REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 780 OF 2017

CASTLE INVESTMENTS COMPANY LIMITED.....APPLICANT

VERSUS

BOARD OF GOVERNORS – OUR LADY OF MERCY GIRLS

SECONDARYSCHOOL.....RESPONDENT

RULING

1. This ruling determines two applications. The first one is the Notice of Motion dated 11th December 2017 in which the applicant, *Castle Investments Company Limited* seeks that the arbitral award made by a sole arbitrator *Mr. Patrick S. Kisia* dated 24th August 2014 be adopted and enforced as a decree of this court.

2. The second application is the Notice of Motion dated 1st February 2018 in which the respondent, *The Board of Governors Our Lady of Mercy Girls Secondary School* seeks that they be granted leave to file the application out of time and that the court be pleased to set aside the aforesaid arbitral award.

3. On 6th February 2018, given the nature of the two applications, the court *(Hon. Mwongo J)* directed that both applications be heard together. The parties subsequently consented to having the applications prosecuted by way of written submissions which they duly filed. The written submissions were highlighted before me on 17th December 2018 by learned counsel *Mr. Ndirangu* who held brief for *Mr. Gichohi* for *Castle Investments Co. Ltd* and learned counsel *Mr. Pala* who appeared for the *Board of Governors of our Lady of Mercy Girls Secondary School.*

4. The background against which the two applications were filed is simple and straightforward. The parties entered into a contract under which the applicant was to construct an office and classroom block for the respondent at a labour cost of KShs.9,199,171.55. After completing the construction works, the applicant demanded payment of KShs.677,320 which the respondent failed to pay on grounds that the works had not been fully completed. A dispute arose which was referred to arbitration in accordance with an arbitration clause incorporated in their agreement.

5. As both parties failed to agree on a sole arbitrator, the chairman of the Institute of Quantity Surveyors of Kenya by letter dated 12th February 2013 appointed *Mr. Patrick S. Kisia* to arbitrate over the dispute.

6. After hearing the dispute, the arbitrator published his award on 24th August 2014 in which he ordered the respondent to pay the claimant (the applicant) a total sum of KShs.459,958.60 in full and final settlement of the dispute which sum would attract interest at the rate of 15% per annum from 31st August 2011 till payment in full. The arbitrator further ordered the parties to meet their own costs but ordered the respondent to shoulder the costs of the reference.

7. From the affidavits sworn in support and in opposition to the applications and from the submissions filed by the parties, it is apparent that though the arbitral award was made on 24th August 2014, it was only released to the applicant in the application dated 11th December 2017 about three years later on 21st November 2017 after the applicant singlehandedly paid the arbitrator's fees amounting to KShs.403,796. The applicant alleged that the respondent refused to remit its share of the balance of fees owed to the arbitrator, an allegation which was not disputed by the respondent.

8. On receiving the arbitral award, the applicant moved the court by way of the aforesaid Notice of Motion seeking adoption and enforcement of the award. When the respondent was served with the application which had as part of its annextures the arbitral award, it was unhappy with the award which it was seeing for the first time. It then filed its application dated 1st February 2018 seeking to set aside the

award.

9. Having outlined the facts forming the background to the filing of the two motions, I now turn to consider their merits or otherwise. I choose to start with the respondent's motion seeking to set aside the arbitral award since its outcome will largely determine the fate of the applicant's motion seeking the adoption and enforcement of the award.

10. In the Notice of Motion dated 1st February 2017 (hereinafter the first application), the respondent (the applicant for purposes of this application) sought three substantive orders as follows:

> ***i. That leave be granted to the applicant/respondent to make this application out of time;***
>
> ***ii. That this honourable court be pleased to set aside the award issued by sole arbitrator Mr. Patrick S Kisia Dated 24th August 2014;***
>
> ***iii. That the cost of this application be provided by the respondent/applicant.***

11. The application is expressed to be brought under *Sections 3A, 1A, 1B Rule 1* of the *Civil Procedure Rules* and *Sections 35 (1); (2), 3* and *40* of the *Arbitration Act*. It is mainly premised on grounds that the arbitrator exhibited bias by not considering the evidence and submissions made the respondent; that the arbitrator overcharged the parties and that he failed to appreciate that the entity which was awarded the tender was different from the one that invoiced for payment.

