REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 41 OF 2018

SIRGOI HOLDING LIMITED……..…….APPLICANTS

VERSUS

BOWEN BUILDING CONTRACTORS (K) LTD……RESPONDENTS

JUDGMENT

1. By a Notice of Motion was filed by the applicant on **2nd May 2018** seeking orders that;

i) There be a stay of adoption, enforcement and execution of the arbitral award delivered on 6th February 2018 by **MR. TOM ONYANGO** pending the hearing and determination of the application inter parties.

ii) The said arbitral award dated 6th February 2018 be set aside.

2. The grounds cited primarily revolve around;

a) The decision delivered by the said **MR. TOM ONYANGO** went beyond the scope of the reference to arbitration which was an error in law and fact.

b) The award given was expressly excluded under the contract, went against the Laws of Kenya and public policy.

c) The award was unsupported by pleadings, contained reliefs that had not been prayed for and arrived at conclusions unsupported by evidence.

d) The arbitrator erred by shifting the burden of proof to the Respondent's counterclaim to the applicant.

The genesis of this matter was a construction contract in which **SIRGOI HOLDINGS LTD**,(the applicants) also being the claimants in the arbitral proceedings, contracted **M/S BOWEN BUILDING CONTRACTORS (the respondents)** to construct for them a five storey commercial building on parcel **No Eldoret Municipality Blk 7/91** along **OGINGA ODINGA** street after the Respondents' successful bid for the tendered for the said construction at a cost of **Kshs. 99,340,870.00** which was negotiated to **Kshs. 89,919,181.80 (Read Eighty Nine Million, Nine Hundred and Nineteen Thousand One Hundred and Eighty One and Eighty cents only)**. The parties thereafter entered into a contract on **29th June 2011** at a contract price of **Kshs. 89,919,181.80** wherein the construction period was agreed at **Fifty Six (56) weeks.** The date of commencement was 29th June 2011 with the expected time of completion being 30th June 2012. Thereafter a "customized" contract agreement was drawn up and the conditions of contract agreed upon and parties executed their respective parts of the contract.

A dispute arose during the performance of the contract and on the 25th November 2013 the applicants issued a default notice to the respondents that they were in breach of the contract by abandoning the works from **18th November 2013** without reasons. On their part, and on the 29th November 2013 the Respondents stated that they had not abandoned the works as alleged but only suspended the same due to non payment. The applicants terminated the contract on the 6thJanuary 2014 and proposed that the respondent attends the site to evaluate the work done before leaving. The applicant then proceeded to complete the works. On the 25th April 2015 the applicants demanded a refund of monies paid to the respondents amounting to **Kshs. 21,470,351.00**, a claim which the respondents believed was totally misconceived. The respondents' on their part sought payment of **Kshs. 35,799,046.50** which sum was to be subject to variations upon site measurements. The parties through a series of correspondences failed to resolve the dispute and the matter had to be referred to arbitration as the agreed mode of disputed resolution incorporated in the parties' conditions of contract.

Upon hearing the dispute, the arbitrator dismissed the applicant's claim and made findings in favour of the respondent thus:

a) Kshs.50,682,585/- being the amount due to the respondent for the work done until completion of the project on 6th July 2015

b) Kshs. 24,958,049/- being interest thereon from 6th July until 6th February 2018

c) Kshs. 9,200,000/- being the amount owing to the respondents at 21st October

d) Kshs. 2,839,901/37cts being interest awarded on (c) above

e) Kshs 37,771,542/- as general damages

f) In default of compliance to pay within 14 days from the date of the award, the amount owing attracts a simple interest at 19% p.a upon the unpaid amount from the date of the award until payment in full

6. In the supporting affidavit of **BARBARA TANUI** who is the chairman of the applicant company he stated that in the contract, the conditions covered were as follows

a) **The contract amount was Ksh. 89,919, 181.80 as per the contact**

b) The construction period was 56 weeks

c) The contract was a full contract

d) The Respondent was required to provide the contract sum in a form of a bank guarantee

e) The Respondent was required to furnish Contractors All Risk insurance cover for the works from a reputable insurance company.

f) The date of completion of the project was on 30th June 2012.

