REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 16 OF 2017

BOLEYN MAGIC WALL PANEL

LIMITED..PLAINTIFF/RESPONDENT

VERSUS

NESCO SERVICES LIMITED..................DEFENDANT/APPLICANT

JUDGEMENT

1. By a Motion on Notice dated 30th January 2020 expressed to be brought under Section 36 of the ***Arbitration Act, 1995*** (hereinafter referred to as “the Act”), the Defendant/Applicant herein, **Nesco Services Limited**, seeks the following orders:

> **1) THAT, the Final Arbitration Award made on 9th day of October 2019 by Nyagah Boore Kithinji QS, FCIARB, Sole Arbitrator be recognized as bind upon the parties to the suit herein.**
>
> **2) THAT, the said Final Award made on 9th October 2019 be entered as the final judgment of the court in the proceedings herein**
>
> **3) THAT, the costs of the suit and application be provided for**

2. According to the Applicant, the Plaintiff/Respondent filed the suit herein against the Defendant/Applicant claiming compensation for breach of contract and payment of the balance amounting to Kshs. 22,310,748.22 together with costs and interest. Immediately the summons were served, the Defendant, pursuant to Clause 44 of the Building Construction Contract dated 14th July 2015 filed an application for stay of proceedings and further sought the dispute to be referred to arbitration on 30th October 2017, the Court made an order referring the dispute to arbitration. Consequently, the dispute was filed before a Sole Arbitrator, **Mr. Nyagah Boore Kithinji** and the parties thereafter were duly heard.

3. On 9th October 2019, the said Arbitrator notified the parties that the final Arbitration Award was available for collection on 11th October 2019 and the Arbitrator also enclosed his invoice and demanded settlement before collection of the award. Immediately after receipt of the said invoice the Defendant on 14th October 2019, paid its balance of Kshs. 884,122/= but the Plaintiff/Respondent neglected, failed and/or refused to settle its balance of Kshs. 884,122/=. Out of abundance caution and being duly advised on time lines on arbitration proceedings, the Defendant paid the Plaintiff’s balance of Kshs. 884,122/= on 3rd December 2019 and on 16th December 2019, the Defendant received a final award from the said Arbitrator.

4. The Defendant averred that over 90 days had lapsed since the publication of the said award and there was no challenge of the said award pending in court and it was the Defendant’s desire to enforce the said award. Based on legal advice, the Defendant believed that before enforcing the said award the same has to be recognized and made the judgment of the court. It was therefore in the interest of justice and in order to bring the proceedings filed herein to an end that the orders prayed in the application be granted.

5. The application was however opposed by the Plaintiff/Respondent. According to the Plaintiff, on 31st July, 2017 the suit herein was stayed and the dispute referred to Arbitration and subsequently, the final award was issued on 9th October 2019. The Respondent/Plaintiff was handed a copy of the award on 19th December, 2019 after furnishing the Arbitrator with a cheque of half of the Arbitrator’s fees and upon receipt of the said award, the Respondent was extremely dissatisfied with the findings of the Arbitrator as the same do not reflect the actual account of events, is contrary to public policy, fails to strictly apply the provisions of the Contract between the parties and fails to appreciate the conduct of the parties in performance of the contract. According to the Plaintiff, the arbitral award is skewed and not suitable for adoption by this Court as the Arbitrator failed to answer a key question asked by the Respondent to wit: whether by failing to make payments to a

contractor (the Respondent) as per the certificate of payment, the Employer (the Applicant) had breached the contract.

6. According to the Plaintiff, the arbitrator in failing to pronounce himself of the foregoing issue, ended up making an erroneous conclusion that the Plaintiff was in breach of the agreement when it was in fact the Defendant who had breached the agreement entitling the Plaintiff to suspend works for non-payment.

7. Based on legal advice, it was deposed that failure by the Arbitral tribunal to address a key issue raised by the parties before it makes the award liable for refusal of recognition by this court as envisaged under section 37 of the ***Arbitration Act*** since it is contrary to public policy for a dispute resolution tribunal to fail to answer specific questions laid before it by one party but answer those laid before it by the other party as this amounts to segregation in dispensation of justice.

8. The Plaintiff asserted that since it is also a clear principle of the law that justice should not only be done but must be seen to be done, allowing a one-sided arbitral award to stand is not only an affront to the rights of the Respondent but also a risk to the credibility of the entire dispute resolution system be it in courts or arbitration and thus the paramount priority of this court should be to sanitize the process of arbitration.

