IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPL. NO. E679 OF 2020

BETWEEN

CAPTURE SOLUTIONS LIMITED .....APPLICANT

AND

NAIROBI CITY WATER AND

SEWERAGE COMPANY LIMITED ..... RESPONDENT

RULING

Introduction

1. The Applicant has moved the court by a Chamber Summons dated 18th July 2020 made under **section 36** of the ***Arbitration Act*** ("the ***Act***") seeking orders that the Final Award prepared by Prof. Ike Ehiribe dated 27th December 2019 ("the Final Award") be recognised, adopted and enforced as a decree of the court.

2. The application is supported by the affidavit and further affidavit of Lorenzo Boncompagni, a director of the Applicant, sworn on 13th April 2020 and 3rd June 2020 respectively. The application is opposed through the replying affidavit of Assumpta Reuben, the respondent's Senior Legal Officer, sworn on 27th May 2020. Both parties filed written submissions in support of their respective positions.

Background matters

3. Before I deal with the matters in contention I propose to set out matters that are common ground. The parties entered into two contracts. The first one was a Contract NWSC/72/16 for supply, delivery, development, installation, implementation and commissioning of GIS enabled system and meter census at a contract price of Kshs. 39,996,000.00 inclusive of Value Added Tax (VAT). The second one was Contract NWSC/73/16 for design, supply, delivery, development, installation and commissioning of workforce management at a contract price of Kshs. 118,802,000.00 inclusive of VAT. Save for the subject matter, the terms of the Contracts were the same in material terms. Following a dispute on the amount due under the Contracts, the Applicant invoked the arbitration clause at Clause 7.2 of the Contracts and disputes were referred to Professor Ike Ehiribe as the Sole Arbitrator.

The Final Award

4. After hearing the matter, the Arbitrator published the Final Award and found in favour of the Applicant as follows:

a) The Tribunal Declares that the Respondent is in breach of the two contracts dated 31st August 2017.

b) The Tribunal Orders the Respondent to pay to the Claimant the total sum of Kshs 57,729,720 inclusive of VAT at 16% being cost of remedying the Respondent's breached of contracts within thirty days of the date of the award.

c) The Tribunal Orders the Respondent to pay to the Claimant the accrued interest at simple interest of 12% per annum on the said sum of Ksh 57,729,720 from the commencement of proceedings being 01 November 2018 until payment in full.

d) The Tribunal Orders the Respondent to reimburse the Claimant for initial Ksh 20,000 paid to the Chartered Institute of Arbitrators Kenya Branch for the arbitrator appointment and the reimbursement of 50% of the arbitrator's fee and expenses in the sum of UKP7500.00 with simple interest at 12% per annum from the date of publication of the award until payment in full.

Sections 36 and 37 of the Arbitration Act

5. Under **section 32(A)** of the ***Act*** an arbitral award is final and binding upon the parties and no recourse is available against the award otherwise than in the manner provided by the ***Act***. The High Court under **section 36** has the power to recognise and enforce domestic arbitral award on the following terms:

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

(2) …

(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.

(4) …..…

(5) …..…

6. **Section 37** of the ***Act***, on the other hand, provides for grounds upon which the High Court may decline to recognize and/or enforce and arbitral award at the request of the party against whom it is to be enforced. It provides as follows;

37. The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes the High Court proof that;

(i) a party to the arbitration agreement was under some in capacity; 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, under the law of the state where the arbitral award was made;

(iii) The party against whom the arbitral award is invoked 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 it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made; or

(vii) The making of the arbitral awards was induced or affected by fraud, bribery, corruption or undue influence;

(b) If 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya. [Emphasis mine]

Application for recognition and enforcement

7. I am satisfied that the Applicant has met the pre-condition for enforcement of the award as it has provided that certified copies of the Contracts which contain the arbitration clause and a certified copy of the arbitral award. In any event both Contracts and the Final Award are not in dispute. Since the Applicant has established a case for recognition and enforcement of the Final Award, the burden is on the

Respondent to demonstrate that the court should not recognise the award based on the circumstances set out in **section 37** of the ***Act***.