7. He states that the completion date of the project was later revised from **30th June 2012 to 15th October 2012** making the construction **time 66 weeks** and not **56 weeks** as earlier worked out.

8. There was a further delay on the Respondents part to which the Applicants declined to grant him extra time. The Applicants issued a notice on 25th November notifying the Respondent that they were in breach of contract and would be charged liquidated damages for its delay and in a bid to offset the interest its mortgage lenders are charging it.

9. The applicants maintain that the Respondent abandoned the works on 18th November 2013 and a default Notice was issued by the Applicant on 25th November 2013 notifying them that they were in breach of contract as the respondent did not give sufficient cause for abandoning the works. Additionally, the applicant claims that the respondent refused to issue it with several performance documents.

10. The applicant terminated the respondent's contract on 6th January 2014 and served it to the respondent. The respondents did not attend a meeting on 13th January 2014 organized by the applicant to conduct valuation of the works executed and the materials, equipment and temporary buildings.

11. Valuation was later done by a **QUANTITY SURVEYOR MR. TOWETT** with a representative of the Respondent, **MR. BOWEN** being present. The applicant took over the building and later issued a demand letter on 7th May 2015 to the Respondent for works done and expenses incurred due to breach and termination of the contract. The applicant states that the arbitrator failed to consider all the costs that had been incurred by them in his final tabulation from the date of termination of the contract until completion in November 2015.

12. The Arbitrator made an award in favor of the Respondent, awarding Ksh. 50, 682,585/- inclusive of a valuation of Ksh. 43,630,373 an amount that the applicant stated was wrong because the works were completed by the applicant.

13. The applicant took issue with most of the awards issued by the arbitrator saying that the sum total awarded was erroneous, as it had not been prayed or pleaded.

The replying affidavit was filed by **CLEMENT BOWEN** who told the court that the parties had tried to solve the dispute amicably before they proceeded to arbitration.

15. The respondent states that the applicants had started letting out the building before the Respondents had completed it and handed it over to the applicants after the final accounts were taken with full measurements yet no quantity surveyor examined the property to get a fair determination of what either party was entitled to.

16. The respondent stated that the issue of who was in breach of the contract had already been addressed at the arbitration stage and ought not to be re-introduced.

17. The Respondents insist that the Applicants could not claim that the project was not completed in time when they added an extra floor on the building mid-way in the project yet there was no re-adjustment of the work schedule. They added that it would be inappropriate to state that the provisions of the arbitration were illegal or against public policy when the applicants fully agreed to and participated from the initial stages.

18. The Respondent maintains that the application is devoid of merit and does not satisfy the conditions for challenge of an arbitral award.

19. **In its submissions the applicant explored the jurisdiction of the court to set aside an arbitral award stating that according to Section 35 of the Arbitration Act (1995) the High court has original jurisdiction to set aside an arbitral award. The applicant states that the court's jurisdiction has been properly invoked because the only recourse available once an arbitrary award is issued is to set aside at the High court.**

20. The applicant contends that an amount of **Ksh. 9,200,000/-** which was awarded as the amount owing as at 21st October 2013 in favor of the Respondent was wrong and against public policy as it had not been pleaded by the defendants or included in the counterclaim. In this regard reference was made to the case of **IEBC vs STEPHEN MUTINDA MULE AND 3 OTHERS (2014) eKLR** where the court held that parties are bound by their own pleadings and cannot be allowed to raise a different or a fresh case without due amendment properly made**.**

22. The applicants cited Lord Denning in **JONES V NATIONAL COAL BOARD [1957] 2QB 55** in drawing a distinction between the adversarial and inquisitorial systems of justice. He argued that the Kenyan system being adversarial means that the learned trial judge/ magistrate will not go into an investigation but will fully rely on the evidence presented to him.

23. On the award of general damages for breach of contract the applicant states that the award was against public policy which prohibits awarding general damages in a contract dispute by a court of law or an arbitrator. It is submitted that general damages cannot be awarded in breach of contract and cited several Court of appeal cases in support of this resting with **JUBILEE INSURANCE COMPANY OF KENYA V ZAHIR ABIB JIWAN & ANOR [2017] eKLR.**

The Applicant pleaded the doctrine of equitable estoppel, estopping the Respondent from claiming that the lack of a project manager frustrated his performance of the contract. The applicant states that the Respondent was satisfied with the status quo until the parties fell out. They said that one **ENGINEER CHUMO** carried on the work of a project manager and the respondent never objected verbally or in writing until the termination of the contract.