9. According to the Plaintiff, by failing to address the specifically address the Defendant's failure to honour the certificates number, 2, 4 and 5, the tribunal acted contrary to public policy, legitimate expectation of fairness, was unjust and discriminatory to the Plaintiff. Further, failure to honour a certificate duly raised amounts to material breach under clause 29.2 (ii) and 36.1 (d) of the contract and entitles the Respondent to suspend works or terminate the contract all together.

10. It was therefore averred that by failing to address himself to this material fact, but going on to purport that the Respondent breached the contract by suspending works, the Arbitrator did not exercise fairness. In addition, the arbitral award is also in conflict with public policy by failing to appreciate that despite the contract term having lapsed, both parties continued to perform their obligations thereunder as if the said agreement was still subsisting. The arbitral award therefore does not reflect and is not based on the will of the parties thereto. The finding by the Arbitrator that the Respondent breached the agreement by failing to apply for an extension when in fact the same was still being performed mutually by the parties amounts to material flow (sic) in reasoning, biasness (sic) and the same is contrary to the actual will and conduct of the parties. To the Plaintiff, the award is contrary to public policy by assuming that when one party to a contract is deemed to be in breach, the other party is automatically deemed to be on the right. The Plaintiff reiterated that the arbitral award is in conflict with Public Policy since the arbitrator ignored the fact that despite the contract period having lapsed, both parties continued to perform the same as if the same still subsisted, attended bi-monthly site meetings, continued to perform obligations, the Project Manager raised certificates after the said expiry which was complied with and paid by the Employer. Therefore, by failing to recognize that the parties extended the contract and continued to perform it well into its expiry, the Tribunal fatally erred in sustaining the termination by the Employer on grounds of the said breach while both parties had by conduct continued to perform the contract.

11. It was averred that the Arbitrator awarded in Clause 25.10 additional liquidated damages for repairs of Kshs. 9,977,977.00 despite the same being specifically precluded by the Contract clause 37.1. this amounts to the arbitrator rewriting the contract between the parties. To the Plaintiff, the Arbitral award was in conflict with the established principles on award of general damages by awarding the maximum general damages available as per the contract but without factoring in such an award the contributory breach by the Applicant which is contrary to public policy. Similarly, the arbitral award is contrary to public policy as the same encompasses double compensation. On the one hand the tribunal refers to a valuation that ascertained the true worth of the completed works, and on the other tribunal the tribunal awards the Applicant compensation for repair of damages while such wear and tear is factored in the valuation. In the Plaintiff's view, the arbitrator ought to have strictly applied the terms of the Contract between the Applicant and the Respondent and ordered the Applicant to fully comply with the certificates issued by the project architect and paid the Respondent the sums therein as prayed. The tribunal however, erred in awarding compensation for repairs when in fact the defects liability clause had not been activated. Further, the Arbitral tribunal erred in awarding compensation for repairs when the Applicant has retained 10% of all payments made to the respondent as compensation for the said purported defects and hence the said payments are not justified.

12. It was therefore contended that it is therefore in the interest of justice that the said arbitral award that this Court rejects the said Application dated 30th January, 2020 and refers the matter back to the Arbitrator for adjudication on the issues raised herein.

13. In support of its submissions, Defendant/Applicant relied on **Tanzania National Roads Agency -vs- Kudahsigh Construction Ltd Misc Civil Application No. 171 of 2012** and **Misc. App 780 of 2017 - Castle Investments Company Limited vs. Board of Governors – Our Lady of Mercy Girls Secondary School [2019] eKLR**.

14. It was submitted that the going by the above, it is evident that the conditions set under section 37 of the ***Arbitration Act*** have not been met to warrant this Court not to recognize and enforce the award. It was noted that though in the Plaintiff's/ Respondent's grounds of opposition, they state that they've seen material errors within the Arbitration award and also intend to apply to the Arbitrator to correct the same errors pursuant to section 34 of the ***Arbitration Act***, section 34(1) of the ***Arbitration Act*** is clear that a party may request the arbitral tribunal to correct in the arbitral award any computation error, any clerical or typographical errors or any other errors of a similar nature within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties. In this case, it has already been held by this Court that the Court lacks jurisdiction as the application was time barred and the time starts to run immediately the Arbitrator gives notice that the award is ready for collection. As such, the Plaintiff/Respondent time to request the award be corrected of any errors by the arbitrator is not only time barred but also a stretch in invoking this Court's jurisdiction to make corrections to an arbitral award. In this regard the Defendant relied on ***Musioki on Commercial Arbitration 2nd Edition pg 47.***