8. In the replying affidavit buttressed by written submissions, the Respondent attacked the Final Award in several respects. It complained that Arbitral Tribunal relied heavily on Proforma Invoices submitted by the Applicant to the Respondent in coming to the conclusion that the Applicant was entitled to Kshs. 57,729,720.00 for supplying software and hardware under the contracts. It further contended that under Clause 3.3 of the Contracts, payment would only be made upon submission of an Invoice and not a Proforma Invoice. In the circumstances, the Respondent argued that the Arbitral Tribunal effectively re-wrote the contract contrary to the binding decision of the Court of Appeal in ***National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another*** **[2001] eKLR**. It submitted that the Arbitral Tribunal also departed from the position articulated by the Court of Appeal in ***Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority*** **[2009] eKLR** and ***Total (Kenya) Ltd formerly Caltex Oil (Kenya) Limited v Janevams Limited*** **[2015] eKLR** where it was held that a Proforma Invoice is a commitment to purchase goods at a specified price and not a receipt and as such cannot attest to the existence of acquisition of goods.

9. In view of the Arbitral Tribunal's departure from binding decisions of the Court of Appeal, the Respondent contended that the Final Award was contrary to public policy as the Arbitral Tribunal was bound by those decisions under the doctrine of *stare decisis*. Counsel for the Respondent cited several cases; ***Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others*** **SCK Pet. No. 4 of 2012 [2013] eKLR**, ***Dodhia v National & Grindlays Bank Limited and Another*** **[1970] EA 195** and ***Kidero and 5 Others v Waititu and Others,*** **SCK Pet. No. 18 & 20 of 2014 [2014] eKLR** where the courts emphasized the importance of stare decisis as a constitutional requirement aimed at enhancing certainty and predictability in the legal system.

10. The Respondent also pointed to para. 55 of the Final Award where the Arbitral Tribunal noted that the Applicant's witness had on cross-examination admitted to importing 20 devices but and only delivered 1 device to the Respondent and not 100 devices. Notwithstanding this testimony, the Arbitral Tribunal still determined that the Applicant was entitled to Kshs. 57,729,720.00 for delivery of software and hardware under the contracts. In the circumstances, the Respondent argued that the enforcement of the Final Award would amount to unjust enrichment contrary to the public policy of Kenya taking into account the testimony. It also added that to the extent that the Arbitral Tribunal considered devices not actually delivered to the Respondent, the Final Award contained matters beyond the scope of the reference before the Arbitral Tribunal.

11. In its rejoinder to Respondent, the Applicant contended that the Arbitral Tribunal considered the decisions of the Court of Appeal and came to the conclusion the that facts were different because the Applicant produced documentary evidence to show that it had delivered the goods in question and the goods remained in its possession. It added that the Applicant only invoiced for the goods it delivered to the Respondent and this is what was reflected in the Final Award.

12. The Applicant stated that the total value of both contract was Kshs. 158,798,800.00 but it only claimed Kshs. 57,729,720.00 for the goods it delivered and in making this finding the Arbitrator considered all facts and evidence before it. It also denied that the Final Award was outside the scope of the reference.

Issues for Determination

13. From the aforesaid arguments, this court is called upon to determine the following two questions:

(a) Whether the recognition and enforcement of the Final Award conflicts with the Public policy of Kenya.

(b) Whether the Arbitral award dealt with matters beyond the scope of the reference to arbitration.

Determination

14. The term public policy used in the ***Act*** as a ground for refusing to recognise an arbitral award or setting aside an award is not defined and is indeed, as courts have stated, a most elastic term. Our courts have, in several cases, attempted to define the contours of public policy when applied to arbitral awards. In ***Christ for All Nations v Apollo Insurance Co. Ltd*** **[2002] 2 E.A 366**, Ringera J., observed as follows:

> *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, or that as the common law Judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you. An award could be set aside under section 35(2) (b) (ii) if 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 of Kenya 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. The first category is clear. In the second category I would without claiming to be exhaustive include the interest of the national defence and security good diplomatic relations with friendship nations and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive include such considerations as whether the award was induced by corruption, fraud or whether it was founded on a contract contrary to public morals.*

15. In ***Glencore Grain Ltd v TSS Grain Millers Ltd*** **[2002] 1 KLR 606**, Onyancha J., held that:

> *A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan Society. It has been held that the ward "illegal" here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.*

16. In Mabeya J., in ***Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd*** **[2012] eKLR** held:

[T]hese terms ("contrary to public policy", "against public policy", "opposed to public policy") do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society.