25. A question arose as to the validity of the valuation report which had been relied upon by the Respondents as evidence saying that it had not been produced or proven. The issue of interest is also said to have been decided contrary to public policy because the Arbitrator issued awards on interest based on his own calculations and reasoning.

26. The Arbitrator was also allegedly guilty of misconduct in that he failed to consider evidence adduced in support of the applicant's case.

27. The respondent's position is that, incorporated within the construction contract and more particularly in the conditions of contract **clause number 37,** were provisions on how disputes would be settled if they arose between the parties in the course of the contract, after completion or termination and the manner in which that process shall be commenced. That the clause also provided the manner of appointment of an arbitrator in the event that parties fail to agree on such appointment.

27. The respondents claim that the entire process of settling the dispute was in accordance with the wishes of the parties and maintain that the award by the arbitrator is final and binding upon the parties.

28. It is argued that the applicant has not set out any grounds to warrant the court's interference with the arbitral award. They sought to be allowed to enforce the award and enjoy their entitlement

29. The Respondent indicated that the main issue in the suit was whether there was a fundamental breach of contract in the purported termination of contract made by the claimant on 6th January 2014.

30. The jurisdiction of the Court under section 35 of the Arbitration Act in setting aside an arbitral award is a strict one. **Section 35 (2) (a) and (b) of the Act reads thus;**

> **"(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;**
>
> **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 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"

31. The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend limits imposed by law; parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be heard. **(See the case of KENYA OIL COMPANY LIMITED & ANOTHER V KENYA PIPELINE COMPANY [2014] eKLR.)**

32. **IN THE CASE OF KENYATTA INTERNATIONAL CONVENTION CENTRE (KICC) V GREENSTAR SYSTEMS LIMITED** the trial judge cited the appeal case of **NYUTU AGROVET LIMITED VS. AIRTEL NETWORKS LIMITED [2015] EKLR where the court stated that;**

"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about."

33 . It is pointed out that central to the agreed mode of dispute resolution by parties to the said contract was the arbitration agreement which was also the most fundamental in the entire arbitration process as it was based on party consensus and autonomy in addition to being contractual. Further that it presupposed that after a proper conclusion of the arbitration process, each party would respect the decision of the arbitrator(s) which would be final and binding, as the arbitration agreement contains a clause to the effect that the award shall be final and binding. Further that the desire of the parties in choosing arbitration as their mode of dispute resolution, was that each party would willingly and voluntarily comply with the award so as to guard the contractual autonomy of the parties away from the influence of the National courts.

34. The agreement to arbitrate is governed by **Section 4** of the Kenyan **Arbitration Act chapter 49** which Act is modelled in line with other International Arbitration Instruments such as the **UNCITRAL Model Law on Arbitration and the New York Convention on Arbitration**. Like the other International Instrument, the Kenyan Act provides on what the Arbitration Agreement ought to be modelled and contain, the procedure and manner of appointment of an arbitrator (s), the procedure in the process of arbitration, the powers of the arbitrator and the effect of the award. It is emphasized that what runs through all these instruments is that the arbitration process is contractual, consensual, autonomous and binding. Further that **Section 32A** of the Kenyan Act provides that an arbitral award is final and binding upon the parties to it.

35. It is the respondent's contention that this court cannot and is not sitting on appeal and the applicant cannot be heard to say the arbitrator erred in admission of evidence or in failing to admit the applicant's defence. That challenge to the award can only be restricted to the provisions of the Act which is as contained in **Section 35 of the Act.** Further that, it ought to be appreciated that parties chose to include and arbitration clause in order to make arbitration as their choice in dispute resolution because:-

· The process is private, confidential and flexible.

· It is also quicker and cheaper and parties can agree mutually on the timetable for the process.

· The arbitrator, just as in the instant case is chosen on the basis of expertise and competence in the area of dispute.