15. According to the Defendant, the Plaintiff/Respondent's objection to the recognition and enforcement of the arbitral award within the provisions of section 34 of the ***Arbitration Act*** is not sustainable in law in reference to this particular arbitral award before you. The objection raised as to why the award should not be adopted as a court judgement without variation or correcting the error of description of the Plaintiff thus prejudicial to them, clearly falls short of the jurisdiction of this court on arbitral awards. Their sure shot was within 30 days after receipt of the arbitral award before the Arbitrator. The time has lapsed. It was contended that in their grounds of opposition dated 4th

March 2020, the Plaintiffs point out that they collected the award on 19th December 2019. If there was any error to be corrected, the application should have been made on or before the 19th January 2020. It is evident that the Plaintiff/Respondent is not sincere about the request and only had to seek the same after we filed our application. It is obvious that the Plaintiff/Respondent are clutching on straws. In this regard the Defendant relied on the decision of **Nyakundi J,** in **Lalji Meghji Patel & Co. Limited vs. Nature Green Holdings Limited [2017] eKLR.**

16. It was therefore submitted that the arbitral award is not only enforceable and binding but also the grounds of opposition do raise issues that the Court lacks jurisdiction to handle thus bad in law.

17. In response to the preliminary objection it was submitted that section 35(4) of the ***Arbitration Act*** is not the enabling clause for recognition and enforcement of arbitral award, but Section 36 is. According to the law, recognition and enforcement of the award does is not time bound and can be made in writing to the High Court at any time after the award has been given. To the Defendant, it is out of utter good faith and as a matter of practice do the party favoured by the award allow the aggrieved party 90 days to apply for setting aside of the award in the High Court or seek clarification or correct errors by the Arbitrator in the award within 30 days. Thus, the Plaintiff's/Respondent's preliminary objection lacks legal backing and is an excuse for its lethargy to the detriment of the Defendant/Applicant.

18. Secondly, assuming the said provision applied to recognition and enforcement of awards, the Plaintiff/Respondent is out of time based on the decision of **Tuiyott J,** in **Mason Services Limited-vs-Safaricom Limited- Nairobi HCCC No.264 of 2017**.

19. It is thus decided that the day the Arbitrator sends the notice, time starts running regardless when the parties decide to collect the award and reliance was placed on **Anne Mumbi Hinga -vs- Victoria Njoki Gathara- Civil Appeal No.8 of 2009.**

20. From above it was submitted that it is clear that the Plaintiff's/Respondent's argument does not hold water. There is no time set to recognize and enforce an arbitral award and the ***Civil Procedure Rules*** does not apply to the Arbitration proceedings. The Court was urged to be guided by the case of **Adrian Manubeli Meja vs. Trident Insurance Co. Ltd [2005] eKLR** and to allow the Applicant's/ Defendant's Application dated 30th January 2020 seeking recognition of the Arbitrator's final award made on 9th October 2019 and dismiss the Preliminary objection and Grounds of objection filed on 4th March 2020 by the Plaintiff/Respondent with costs.

21. In its submissions, the Plaintiff reiterated the contents of the replying affidavit and contended that section 37 of the ***Arbitration Act*** grants this Court permission to interrogate the suitability of the award before adopting the same or referring the same for reconsideration by the tribunal. It was submitted that the dismissal of the Application to set aside the award is not a bar for this Court to consider the provisions of section 37 and refer the matter for reconsideration based on the case of **Mahican Investments Limited & 3 others v Giovanni Gaida & 80 Others [2005] eKLR**. It was submitted that unless this Court intervenes, the Respondent will be gravely disadvantaged as he will be forced to comply with a skewed award that deliberately omits to address his side of the case. Further, this Court has discretion under section 37 to make an array of orders, including referring the matter to the arbitrator to reconsider the same. It was submitted that this Court has discretion under section 37 to make an array of orders, including referring the matter to the arbitrator to reconsider the same. The Court was therefore urged to consider the arguments herein and reject the present Application and refer the matter back to the Arbitrator for determination.

Determination

22. I have considered the issues raised in this application. Section 36 of the ***Arbitration Act, 1995*** under which the application is brought provides in subsection (1) as hereunder:

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.

