direct conflict with various laws and constitutional principles and therefore inimical to public policy;**
>
> **(b) The Arbitral award is inconsistent with the Constitution of Kenya and in violation of Section 26(c) of the Arbitration Act which requires the Arbitral Tribunal to make an award on the evidence before it and hence inconsistent with public policy;**
>
> **(c) The Arbitral award is contrary to justice and morality and tainted with illegality in so far as it is conferred a benefit and unjustly enriches the Respondents from their own contractual omissions and wrong doing, hence in conflict with Article 10 of the Constitution and accordingly inimical to public policy.**
>
> **(d) The conflict between the Award and the laws and the Constitution justifies setting aside the award by this Honourable Court."**

(18) **Section 35** of the **Arbitration Act** allows for the the setting aside of an Arbitral Award High Court but only in certain specific scenarios. **Section 35** provides as follows:-

> **"35(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)**
>
> **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 or 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 of 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.

(19) The Award in question having been published on **23rd January 2019** and this Application for setting aside having been filed on **17th April 2019** the same was made within the 3 month period specified by the Act. I am satisfied that **Section 35(3)** of the Act has been complied with and that this application is properly before this court.

(20) The Applicant herein takes issue with two aspects of the Award and seeks determination of the following two issues:-

(i) Whether the award in the sum of Kshs.12,122,500/= to the Respondents was made in disregard of the evidence before the Arbitrator and the applicable law contrary to Section 26(c) of the Arbitration Act, 1995 ("the Act") and the law of Evidence and therefore inimical to public policy.

(ii) Whether the award in the sum of Kshs.41,580,000/= to the Respondents was made in violation of the Constitutional Principle of equity enshrined under Article 10(2)(b) of the Constitution of Kenya 2010 and the established principles of Estoppel enshrined in the Law of contract and therefore contrary to public policy."

(21) In other words the Applicant contends that the Award as published is firstly inimical to public policy and secondly contends that said Award was made in violation of the Constitutional Principle of Equity enshrined under **Article 10(2) (b)** of the **Constitution of Kenya 2010** and the established principles of "**Estoppel**".

PUBLIC POLICY

(22) The Applicant submits that the Award as published went contra to Public Policy in that it shifted the burden of proof to the Applicant against known principles of the Law of Evidence and alleges further that the Arbitrator exhibited open bias in favour of the Respondents thereby denying the applicants a fair trial. That the Arbitrators reliance on the lease statement Account for **Buzeki Dairy Limited** was done in complete disregard of the oral evidence and the documents submitted before him and is therefore contrary to Public Policy.

(23) Public Policy was defined in the case of **Charles Gatheca Vs Atlas Copco Cmt & Ct Management Limited & 2 others [2019] eKLR**, the court observed as follows:-

"Setting aside arbitral awards on ground of conflict with public policy is not novel in Kenyan Courts. For years now, Kenyan courts have discussed the meaning and the scope of what constitutes conflict with the public policy under section 35 (2) (b) of the Arbitration Act. In Christ for All Nations Vs Apollo Insurance Co. Ltd [2002] 2 E.A 366 Ringera J held that:

"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either (a) inconsistent with 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..

The questions that beg for answer are, what is the public policy in contracts when it comes to litigation, and, whether the impugned arbitral award is in conflict with the said public policy. Another question that arises is whether there is public interest in the manner in which proceedings in litigation/ arbitration are conducted. In my view, the public policy regarding contracts, whether commercial or employment, when it comes to litigations is that the court or the tribunal's power is limited to enforcing the terms of the contract as agreed by the parties and the court cannot rewrite it for them. [emphasis added]

(24) The definition of Public Policy above was adopted by the Court of Appeal in **Tanzania National Roads Agency Vs Kundan Singh Construction Limited, [2014] eKLR**, where it was held:-

Public Policy as defined above, is a broad, infinite and malleable concept and when considering it, the salutary warning of Burrough J. in Richardson V Mellish [1824] 2 Bing 228 that, *"Public Policy is a very unruly horse, and when you get astride, you never know where it will carry you"* must be kept in mind."