· The arbitrator has competence to determine his own competence (– **S.17 of the Act)** and is also the master of procedure and is given the latitude to conduct the proceedings as he deems fit provided he treats all parties equally. **(Section 18 of the Kenyan Act)**

36. To clearly demonstrate to this court that the entire process of settling the dispute between the parties was in accordance with the wishes of the parties, the respondent points out that:

(i) <u>The Arbitration Agreement</u>

It is not disputed that the parties under clause 37 of the conditions of contract the parties included the Arbitration agreement which clause was comprehensive on the mode of dispute resolution, appointment of the arbitrator(s) and the scope and powers of the arbitrator so appointed in settling the dispute.

(ii) <u>Appointment of the Arbitrator(s)</u>

That both parties were involved in a consultative manner in the appointment of the arbitrator and the appointment materialized when a consensus was reached. That in any event after the dispute arose, parties through a series of correspondences tried to resolve the dispute unsuccessfully and thus the mutual decision to go for arbitration. Thereafter, the respondents wrote to the President of **Architectural Association of Kenya (AAIC)** being the first option given under clause 37 of the conditions of contract, paid the requisite Kshs. 15,000/= and **AAK appointed one QS. EMMANUEL ODHIAMBO** on the 13th August 2015. This appointment was rejected by the applicants even after **QS EMMANUEL ODHIAMBO** had accepted the appointment. Instead the applicants insisted on the **Institute of Quantity Surveyors of Kenya (IQSK) appointing an arbitrator**. All the correspondences to this effect are annexed to our replying affidavit.

37. Since it was the Respondent's desire to have the matter concluded without side shows, the respondent accepted the applicants' choice of the appointing body and interestingly the **IQSK** appointed another Quantity Surveyor by the name **QS TOM O. OKETCH** who accepted the appointment and the respondent agreed with that choice to expedite the process.

38. The respondents maintain that all that was needed to resolve the dispute was a **Quantity Survey** and again parties agreed to be **BOUND BY THE AWARD OF THE ARBITRATOR which would be final**

(iii) <u>The Proceedings.</u>

It is also submitted that after the arbitrator's appointment was done, parties accepted the appointment of the arbitrator to hear, resolve and make **<u>final</u>** decision on the matters in dispute between the parties to the contract. After the said acceptance parties executed **"the Arbitrators agreement"** in the Preliminary meeting held on the 3rd December 2015 at the **Noble Hotel Eldoret** and the seat of the tribunal was agreed to be the same Hotel.

39. In the arbitrators agreement dated the 3rd December 2015 the parties agreed inter alia that the rights and obligations of the arbitrator and the parties shall be as set out in the **Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules (the Rules) the Arbitrator to act** and conduct the proceedings in accordance with the rules and the parties to be bound by the rules thereafter a pre-trial review meeting was held on the 17th February 2016 and orders for directions were given numbering 1 to 14.

40. The court is urged to take note that the hearings were held on the 15th and 16th June 2016 at the seat of the tribunal and each party had called their witness and produced their documentary evidence. Of importance to these proceedings was the fact that apart from the arbitrator being a Quantity Surveyor both sides called experts in the construction industry with the claimant calling **QS. Fredrick Kiplang'at Towett** (CW5and the respondent called **Architect Shadrack Tulon** (RW2) and **QS. Mwaragania Wambugu** (RW5) Again, both sides acknowledged the arbitrators disclosure that he was a **registered Quantity Surveyor** with special knowledge & skills in the construction industry.

41. All these experts were involved in the proceedings due to the appreciation by the parties of the fact that the nature of the dispute could only be resolved by a Quantity Survey of the subject matter project to determine the value of the work done by the respondents. The court is urged to find that it is only from such determination that a decision would be made on how much would have been payable either to the Respondent for the work done or by way of reimbursement to the Claimants for any overpayment.

42. Further, although each side called several witnesses who gave evidence on how the project was undertaken and how the parties related, and since the dispute was principally about who ought to pay who for the work done or not done, only evidence of the experts and the expertise of the arbitrator would lead to a just determination of the dispute. In essence the only way to determine the dispute was by way of quantity survey. Again, it is emphasized that the role of this court does not include the re-evaluation of the evidence tendered at the arbitral.