12. These grounds were amplified in the supporting affidavit sworn on 1st February 2018 by *Mr. Ben Otunga*, the chairman of the development committee of the applicant.

13. The application is opposed through a replying affidavit sworn by Mr. *David Gitau*, a director of the respondent. The deponent denied the applicant's claim that the arbitrator overcharged the parties contending that the fees charged were within the market rates charged by arbitrators; that in any event the parties had agreed on the arbitrator's fees in the sum of KShs.635,776 and they equally contributed to payment of the deposit in the sum of KShs.232,000 leaving a balance of Kshs.403,776 which was to be shared equally. *Mr. Gitau* also denied the claim that the arbitrator exhibited bias against the applicant.

14. In response to the replying affidavit, *Mr. Otunga* swore a further affidavit on 18th April 2018. In the affidavit, he emphasized the position taken by the applicant that the arbitrator's fees were exorbitant considering the amount that was in dispute; that the respondent could not seek enforcement of the award when he was not a party to the arbitration agreement; and, that it was unethical for the arbitrator to withhold his award due to nonpayment of his fees after he had been paid a deposit.

15. Having carefully considered the application, the affidavits on record and the written and oral submissions made on behalf of the parties, I find that it is not disputed that the applicant became aware of the arbitral award on 25th January 2018 when it was served with the respondent's application dated 11th December 2018. S*ection 35 (3)* of the *Arbitration Act No. 4 of 1995 (* the *Act)* provides that :

> ***"An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.''***

16. Given the fact that it is not contested that the applicant received the arbitral award on 25th January 2018 and the instant application was filed on 2nd February 2018, it is my finding that the application was filed within the timelines prescribed by *Section 35 (3)* of the *Act* and there was therefore no need for the applicant to seek court's leave to file the instant application out of time. The prayer is in my view superfluous and does not require any consideration by this court.

17. Turning to the prayer seeking setting aside of the arbitral award, the applicable law is *Section 35 (2)* of the *Arbitration Act* which sets out the conditions under which an arbitral award can be set aside. The section states as follows:

> ***"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."

18. It is important to note that *Section 35 (2)* of the *Act uses* deliberately chosen words to leave no room for doubt that an arbitral award can only be set aside if the conditions specified therein are established. In my view, an applicant who fails to fit his application into any of the aforesaid conditions cannot succeed in having an arbitral award set aside.

19. In this case, it is the applicant's submission that the arbitral award went against public policy as it was made in favour of a party who was not privy to the arbitration agreement as the respondent was not the same entity that signed the agreement; that the arbitrator violated public policy by charging exorbitant fees without considering that the applicant was a public institution whose main objective was to assist needy students. The applicant also submitted that the presence of bias against it by the arbitrator can be discerned from the fact that the arbitrator made an award in favour of the respondent and even after he was paid his fees, he never issued the applicant with a copy of his decision.

20. On its part, the respondent submitted that the claim that the arbitrator's fees were exorbitant was a non-issue since the same had been discussed and agreed upon by the parties. Regarding the claim that it was different from the party which signed the agreement, the respondent submitted that this issue was raised before the arbitrator and was settled by consent of the parties.

21. Given the foregoing, it is clear that the gravamen of the applicant's case is that the arbitral award should be set aside as it was against public policy. That being the case, it is necessary for me to interpret what constitutes "contrary to public policy" as a ground for setting aside an arbitral award. This term has been defined in several authorities including the case of ***Cape Holdings Ltd V Synergy Industrial Credit Limited, [2016] eKLR*** which was cited by the applicant. In that case, *Kariuki J* adopted with approval the definition given by *Ringera J* (as he then was) in ***Christ For All Nations V Apollo Insurance Company Limited, NRB HCC No. 477 of 1999*** where he expressed himself 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…"

The same definition was adopted by the court of appeal in ***Tanzania National Roads Agency V Kundan Singh Construction Limited, [2014] eKLR***.

22. Given the judicial interpretation of what would qualify to be against public policy in the context of arbitral awards, I must now answer the question whether the applicant has demonstrated that the arbitral award in this case was contrary to public policy.

