IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

MISC. APPLICATION NO. E747 OF 2020

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE

AN ARBITRAL AWARD

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....APPLICANT

AND

MOEISH CONSULT LIMITED.....RESPONDENT

RULING

Introduction and Background

1. By the Chamber Summons application dated 2nd June 2020, the Applicant ("the Bank") has moved the court under **section 35(2)** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking that the arbitral award dated 11th October 2019 and published on 6th March 2020 by Mr Collins O. Adipo, the Arbitrator ("the Award") in the arbitral proceedings involving the parties herein be set aside.

2. The application is supported by the affidavit and further affidavit of Wanda M. Atsiaya, the Bank's officer, sworn on 2nd June 2020 and 13th August 2020 respectively. The Respondent opposed the application through Grounds of Opposition dated 23rd July 2020 and the replying affidavit of its Managing Director, Isha Kasule, sworn on 23rd July 2020. Both sides filed written submissions in support of the respective positions.

3. Before I deal with the application, a brief background of the matter will suffice. The parties entered into a Transaction and Fee Agreement dated 4th January 2014 ("the Agreement") in which the Bank engaged the Respondent to source a lender willing to extend a line of credit to it up to USD 100 million. Under Clause 3(a) of the Agreement it was agreed that, *"The amount payable by the Bank to the Agent for the engagement shall be a commission amounting to 1.0% of the total aggregate amount of funds sourced and committed to the Bank."*

4. The transaction failed to materialize as anticipated by the Bank and by a letter dated 27th April 2015, the Bank gave the Respondent notice to terminate the Agreement. As the parties could not agree on remuneration, the dispute was referred to Mr Collins O. Adipo as the sole arbitrator.

5. The Respondent claimed USD 950,000.00 being the balance of the outstanding commission after giving credit to part payment of USD 50,000.00, an award of USD 500,000.00 for time and resources expended in assisting the bank conclude negotiations with the lender for the USD 100 million facility, general damages and interest. The Bank filed a Defence and Counterclaim denying that the Respondent was entitled to any commission. It averred that the Agreement was procured by improper inducement and undue influence and for that reason it sought to avoid the agreement.

6. After hearing the matter, the Arbitrator awarded the Respondent, *"[T]he sum of USD 150,000 and simple interest thereon at 8% per annum from 28th April 2015 calculated on daily rests (sic) until payment in full."* In coming to this conclusion, the Arbitrator held that the remuneration under Clause 3 was not payable as the Bank opted not to complete the transaction with the lender but found that the Respondent was entitled to remuneration under Clause 5(d) of the Agreement. The Bank was ordered to pay costs and expenses of the arbitration.

The Applicant's Submissions

7. The Bank's case contests the award of USD 150,000.00 based on two grounds. The first is under **section 35(1)(a)(iv)** of the ***Act*** that the, "*arbitral award in issue dealt with a dispute that was not contemplated by or falling within the terms of the reference to arbitration and therefore contains decisions on matters beyond the scope of the reference to arbitration*." The second is that the arbitral award is in conflict with the public policy of Kenya contrary to **section 35 (b) (ii)** of the ***Act***.

8. The Bank submitted that in finding that the Respondent had tendered evidence to show that it had incurred expenses payable under clause 5(d) of the Agreement in the sum of USD. 200,000.00, the Arbitrator dealt with a matter that was not subject of the dispute before him as framed by the parties. This matter, it submitted, was not raised and framed as an issue in the dispute for determination.

9. To support this aspect of the case, counsel raised several issues to demonstrate that the arbitrator exceeded his mandate. Counsel submitted that although expenses were covered under clause 5(d) of the Agreement, the Respondent did not plead its claim under this clause. Counsel pointed out that the Respondent anchored its claim solely on clauses 3(a) and 5(e) of the Agreement and indeed made extensive submissions on the two clauses but not on clause 5(d) of the Agreement. Counsel further submitted that the Respondent only framed 3 issues relating to payment and/or remuneration none of which dealt with reimbursement of expenses already incurred. Likewise, the Bank did not raise or address any issue related to such reimbursement of disbursements already incurred.

10. The Bank also attacked the basis for the Arbitrator's finding in so far as it was based on a letter dated 9th July 2015. Counsel pointed out that the letter was pleaded in the Statement of Claim and supported in the submissions to show that it has offered to make a concession on its claim for commission under the Agreement. In addition, the Respondent's witness confirmed the understanding. In the circumstances, counsel urged that by relying on the letter of 9th July 2015, the Arbitrator went outside the scope of the reference.

11. Counsel for the Bank also submitted that a claim for reimbursement of expenses cannot by any stretch of imagination be part of the claim in the sum of USD. 500,000.00 pleaded in the Statement of Claim in so far as it was in respect of compensation for time and resources allegedly incurred. In any case, the Bank argued that the Arbitrator, having dismissed the claim for USD 500,000.00 could not make the additional award for reimbursement of expenses.