43. It is pointed out that after the preliminaries each side presented their issues they considered would be determination after which the Arbitrator formulated the real issues for determination based on his skills. Thereafter the arbitrator did an analysis of the evidence before he proceeded to make the following determinations:-

(a) THAT there was no duly appointed **PROJECT MANAGER** as set out in the conditions of contract which whereas they provided for a project manager as the person named in the Appendix, there was actually no such project manager named. This was so despite the claimants own witnesses admitting the need for such a manager for the project and the same being part of the conditions of contract. From the provisions of the contract and the analysis of the evidence, the role of the project manager in case of any breach was so fundamental that his absence was fatal to the claimants case This the tribunal held was a breach on the part of the claimant.

(b) THAT there was no **PROJECT MANAGEMENT BOARD** to supervise the works and administer the contract. Again, in a detailed analysis of the contract and the evidence the tribunal found the need for such a board, what its composition ought to be and it's very important role. It was also determined that by failing to constitute such a board the claimant was in breach of the contract. Infact CW1 confirmed that the respondent requested for a meeting with all the building team/professionals related to the project vide his letter of 8th January 2014 but no such meeting was convened. The arbitrator also found that from the evidence submitted, the claimant by failing to appoint a qualified and competent project manager who would in turn constitute a project management board, the claimant failed in its duty to supervise the execution of the works and to administer the contract. The Respondent was therefore forced to deploy its expertise throughout the project thus another breach of the contract by the claimant.

(c) As regards contract management meetings held as per clause 18 (1) of the conditions of contract it is pointed out by the respondent's counsel, that the evidence showed that the claimant failed to call and hold monthly project management meetings which were necessary in the construction management and contract administration thus constituting another breach of the contract.

(d) As regards agreed timelines of the contract in availing finances, the tribunal found that the initial contract sum was **Kshs.**

89,919,181.80 and Kshs. 13,553,250.25 for the additional floor and the amount due to the Respondents on the 19th September 2013 was **Kshs. 20,961,053.20** with no evidence of payment. It also emerged from the evidence that the Respondent would use their resources in the contract and later get reimbursed by the claimant instead of the claimant paying upfront as agreed. CW3 admitted on cross examination that by the time of purported termination, the Kshs. 9,200,000/= plus the 20,961,053 which was about 30 million was owing to the Respondent. According to the minutes of site inspection on 14th October 2013, the claimants board of Directors acknowledged receipt of request for payment from the Respondent for Kshs. 9,200,000/=**.** This was done in accordance with clause 23.1 of the conditions of contract but no evidence of payment was presented by the claimant. It is contended that the tribunal made a reasoned **analysis** of how payments would be done and found that the claimant was continuously in breach of the contract in relation to agreed timelines in availing finances. Consequently the Respondent would not be expected to remain on schedule in contract delivery. I am unable to find fault with this line of submission.

44. Indeed the Respondent had even put it in writing the difficulties it was encountering in the project due to non-availability of funds**.** On this the tribunal found that there were agreed timelines of the contract in availing finances which the claimant never adhered to do and found that again the claimant was in breach.

45. Further, the tribunal found that there was no evidence **of payment certificate** from the Project Manager and without that the question as to whether the claimant paid the Respondent in time and fully for the works done would be indeterminate and that the last payment made on the 19th July 2013 was payment in arrears for work already done, on 21st October 2013 the claimants board of directors acknowledged receipt of request for payment from the Respondent for the sum of Kshs. 9,200,000/= again a payment in arrears which was not paid.

(e) Did the claimant withhold any payment without justification?

The tribunal in pages found that the claimant withheld Kshs. 9,200,000/=, Kshs. 20,961,053.85 and Kshs. 7,568,237.20 (Retention fee), and that at the time of the purported termination, the Respondent had **completed the initial 5 floors plus the additional 6th floor save for the fittings**.

46. Although the purported valuation by CW5, was challenged by the Respondent on the grounds that first it was exparte and no reason was given for the Respondents exclusion. The tribunal has clearly given the reasons as to why such a valuation would not help in determining the dispute and, the claimants having excluded a large portion of their report leaving the tribunal with no option but to use CW5's analysis of the work done by the Respondent in quantifying the value of the project.

47. As a result of many documents not being submitted, it was only reasonable that the tribunal would use its expertise to resolve the question of valuation.

48. Did the Respondent receive payments from the claimants for work not done and failed to give satisfactory account thereof?