17. All these pronouncements show that for an award to be contrary to public policy, there must be some fundamental departure from the law and legal norms. The Respondent complaint on this score relates to the departure by the Arbitral Tribunal from binding precedent of the Court of Appeal. It must be recalled that an Arbitrator like a judicial officer is required to exercise his or her judgment based on the facts of the case. The use of precedent is not a mechanical process. Precedents are applied to a set of facts and the Arbitrator as the decision maker is entitled and indeed empowered by the parties to apply his mind to the facts and the law and come up with a decision. It cannot be that every departure from binding precedent amounts to a violation of public policy. In ***George Mike Wanjohi v Steven Kariuki & Another SCK Pet. 2A of 2014*** **[2014] eKLR**, the Supreme Court expressed the following view:

[83] Different sets of facts present themselves in the adjudication of disputes before the Courts. These varying facts fall for evaluation, interpretation and analysis, outcomes of which are then weighed, in a process of judicial reasoning, against some defined principles of law, so as to determine the respective rights of parties. Indubitably, the differing fact-situations make every given case peculiar, and quite apart from the other. Bearing in mind that ascertained legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion. Where facts are materially dissimilar, or the case is not analogous to the previous decision, this Court will always distinguish the rule and may, in the interest of justice, choose not to apply its previous decision. This is the guiding principle to be applied by this Court in distinguishing its decisions.

18. I will also add under Clause 17.3 of the Contracts, the parties reserved the right of appeal to the High Court, but the Respondent did not lodge its appeal within the time limited for appeal in line with **section 39(2)** of the ***Act*** but instead opted to oppose the application for recognition and enforcement of the Final Award. The court must therefore be careful to avoid entering into the arena of an appellate court by reviewing the award and correcting errors of law and fact when the parties have agreed that a determination by the Arbitrator is final as underscored by the Court of Appeal in ***Kenya Shell Ltd vs Kobil Petroleum Limited,*** **Civil Appeal No. 57 of 2006 [2006] eKLR** as follows;

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 the proceedings in this matter were conducted underscores that policy…. At all events the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under section 10 of the Act unless either party can satisfy that court that it ought to be lawfully set aside.

19. In order to understand whether the Arbitral Tribunal disregarded binding precedent, it is important to consider what was before the Arbitral Tribunal. The case was essentially one for goods, hardware and software, sold and delivered under the Contracts. The issue raised by the Respondent about the invoices concerned whether the items under the Contracts were delivered. The Applicant's case was that it had supplied equipment and software and has not been paid within 60 days of invoicing under the Contracts. In response to that contention, the Respondent justified the failure to pay on the ground that the applicant had only provided a Proforma Invoice and not an Invoice properly so called which was a condition to payment of sums due under Clause 3.3 of the Contracts. It is in support of this argument that the Respondent cited ***Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority*** **(Supra)** and ***Total (Kenya) Ltd formerly Caltex Oil (Kenya) Limited v Janevams Limited*** **(Supra)** to argue that the proforma invoices were neither proof of delivery of delivery or payment.

20. This is how the Arbitral Tribunal dealt with the issue in the Final Award:

[48] The Tribunal accepts as argued by the Respondent that the two decisions of the Court of Appeal are binding on the Tribunal, but with a caveat, which is particularly, where the facts are the same. It is the Tribunal's finding however, that the facts under consideration in this reference are materially and radically different from the facts that arose in the two Court of Appeal decisions cited by the Respondent. This is mainly because in the case under consideration, not only did the Claimant provide documentary proof of the items purchased in further execution of the contract, further documents was adduced to show that delivery notes were issues and the names of the Respondent's backroom staff (Doreen) who received the goods delivered was mentioned and confirmed by the Claimant's Chief Executive under cross-examination. ….. The two decision from the Kenyan Court of Appeal referred to by the Respondent are cases where before the court of first instance the parties had relied on solely on the proforma invoices as proof of purchase of goods. In the case, under consideration, reliance has been placed not only on the proforma invoices but also delivery notes, the unchallenged delivery and acceptance of the goods and services to the Respondent's staff and the silence of the Respondent.