23. After carefully reading the arbitral award and considering the submissions made by the parties, I find nothing to prove or even suggest that the award was against public policy. The claim that the entity that signed the agreement was different from the respondent is not well founded considering that the record of the arbitration proceedings confirm that at the preliminary stages of the proceedings, this issue was raised and settled by the parties who agreed that the respondent was a proper party to the tribunal.

Besides, a look at the agreement shows that the respondent in its corporate status also featured in the execution of the agreement as the stamp used to attest execution of the agreement by the respondent bore the names of *Castle investments Co ltd*.

24. In addition, the applicant having benefited from the works undertaken by the respondent and having made part payment for the same under the agreement and having conceded before the arbitral tribunal that the respondent was a proper party to the agreement cannot now turn around and claim that the respondent was a different party from the one who signed the contract. Nothing therefore turns on the applicant's claim that the respondent did not have capacity to seek enforcement of the award.

25. On the claim that the arbitrator's fees were exorbitant and that they contravened public policy given the status of the applicant and its role in society, a reading of the *Arbitration Act* clearly shows that an arbitral tribunal has full discretion in determining its own fees irrespective of the nature of the parties before it if the fees are not settled by consent of the parties. This position is well illustrated by *Sections 32 (B) (1)* of the *Act* which is in the following terms:

"Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5)."

While *Section 32 (B) (2)* is clear that:

> ***"Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration."***

26. In this case, though the respondent has maintained that the arbitrator's fees were discussed and agreed upon by both parties, the proceedings before the tribunal do not attest to this fact and the fees are not specified in the award.

Given that the law allows arbitrators to set their own fees if the same is not agreed upon by the parties, I find that a dispute concerning an arbitrator's fees cannot be a ground for setting aside an arbitral award.

27. The applicant has also challenged the arbitral award on grounds that the arbitral tribunal exhibited bias towards it. Although bias is not specified in *Section 35 (2)* of the *Act* as a ground that if proved can lead to the setting aside of an arbitral award, it is my finding that in this case, the applicant has not availed any evidence to demonstrate that the arbitrator exhibited any bias towards it.

28. In view of the foregoing, I have come to the conclusion that the applicant has failed to establish that the arbitral award in this case falls within any of the circumstances stipulated or envisaged under *Section 35 (2)* of the *Act*. I am thus satisfied that the applicant has failed to establish a basis for setting aside the arbitral award dated 24th August 2014 as sought. In the premises, it is my finding that the Notice of Motion dated 1st February 2018 lacks merit and it is hereby dismissed with costs to the respondent.

29. Having determined the application dated 1st February 2018, I now turn to consider the 2nd application dated 11th December 2017 seeking the adoption and enforcement of the arbitral award. The application is supported by the affidavit sworn by the applicant's counsel *Mr. Kimandu Gichohi* to which he annexed certified copies of the arbitral award and the arbitration agreement. I have taken note of the respondent's claim that the application was filed out of time but considering that it is not disputed that the arbitral award was released to the applicant on 27th November 2017 and the application was filed on 14th December 2017, I have no doubt in my mind that the motion was filed timeously.

30. The recognition and enforcement of arbitral awards is governed by *Sections 36* and *Section 37* of the *Act. Section 36* confirms the binding nature of domestic arbitral awards and requires a party seeking enforcement of such awards to avail to the court either the original arbitral award and the original arbitration agreement or their certified copies. As stated earlier, the applicant has already availed to this court certified copies of the arbitral award and the arbitration agreement. *Section 37* of the *Act* sets out the grounds upon which this court can decline to recognize or to enforce an arbitral award. These grounds are similar to those that warrant the setting aside of arbitral award as provided under *Section 35 (2)* of the *Act.* In essence, *Section 37* of the Act prohibits a court from recognizing or enforcing an award if the conditions stated therein are shown to be present.

31. I have already found in determining the application dated 1st February 2018 that the respondent failed to establish the existence of any of the grounds that would justify the setting aside of the arbitral award in this case. In the circumstances, I find merit in the Notice of Motion dated 11th December 2017 and the same is hereby allowed in terms of prayer 2 with no orders as to costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 30th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ndirangu holding brief for Mr. Gichohi for the applicant

No appearance for the respondent

Mr. Salach: Court Assistant