On this the tribunal found that the evidence by the claimant did not prove any such payments and that there was absolutely no proof of over-payment to the Respondent. Nothing has been presented to suggest that this was an erroneous finding.

49. When were the electrical and mechanical drawings to be supplied to the Respondent?

From the evidence, the nature of the contract was a full contract where the claimant was to provide the above mentioned drawings but CW1 admitted that the same were not provided. Again the tribunal based on the evidence provided found that such drawings were not provided and thus the claimant was again in breach.

50. Were there agreed timelines in the project?

It was held that due to the breaches mentioned on the part of the claimant and variations without fresh agreements of the schedules, there was no extension of time. In the absence of any extension of time, one the date of completion of the project dated 30th June 2018 lapsed; the completion date remained at large.

"However the claimant continued to issue instructions to the Respondent and also held site inspections with the Respondent past the completion date thus it was inferred that the claimant treated the contract as ongoing"

51. The applicant did not explain why payments were made even after that and consequently the revised date would be determined by updated work program by the Project Manager which was not done, In this regard the claimants cannot claim that there was breach on the part of the Respondent.

52. The tribunal also found the claimants' allegations that the Respondent vacated the site on 9/02/2014 not true and found that the Respondents staffs were on the site till the 6/07/2015. It was also established that there was no other contractor who was appointed to complete the works.

53. Did the claimant interfere with the Respondents work by having one of its directors as a Project Manager and another as a supplier?

From the evidence tendered it was established that indeed the claimant interfered with the Respondents work as stated. There was evidence by the claimants **CW5 that Kshs. 4,327,697.50** was retained and paid to **Eldoret Hardwares Ltd** and **the Treasurer to the Claimants Board** responsible for disbursement of funds from the claimant. The tribunal found that the claimant grossly interfered with the respondents

work by having one of its directors as a supervisor and another one as a supplier.

54. Was the contract terminated?

On this, the tribunal found that under clauses 33.1 to 33.4 of the conditions of contract, there was a well set out procedure for termination which the claimants should have adhered to if they intended to terminate the contract. The tribunal found that they did not do that in interestingly inspite of the claimants allegations that the respondents abandoned work on 18th November 2013, CW3 on cross examination confirmed that on 18th December 2013 when CW5 and CW1 visited the site to access the value of the works done then, the Respondents was present and even on 6th January 2014 the Respondent was on site which evidence contracted the claim that the Respondent abandoned work on the 18th November 2013.

The claimants did not also submit evidence to confirm that the Project manager complied with clause 33.2 of the conditions of contract as regards termination**.**

55. What was the final value of work done by the Respondent?

Both parties in their pleadings, evidence and submissions stated what they thought the value of the works done was. The claimants on its part claimed that the initial cost of the contract was Kshs. 99,568,157.50 but due to breach on the part of the Respondents, the claimants ended up spending Kshs. 104,584,581.60 thus an over expenditure of Kshs. 5,016,424.10. **The claimants relied on the expert witness report of CW5 to arrive at these figures but unfortunately and as stated earlier the claimants chose not to present the entire report to the tribunal and chose to redact pages 1 to 66. (They chose to censor their own expert witness report) and which pages should have demonstrated how CW5 arrived at the figure.**

56. The Respondent on the other hand stated that they did all the 6 floors as agreed and that they were not in breach. They claimed the sum of Kshs. 35,358,297.05/= which sum they stated would be subject to variation upon a full Quantity Survey of the entire contract and a determination as to who was in breach. Just as the claimants had asserted in their pleadings that the tribunal must undertake a Quantity survey of the project, the Respondents on their part also urged the Tribunal to use its discretion and expertise to determine if any amounts are to be added or subtracted from the amount determined as payable by RW5.

The expert witnesses failed to agree on a Joint report and parties requested the tribunal to assess the final value of the works done. The Respondent submitted that this was a matter to be determined based on the technical reports by the two Quantity surveyors. The claimant submitted a report prepared by CW5 on the 24th November 2015. **CW5 relied on information received from the claimant. A significant part of CW5's report comprising of sixty six pages was redacted and not submitted by the claimant.**

The Tribunal therefore could not determine the total value of the works done from CW5's report as so many pages were missing. An analysis of the various stages of the constructions was made plus the works the claimant alleged to have undertaken after the purported termination, in my view the tribunal rightly found that there was no evidence to support the claimants' allegations.