[49] It is the Tribunal's finding therefore, that the Respondent received the goods and services delivered by the Claimant which are itemized in the covering letters, invoices and delivery notes submitted by the Claimant and as contained in the Claimant's bundle of documents ….. the fact that the Claimant has included in the documentary evidence proforma invoices does not preclude the Claimant from seeking payment for those goods and services …..

21. The passage I have set out show that the Arbitrator considered the Court of Appeal precedents along the facts of the case and concluded that the decisions were inapplicable to the matter before it. As I stated elsewhere distinguishing of precedents based on the facts of the case is allowed under common law and does not ipso facto violate the doctrine of stare decisis. I find and hold that Respondent has not proved that the Arbitral Tribunal violated public policy by declining to follow Court of Appeal precedents in the circumstances of the reference before it.

22. To support its argument that the Arbitral Tribunal dealt with matters beyond the scope of the reference, the Respondent referred to the case of ***Mahican Investments Limited & 3 Others v Giovanni Gaida & 80 Others*** **[2005] eKLR** where the court observed as follows:

In order to succeed (in showing that the matters objected are outside the scope of the reference to arbitration) the application must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute.

23. To support this aspect of the case, the Respondent contended that the Applicant's representative admitted at the hearing it imported 20 devices but delivered only one hence by awarding Kshs. 57,729,720, the Arbitral Tribunal went outside the scope of the award. Bearing in mind, that the claim was good and services, the Arbitrator expressed himself as follows:

> *[55] ….. The Tribunal's understanding of the Claimant's case, simply put, is this. Since the Respondent for whatever reason unable or incapable of abiding by the contract terms it provided, the Respondent should pay back all the amounts the Claimant has expended in furtherance of the contract including VAT, Interest and Costs. The Tribunal observed that the Claimant is not claiming for the time and or labour put into sourcing the hardware and software delivered to the Respondent. Furthermore, the Respondent has belatedly sought to rely on a response given by the Claimant's chief executive during cross-examination to the effect that the Claimant did not deliver 100 devices but imported around twenty devices and delivered only one to the Respondent as the basis for asserting that the Claimant has not proved a basis recognised by law for the claim for Ksh. 84,460,170. The Tribunal finds that the Respondent has failed to demonstrated how this identified piece of oral testimony detracts from the Claim for Ksh. 84,460,170 either by reference to the delivery notes signed by the Respondent's staff named "Doreen" or on the proforma invoices submitted by the Claimant. Secondly, the Tribunal finds as an undisputed fact that the Respondent's staff accepted the software and hardware supplied by the Claimant without any complaint in January 2018 by reason of the Respondent's silence and acquiescence already alluded to in paragraph 49 above.*

24. The passage I have set out shows that the Arbitrator dealt with the issue of delivery on the basis of the evidence. Delivery of the devices was at the heart of the dispute between the parties and the Arbitrator considered the evidence of the Applicant and Respondent and came to the conclusion he was entitled to on the material before him. I therefore find that the respondent has not established that the Arbitral Tribunal exceeded the scope of the reference. This finding is also sufficient to dispose of the Respondent's case that the Applicant was unjustly enriched as the Arbitrator found as a fact that the Applicant delivered goods which were not paid for.

Disposition

25. For the reasons I have set out above, I find and hold that the Respondent has not discharged the burden or indeed proved that the Final Award is contrary to public policy or that the Arbitral Tribunal dealt with matters beyond the scope of the reference to arbitration.

26. On the other hand, I find and hold that the Applicant has met the conditions for recognition and enforcement of an award under **section 36** of the *Act*. I therefore allow the Chamber Summons dated 18th July 2020 on the following terms;

(a) That the Final Award prepared by Prof. Ike Ehiribe dated 27th December 2019 be and is hereby recognized and adopted as a judgment of this court.

(b) That leave is granted to the Applicant to enforce an award as a decree of this court.

(c) The respondent shall bear the costs of this application.

DATED and **DELIVERED** at **NAIROBI** this **27TH day of AUGUST 2020**

D. S. MAJANJA

JUDGE

Mr Gitonga instructed by Majau Maitethia and Associates Advocates for the applicant.

Mr Ogutu instructed by TripleOKLaw LLP Advocates for the respondent.