23. Section 37 of the said Act, on the other hand, provides as hereunder:

> ***(1) 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 to the High Court proof that—***
> >
> > > ***(i) 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, 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 decisions 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 recognised 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 award 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.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

24. Rule 6 of the ***Arbitration Rules, 1997***, on the other hand, provides that:

If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree.

25. Section 10 of the said Act, on the other hand provides that except as provided in the Act, no court shall intervene in matters governed by the Act.

26. Generally speaking, the courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision. The jurisdiction of the court is statutory, and cannot be increased or cut down. In our case this position is reinforced by the provisions of section 10 of the ***Arbitration Act***. Again the arbitral awards are insulated by section 32A of the Act wherein it is provided that except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by the Act. The parties having chosen their own tribunal, they must, generally speaking, accept the result whether it is right or wrong. That seems to be the reasoning of ***Musioki on Commercial Arbitration 2nd Edition pg 47,*** wherein it is stated that:

"By submitting their disputes to arbitration, the parties consent to run the risk that the chosen tribunal will prove unequal to its task. The position is the same as regards errors of law, and that the court will not order remission or setting aside, even where it is quite obvious from the terms of the award that the Arbitrator made a mistake. If the losing party has any remedy it must take the shape of an appeal and this will be available only if it has not been validly excluded by consent."

27. The circumstances in which the court will intervene are therefore the exceptions to that general rule. See **Rashid Moledina & Co. (Mombasa) Ltd and Others vs. Hoima Ginners Ltd Civil Appeal No. 45 of 1966 [1967] EA 645; Re Baxters & Midland Ry. Co. [1906] 95 LT 20** and **Universal Cargo Carriers vs. Citati [1957] 2 All ER 70; [1957] 1 WLR 979.**

28. Recourse to court is provided for under Part VI of the Act and the implication is that the High Court has no other power against an arbitral award outside the provisions of Section 35 and 37 of the Act. Based on the provisions of section 10 of the Act, the Court has no jurisdiction to intervene in arbitration proceedings in any manner not specifically provided for in the Act since the provisions of the ***Arbitration Act*** make it clear that it is a complete code except as regards the enforcement of the award/decree where ***Arbitration Rules, 1997*** import the provisions of the ***Civil Procedure Rules*** where appropriate and in my view, the application of the ***Civil Procedure Rules*** would be regarded as inappropriate if their effect would be to deny an award finality and speedy enforcement of arbitral proceedings both of which are major objectives of arbitration.

29. Even if the court had jurisdiction it must be noted that the court's role in an arbitration process is supportive and that of giving guidance to it but should not be obstructive. Therefore, any delay in enforcing an award should, as much as possible, be avoided. Apart from sections 35 and 37 of the ***Arbitration Act***, it is clear from the provisions of section 39 of the Act, that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to section 39(2) thereof. No intervention should be tolerated firstly because one of the underlying principles in the Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly, although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy or public interest would involve some element of illegality or it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the State's powers are exercised. It was therefore held by the Court of Appeal in **Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 of 2009** as follows***:***

"Part VI of the Arbitration Act has a heading under the title "Recourse to High Court against Arbitral Awards" and the implication is that the High Court has no other power against an arbitral award outside the provisions of Section 35 and 37 of the Arbitration Act. It is clear, in the light of the above provision, that a party cannot ground an application to set aside an award outside section 35 of the Act…Similarly, the grounds for refusal of recognition or enforcement which by large are almost similar to those for setting aside an award are contained in section 37 of the Arbitration Act and again it is clear that none of the grounds set out in the application fall under the provisions of section 37 of the Arbitration Act. A careful look at all the provisions cited in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override section 10 of the Arbitration Act which provides that except as provided in this Act no court shall intervene in matters governed by this