57. Was the claimant entitled to interest on liquidated damages, over expenditure, lost rental income and the refund on Bank interests?

It was held by the tribunal, the claimant who was in breach as confirmed. The respondent on the other hand claimed interest on amount it considered due as determined by **RW5 i.e. Kshs. 53,960,633.23.**

The tribunal held that the claim for interest by the claimants in accordance with **clause 63 is fatally defective as the said clause 63** was not submitted in evidence and its content is not known. Since the tribunal had determined that there was no liquidated damages, no over expenditure, no lost rental income nor any refund on bank interest payable to the claimants, then it would follow that the claimants would not get interest on such items.

On the other hand the tribunal found that the Respondent was entitled to interest on what was due as following of 7th October 2013 and what became due on the actual completion date i.e. on 6th July 2015. The tribunal noted that according the Respondents requested for payment of Kshs. 9,200,000/= but the claimants' chairman informed him to proceed with the work as issues of payments were being addressed by the claimants. The claimants board acknowledged receipt of the said request (for Kshs. 9,200,000/=) and as per the conditions of contract the Project Manager was obliged to check and certify the amount to be paid to the Respondent within 14 days (i.e. from October 21st 2013). Under Section 23.3 of the conditions of contract, the claimant was obliged to pay the respondents the amounts certified by the Project Manager within 30 days of the date of issue of certificate i.e. 20th November 2013. Under the said clause 23.3, if payment was not made within the stipulated time, the Respondent would be entitled to interest at **"a rate three percent above the central Bank of Kenya's average rate of base lending prevailing as of the first day the payment becomes overdue"**

The tribunal was guided by the CBK rate at November 2013 then being 16% p.a and added 3 points to get 19% which rate we submit was contractual between the parties and not a creation of the tribunal. Again it is on this basis that the tribunal determined that interest on the **Kshs. 9,200,000/= at Kshs. 2,839,901.37**. Again the amount due to the Respondent on the 6th July 2015 was Kshs. **50,682,585.40** for which the tribunal worked out the interest at **Kshs. 24,958,049.04/-**

58. General damages

Under this head, the question before the tribunal was whether there were any damages for breach of contract.

Both parties to the suit claimed that they were entitled to general damages. The arbitrator however found that it is the claimant/ applicant that had breached the contract and therefore was not entitled to damages. In awarding damages to the Respondent, he reasoned that the respondent suffered loss of productivity, increase in the scope of the contract, failure to have a Project Manager and service engineers, compensation for extension of completion date, loss of anticipated profit and additional overheads.

59. Damages in breach of contract are awarded where a tortious act such as negligence has ensued. This was addressed for instance in the case of **AIRTEL NETWORKS KENYA LIMITED. VS NYUTU AGROVET LIMITED [2011]eKLR** where the learned judge Kimondo J. cited as follows;

> ***"In my considered opinion once the arbitrator embarked on assessment of general damages for the tort of negligence and set up a contract period to run to the year 2013 and to employ the arithmetic and multipliers above, he expanded the margins and boundaries of the contract between the parties. He went on a journey beyond the margins of contract into the world of tort and damages for negligence. ..... The Arbitration clause in the distributorship agreement had limited the dispute to those arising out of or relating to this agreement and breach thereof.....while it is true that in the course of breach of contract a tort may arise, I am prepared to hold that in this case it may well have been completely outside the contemplation of the parties. Having then meandered outside his boundaries, it is then safe to say that the Arbitrator exceeded his jurisdiction ....”***

In the instant case, the aspect of tort/ negligence has not emerged and in my view, the Arbitrator also overstepped the mark when he issued such award.

60. In my opinion, the application does not succeed as far as setting aside the entire award is concerned. However general damages issued here do not consist in the ambit of the arbitrator's powers and this was erroneous and must be and are hereby set aside. It is only to that extent that the application succeeds.

(i) **Costs of the Arbitration**

In any litigation the unsuccessful party pays the costs to the successful party as costs would always follow the event and I concur with the respondent's counsel that the respondent was automatically entitled to costs

Delivered and dated this 15th day of March 2019 at Eldoret.

H. A. OMONDI

JUDGE