12. In support of the Bank's case, counsel for the Bank cited ***Ecobank Kenya Limited v Bell Pacific International Limited*** **NRB CA Civil Appeal No. 416 of 2017 [2020] eKLR** where the Court of Appeal held that parties are bound by their pleadings and the court was required to determine the case based on what was pleaded and ***Kenya Bureau of Standards v Geo Chem Middle East*** **NRB CA Civil Appeal No. 259 of 2018 [2019] eKLR** where the Court of Appeal held that while party autonomy is accepted in arbitration, the arbitral tribunal cannot re-write the terms of the agreement.

13. The Bank submitted that expenses incurred are special damages which ought to have been claimed as such. In this respect, counsel submitted that the accepted law is that for the Respondent to succeed, it must specifically plead and prove those special damages. In the circumstances, the Bank's case is that in awarding such expenses without any basis of the pleading, the Arbitrator went against the law and offended the public policy of Kenya hence the award ought to be set aside.

The Respondent's Submissions

14. The Respondent opposed the application on the basis that in its Statement of Claim, it not only claimed the commission under the Agreement but also sought compensation for expended resources incurred in the performance of its obligations. It pointed out that in the determination, the Arbitrator found that it was not entitled to the full fee of USD 1 Million but since the Bank terminated the Agreement, it was liable to compensate it for resources expended under Clause 5 (d) of the Agreement.

15. The Respondent submitted that from the pleadings, the Arbitrator was properly seized of the issue of compensation for expended time and resources because in its Statement of Claim it made a claim for USD 500,000/= for additional and further time expended to which the Bank responded generally stating that it was not entitled to the same.

16. The Respondent submitted that the Arbitrator draws his jurisdiction from the arbitration agreement, the law and the reference and is bound to decide in accordance with the contract and that all issues discussed, analysed and determined in the Award arose at the onset of the reference in its pleadings as well as in its evidence. It maintained that the Bank participated fully in the proceedings but did not raise any objection to any of the claims at the earliest opportunity as required by **section 17 (3)** and **(5)** of the ***Act.***

17. The Respondent contended that findings on matters of fact in the Award are within the exclusive jurisdiction of the Arbitrator and that it is not open to the Bank to reopen the dispute at this stage. Moreover, the award of USD 150,000.000 was made after assessment of all the facts and evidence and that it was a logical and fair conclusion arrived at and based on the agreement and evidence. The Respondent added that the Bank has not placed before this court the full record of evidence considered by the Arbitrator to sustain the argument as to want of proof on any aspect of the award.

18. The Respondent cited the case of ***Christ for All Churches v Apollo Insurance Co. Ltd*** **[2002] 2 EA 366** where the court held that to warrant setting aside of an arbitral award as being contrary to public policy, the applicant must show that it is inconsistent with the Constitution or any other laws of Kenya, inimical to the national interests of Kenya; and contrary to justice and morality. It submitted that the Bank needs to demonstrate how the Award is contrary to public policy. Counsel for the Respondent concluded by stating that the Bank has failed to meet the pre requisites for setting aside an arbitral award.

Analysis and Determination

19. As this is an application to set aside an arbitral award, the court's jurisdiction is circumscribed by **section 35** of the ***Act*** which, at the part

material to this application, 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).*
>
> *(2) 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 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 laws of Kenya; or*
>
> *(ii) the award is in conflict with the public policy of Kenya:*
>
> *(3)* ----------
>
> *(4)* ---------- [Emphasis mine]

20. In considering whether or not an arbitral award deals with matters not contemplated or falling within the terms of the reference to arbitration, the Court of Appeal in ***Synergy Credit Limited v Cape Holdings Limited*** **NRB CA Civil Appeal No. 71 of 2016 [2020] eKLR** observed as follows:

> *In determining whether the arbitral tribunal has dealt with a dispute not contemplated or falling within the terms of the reference, or whether its award contains decisions on matters beyond the scope of the reference to arbitration, the arbitral clause or agreement is critical. Other relevant considerations, with-out in any way prescribing a closed catalogue, would include the subject matter, pleadings and submissions by the parties, as well as their conduct in the arbitration. Pleadings, however, must be considered with circumspection because, as the US Court of Appeals for the Ninth Circuit observed in* ***Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc. (supra),*** *the real issue in such an inquiry is whether the award has exceeded the scope of the arbitration agreement, not whether it has exceeded the parties' pleadings.*

21. The arbitration at **Clause 20(c)** of the Agreement stipulated as follows:

> *Any controversy or claim, whether based on contract, tort or other legal theory (including but not limited to, any claim of fraud or misrepresentation) arising out of or relating the Agreement including its interpretation, performance, breach of or termination that is not resolved in good faith negotiations, as provided above, shall be resolved exclusively by arbitration in accordance with the following provisions.*

22. The wording of the aforementioned Clause is wide and covers any dispute or difference that may arise between the parties concerning the Agreement. The controversy between the parties arose as to what fees and remuneration was payable to the Respondent under the Agreement when the Bank terminated it, hence the reference to arbitration.

