



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 279 OF 2019

(CONSOLIDATED WITH MISC. APPLICATION NO. 277 OF 2019)

IN THE MATTER OF SECTIONS 17, 29 AND 335 OF THE ARBITRATION

THE COUNTY ASSEMBLY OF VIHIGA.....APPLICANT

VERSUS

KENCHUAN ARCHITECTS LIMITED ... RESPONDENT

RULING

1. There are two applications pending determination. The first application was filed by the County Assembly of Vihiga, hereafter referred to as the applicant, dated 28th November 2019, seeking stay and setting aside of the arbitration award published on 8th May 2019. The second application is by Kenchuan Architects Limited, hereafter to be known as the respondent, dated 13th December 2019, seeking recognition of the arbitration award, for leave to enforce it and for orders that the applicant deposits Kshs.27,761,225.00 as security for payment of the award.

2. Both applications are born out of an arbitration award, dated 8th May 2019, in which the arbitrator had found in favour of the respondent and against the applicant, and awarded a sum of Kshs. 27,761,225.00 to the respondent. The respondent now seeks to have the award adopted as a judgment of the court, while the applicant seeks to have the award stayed and set aside. The award was published on 8th May 2019.

3. I will start by considering the application for stay and setting aside of the arbitral award. That application was brought pursuant to section 35(1)(2) of the Arbitration Act, which provides as follows:

“(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 law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya."

4. The main ground in the application is that the award is in conflict with public policy, in that the award is based on a contract that is actively under investigation by the Economic and Anti-Corruption Commission.

5. The Court of Appeal, in *Kenya Shell Limited vs. Kobil Petroleum Limited* [2006] eKLR, addressed the effect of section 35 of the Arbitration Act, as follows:

"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 is shown that it was either (a) inconsistent with the Constitution 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."

6. The court in *Open Joint Stock Company Zambezstony Technology vs. Gibb Africa Limited* [2001] said as follows on public policy:

"I may perhaps add that public policy, in my view, generally refers to the set of stoic-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained. Public policy acts as a shield for safeguarding the public good, upholding Justice and morality and preserving the deep rooted interest of a given society."

7. In *Christ for All Nations vs Apollo Insurance Co. Ltd* (2002) EA 366; the court defined public policy, in the following terms:

"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 either it was:

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."

8. In *Continental Homes Ltd vs Suncoast Investments Ltd* [2018] eKLR, it was said:

"In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator."

9. The issue of fraud was raised by the applicant during arbitration. See pages 33 - 35 of the award. The arbitrator held that there was no sufficient proof of the allegation and dismissed it. The applicant seeks to have the award set aside on the basis of an existing investigation, yet no evidence has not been availed to this court as to the status of the said investigation or its findings. It has not been demonstrated that the investigations impute culpability on the respondent. It is only upon conclusion of investigations and the pressing of charges on a person that a court can conclusively determine the issue of fraud. As it stands now, the allegation of fraud is unsubstantiated, and there is, therefore, no merit in the claim.

10. In *Christ for All Nations vs. Apollo Insurance Co. Ltd* (2002) EA 366, the court said:

"[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."

11. This point is also underpinned by the decision in *Mall Developers Limited vs. Postal Corporation of Kenya* [2014] eKLR, where the court observed:

"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.”

12. In *Boleyn Magic Wall Panel Limited vs. Nesco Services Limited* [2020] eKLR, the court said:

“... 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”

13. From the fore going, it is clear that the mere existence of investigations is not sufficient to establish that an arbitral award is against or contrary to public policy, and as such the application for stay and setting aside of the award should fail. The application dated 28th November 2019 accordingly dismissed.

14. With regard to the application seeking for recognition of the arbitration award, for its enforcement, and for deposit the arbitral amount as security for payment of the award, I note that the same is not opposed. Consequently, I do hereby allow the application dated 13th December 2019 as prayed. The respondent shall have the costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020

W MUSYOKA

JUDGE