(25) With this in mind I have considered the arguments put forward by the Applicant in support of its contention that the Award published on **23rd January 2019** offended Public Policy in Kenya. The applicant for example cites **clause 13.8** of the Award where the Arbitrator held as follows:-

"It is further my finding that the previous lessee (Buzeki) as at the time of entering into the Deed of Assignment & Novation of Lease, was already in arrears, payment of which formed part of its obligations under the Lease. By assigning and novating the Lease to the Respondent herein, Buzeki transferred all its rights and obligations under the Lease to the Respondent. Consequently, the Respondent was bound to make good any arrears outstanding as at the date of executing the subject matter Deed." (See page 41 of the Award at Page 752 of the Application).

(26) The Applicant submitted that the above finding had no legal basis and moreover was contrary to the express provisions of **Section 71(3) of the Land Act 2012**. The Applicant further alleges and gives examples of instances where the in their view the Arbitrator misconstrued or

misinterpreted the evidence of the witnesses who testified before him.

(27) The Applicants further allege that the Arbitrator shifted the burden of proof to the applicant against the known principles of the law of Evidence and against the tenants of a fair trial when he stated as follows:-

> **"The Respondents when deciding to take over the premises and the plant from Buzeki Dairy, was obligated to undertake a comprehensive due diligence on Buzeki's operations and financial situation to establish all outstanding liabilities. Failure to do so, or its misapprehension of the import and effect of a Deed of Assignment and Novation, is an error whose negative effects cannot be visited upon the Claimants." (See Page 752 of the application).**

By this the Applicants are suggesting that the Arbitrator misapprehended the law to their prejudice.

(28) Finally the applicants take issue with the reliance by the Arbitrator on the **Lease Statement of Account for Buzeki Dairy Limited** in complete disregard of the oral and documentary evidence adduced before him and point at this as a being contrary to Public Policy.

(29) Taken as a whole the gravamen of the Applicant's argument is that the Arbitrator misconstrued the evidence and misapprehended the law. The Applicant is clearly dissatisfied with the findings of fact made by the Arbitrator and claims that the Award reached by the Arbitrator is not supported on the evidence presented in Arbitral proceedings. These are arguments which would typically be made by a party in support of an appeal.

(30) The Applicant is in effect asking this court to re-examine the evidence placed before the Arbitrator and arrive at a different conclusion. A court sitting on appeal can do this but **Section 35** does not authorize the High Court to sit on appeal over an Arbitral Award. The High court under **Section 35** is only concerned with the **propriety** of the Arbitral process and must restrict itself to the specific grounds for setting aside an Arbitral Award as specified in **Section 35**. To do otherwise could mean this court would be exceeding its mandate under the Arbitration Act.

(31) In the case of **Mahican Investments ltd & others Vs Giovanni Gaida & 2 Others Hon Justice Ransley** (as he then was) **[2005]eKLR,**

> **"A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpre-tation 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**."[own emphasis]

(32) Likewise in the case of **Kenyatta International Convention Centre (KICC) Vs Greenstar Systems Ltd [2018] eKLR**, the Court reiterated the principle that an Arbitrators finding of fact cannot be challenged under Section 35 as follows:-

> **"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 to agreement to honour the arbitrators' award on the facts. The principle of party autonomy decres that a court ought never to question the arbitrators' findings of fact**." [own emphasis]

(33) It is trite law that parties who enter into an arbitration agreement expect a level of finality from that process. In **CHRIST FOR ALL NATIONS (SUPRA) Justice Ringera** (as he then was) further stated thus:-

> **In 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 grounds for doing so. He must be told clearly that an error of fact or law or mixed fact of 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**."[own emphasis]

(34) Similarly the Court of Appeal in **KENYA SHELL LIMITED –VS- KOBIL PETROLEUM LIMITE [2006] eKLR**, held:-

> **"We think as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which proceedings in this matter were conducted underscores that policy."**

(35) Where parties agree to have their dispute settled by through Arbitration, they must be aware that the decision may be for or against them. It is not the case that every error committed by an arbitrator forms grounds upon which the dissatisfied party may apply to set aside the Award under **Section 35** of the Arbitration as the High Court does not exercise appellate jurisdiction. As my learned brother **Tuiyott J** stated in **MAHAN LIMITED –VS- VILLA CARE ML [2019] eKLR,**

> **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 other 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 were 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) Finally I find no evidence that the Award published on **23rd January 2019** offended public policy in any way. Further, I find that the Applicant has failed to establish that this final Award comes under any of the circumstances envisaged by Section **35(2)** of the **Arbitration Act**. I find that there exists no legal basis upon which to set aside the said Award and accordingly I find no merit in this application and dismiss the same. The Notice of motion dated **16th April 2019** is dismissed in its entirety and I award costs to the Respondents.