23. The Arbitrator relied on **Clause 5(d)** and **(e)** of the Agreement which provides for the Bank's liability and obligation to the Respondent when adverse circumstances make it impossible for the Respondent to carry out its obligations under the Agreement and when the Bank opts not to complete the transaction of obtaining the facility sourced by the Respondent. The provisions are as follows:

> *d. Accordingly, the Bank shall inform the Agent as soon as it becomes aware of circumstances which will be likely to have a significant adverse effect on the Agent's ability to execute its obligation herein. This notification shall however not affect any fees payable to the Agent in undertaking the services of securing the funding and the Bank shall remain liable to compensate the Agent*

for any expenses incurred in the execution of its obligation hereunder.

e. The Bank hereby undertakes that where the Agent has expended and undertaken all due diligence and carried out its duties in accordance with this Agreement by sourcing the funding on behalf of the Bank and further where the Lender has entered into the Agreement and taken significant steps in the pursuit of the conclusion of this transaction, the Bank shall remain liable to pay unto the Agent the sums set out as per Clause 2 herein even where the Bank opts not to complete the transaction.

24. In **Paragraph 28(b)** of the Statement of Claim, the Respondent claims the following from the Bank as one of its prayers, "*USD 500,000/- being additional and further time and resources expended by the Claimant….. "*

25. It is clear that from the prayer in the Statement of Claim read alongside the provisions of **Clauses 5(d)** and **(e)** of the Agreement, the issue of expenses was within the Arbitrator's purview, jurisdiction and scope of reference and within the arbitration clause. In ***Mahican Investments Limited & 3 Others v Giovanni Gaida & 80 Others*** **[2005] eKLR,** it was held that:

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.

26. In the same case, the court further stated that;

A court will not interfere with the decision of an Arbitrator even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the 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.

27. Having established that the matters dealt with by the Arbitrator were within the reference to arbitration, the other issue raised by the Bank is whether the Arbitrator appreciated the evidence before him. The Bank attacked the Arbitrator's reliance on a letter dated 9th July 2015. Bearing in mind this is not an appeal, it is also important to recall that the manner in which an arbitrator deals with evidence and reaches conclusions is beyond the reach of the court exercising jurisdiction under **section 35** of the ***Act*** and as the courts have previously held, the arbitrator is the master of facts. This position was buttressed by the Court of Appeal in ***Kenya Oil Company Limited & Another vs. Kenya Pipeline Co.*****NRB CA CA No. 102 of 2012 [2014] eKLR** where it cited with approval the following dicta by Steyn LJ., in ***Geogas S.A v Trammo Gas Ltd (The "Baleares")*** **1 Lloyds LR 215**:

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 by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

28. I find and hold that the Arbitrator tackled all of the issues that were listed by the parties for determination including whether the Respondent was entitled reimbursement for the services it had rendered to the Bank within the Agreement. The determination of all those issues were contemplated and indeed fell within the terms of the reference and were not beyond the scope of the reference to arbitration.

Whether the arbitral award is in conflict with the public policy of Kenya

29. The Bank submitted that for the Arbitrator to have allowed a claim in the nature of special damages that had not been specifically pleaded and strictly proved, he went against the law and offended the public policy of Kenya. In the case of ***Christ for All Nations v Apollo Insurance Co Ltd*** **(Supra)**, Ringera J., explained the scope of public policy as a ground for setting aside an arbitral award as follows:

I take the view that although public policy is a most broad concept incapable of precise definition, … an award will 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……"

30. It is not every infraction of precedent or misinterpretation of law that falls within the scope of the public policy exception. This was in fact recognised by the learned judge who added that:

[I]n 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 the grounds for doing so. He must be told clearly that an error of fact or law or mixed fact or 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.

31. This point is also underpinned by the decision of the court in ***Mall Developers Limited v Postal Corporation of Kenya*** **ML Misc. No. 26 of 2013 [2014] eKLR** where the court observed that:

Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties

herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.

32. The issue raised by the Bank is that the claim for reimbursement was neither pleaded nor proved as required by law. This principle is not in doubt and has been established in several cases of our superior court (see ***Maritim & Another v Anjere [1990-1994] EA 312*** *and* ***Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992 (UR)****).*

33. I have already held that the issue of reimbursement of expenses awarded to the Respondent was within the scope of the arbitration clause. The Statement of Claim supported the claim and there was evidence upon which the Arbitrator could reach the conclusion he did. All these matters fell within the Arbitrator's jurisdiction as such whether or not the arbitrator erred in awarding damages contrary to the precedent is not a matter for this court to determine. I also find that the issue does not rise to the level of a violation of public policy to warrant the setting aside of the Award.

Disposition

34. For the reasons I have set out above, I find and hold that the Applicant has not established that the arbitral tribunal dealt with a dispute not contemplated or falling within the terms of the reference or that the award contains decisions on matters beyond the scope of the reference to arbitration. I also find and hold that that Award is not against the public policy of Kenya.

35. I therefore dismiss the Chamber Summons dated 2nd June 2020 with costs to the Respondent.

DATED and DELIVERED at NAIROBI this 20th day of NOVEMBER 2020

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mutua instructed by Mutua and Molo Advocates for the Applicant.

Mr Onyambu instructed by Nyaundi and Tuiyott Advocates for the Respondent.