Act…In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act and this includes entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or the judgement/decree arising from the award...The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. In the court's view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to the Court that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration…It is clear to the court that none of the grounds relied on by the appellant fall under section 35 or section 37 of the Arbitration Act. An award having been published nearly 10 years ago after several mention notices concerning the award were ignored by the appellant and her advocates, the filing of the application constituted an abuse of the court process. The superior court had no business entertaining the application giving rise to this appeal as well and should have struck it out for lack of jurisdiction...One of the grounds relied on to invite the superior court's intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the State's powers are exercised…There is nothing whatsoever indicating that the award before the court fell under any of the above definitions of public policy, so as to warrant a challenge under the public policy exception…In the arbitration agreement there is an implied agreement between the parties to carry out the ultimate award. The concept of the finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modelled 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 this Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation. Where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the 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 opens the door to the full-bore evidentiary appeals that render the informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process which is an unacceptable process. 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…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. From the above it is clear that from the case before the court the appellant has made nonsense of all the virtues of having gone to arbitration resulting in a delay of 10 years following resort to many interlocutory applications aimed at upsetting the finality of the award which is illegal and unacceptable...In this case it is quite clear to the court that it was wrong for the court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The court had no jurisdiction to do so in the first place under the clear provisions of the Act. Intervention by the filing of several applications which has in turn resulted inconsiderable delay should have been treated as a jurisdictional issue under the Act and dealt with straightaway. On the court's part, it recognises that the matters raised in the application before the superior court and this appeal are well outside the provisions of section 39 of the Arbitration Act and for this reason, the court has no hesitation in striking out this appeal and setting aside the superior court ruling and striking out the application with costs."

30. I associate myself with the opinion in **Tanzania National Roads Agency -vs- Kudahsigh Construction Ltd** **Misc Civil Application No. 171 of 2012** where the Court ruled that:

"recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the Arbitration Act. It confirms the binding nature of arbitral award and requires a party seeking enforcement of such award avail to the Court the duly authenticated arbitral award or a duly certified copies of it and the original arbitration agreement or a duly certified copy of it."

31. I also agree with the holding in **Misc. App 780 of 2017 - Castle Investments Company Limited vs. Board of Governors – Our Lady of Mercy Girls Secondary School [2019] eKLR** where the Court pronounced itself that:

"The general principle in the law of arbitration with regard to the finality of the award given at the end of arbitral proceedings is binding and enforceable unless the condition set under section 37 of the Arbitration Act are met."

32. In this case an application seeking the setting aside of the award was unsuccessful when the same was dismissed on 17th day of August, 2020. The grounds upon which this application is opposed are grounds for setting aside the award. The Act does not make provisions for declining to adopt an award based on grounds other than those provided under the Act and the application based on the said grounds having been unsuccessful, this Court cannot under the guise of investigating the award make orders whose effect would amount to setting aside the award. This is the scenario that **Nyakundi, J** had in mind when he held in **Lalji Meghji Patel & Co. Limited vs. Nature Green Holdings Limited [2017] eKLR** that:

"What the defendant director is attempting to do through this objection is to seek the setting aside of the award through back door. However, as I have already argued elsewhere in this ruling he has not satisfied the legal criteria to vary or set aside the arbitral award clearly the defendant director is not dealing with anything new at this stage he is not called upon to defend the entire arbitral proceedings. The objection filed has been overtaken by the timelines set out under section 34 regarding the 30 days to apply to the arbitral tribunal to correct any computation errors/mistakes in the award."

33. There is no pending application before me challenging the award and as the Court of Appeal in **Robert Njue Wangai vs. Francis Muthike Civil Appeal No. 274 of 2000** held, if there is no pending application to challenge the arbitration award, the Court should as a

matter of course enter judgement in terms of the award. Just like the Court of Appeal held in **Rimbi vs. Rimbi & Another [1989] KLR 173**, I find that the Respondent's submission in attacking the award has no basis. It has no chance to do so having been precluded from doing so by the lapse of time and because its application to have the award set aside had been disallowed.

34. I wish also to reiterate the words of **Kimaru, J** in the cases of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where the learned Judge stated that awards have now gained considerable international recognition and courts, especially commercial ones, have a responsibility to ensure that the arbitral autonomy is safeguarded by the courts, as arbitral awards are surely and gradually acquiring the nature of a convertible currency due to their finality. He further held that it is now trite that where parties have agreed to resolve a dispute arising out of a commercial agreement by arbitration, the courts are required to give effect to the wishes of such parties by enabling the parties to conclude with the finality the determination of the dispute by arbitration.

35. Having considered the issues raised in this application, I find no reason why this application cannot succeed. In the premises I find merits in the same and I hereby direct that the Final Arbitration Award made on 9th day of October 2019 by **Nyagah Boore Kithinji QS, FCIARB,** Sole Arbitrator be recognized as binding upon the parties to the suit herein. Consequently, I enter judgement in terms of the said award and award the costs of this application to the Defendant/Applicant.

36. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 18th day of November, 2020.

G V ODUNGA

JUDGE

In the presence of:

Miss Nyakundi for the Applicant

Mr Ochanda for Mr Eredi for the Respondent

CA Geoffrey