(iii) Notice of Motion dated 22nd March 2019

(37) By this application the Applicant **Limuru Milk Processors**, and **Limuru Dairy Farmers Co-operative Society** seeks orders for the recognition and enforcement of the Arbitral Award of **23rd January 2019**. The application is premised upon **Section 36(1)** of the **Arbitration Act** which provides that:-

"36(1) a domestic Arbitral Award shall be recognized as binding and upon application in writing to the High Court shall be enforced subject to this Section and Section 37.

(38) **Section 37** of the Act provides for the grounds upon which the High Court may decline to recognize and/or enforce an Arbitral Award at the request of the party against which it is invoked.

(39) A keen perusal of the file reveals that the Applicants herein have not complied fully with **Section 36 (3)** of the **Arbitration Act**.

(40) **Section 36(3)** provides:-

"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."

(41) This Section has been couched mandatory terms. The use of the words "**must furnish**" make the furnishing of a certified copy of the Arbitral award and Arbitration Agreement mandatory conditions for the enforcement of the Award.

(42) The Applicants have failed to annex to their application for enforcement the original or certified copy of the Arbitration Agreement or the Arbitral Award. Instead the applicants only annexed to the **Supporting Affidavit** dated **16th April 2019 photocopies** of the **Deed of Assignment of lease** and the **Arbitral Award**. These photocopies do **not** meet the requirements of **Section 36 (3)** of the Act. In the case of **DAVID CHABEDA & ANOTHER –VS- FRANCIS INGASI [2007] eKLR**, in an application seeking to enforce an Arbitral Award **Hon Justice Hatari Waweru** held as follows:-

"It was submitted for the Defendant that no duly authenticated original arbitral award or a duly certified copy of it has been furnished by the Plaintiffs. This is a statutory requirement couched in mandatory terms. Indeed the Plaintiffs have not furnished a duly authenticated original arbitral award or a duly certified copy of it. Failure to comply with an express statutory provision cannot be cured under Section 3A of the Civil Procedure Act…"[own emphasis]

(43) Similarly in the case of **DEEKAY CONTRACTORS LIMITED –VS- CONSTRUCTION & CONTRACTING LTD [2014] eKLR, Hon Justice Gikonyo** stated:-

"Let me go back to Section 36(1) and (3) of the Act which provides:-

36(1)……..

36(3) Unless the High Court otherwise order, the party relying on the Arbitral award or applying for its enforcement must furnish:-

(a) The duly authenticated original award or a duly certified copy of it; and

(b) The original arbitration agreement or certified copy of it.

Of course Section 36(1) requires an application in writing for recognition and enforcement of an award to be made. But the application is subject to Section 36 and 37 of the Act and I should add, to the Constitution. Section 36(3) of the Act makes it mandatory that the party applying for recognition and enforcement of the award should file (1) The duly authenticated original award or a duly certified copy of it, and (2) the original arbitration agreement or a certified copy of it. Doubtless the award must be filed.

Accordingly, by that requirement, I think, a notice will invariably be required and the provisions of rules 4 and 5 of the

Arbitration Rules on filing of the award will abide which provide that-

The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an Affidavit of Service." [own emphasis]

(44) It is therefore clear that in order for the Notice of Motion dated **22nd March 2019** to succeed the original or certified copy of the Arbitration Agreement as well as the Arbitral Award must be annexed thereto. For this reason I find that the present application seeking enforcement of the Award is incompetent and cannot be allowed as it is. I therefore strike out the Notice of Motion dated **22nd March 2019** and make no orders as to costs. Leave is granted to the Applicants herein to refile a compliant application.

CONCLUSION

(1) The Notice of Motion dated **16th April 2016** is dismissed in its entirety with costs being awarded to the Respondents.

(2) The Notice of Motion dated **22nd March 2019** is hereby struck out with no orders on costs.

Dated in Nairobi this…19th .day of June 2020.

……..

Justice Maureen A. Odero