



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**MISC. CIVIL CASE NO. 33 OF 2019**

**CONSOLIDATED WITH MISC. CC 35 OF 2019**

**MASTERPIECE INVESTMENT LIMITED.....APPLICANT**

**=VRS=**

**COUNTY ASSEMBLY OF NYAMIRA.....RESPONDENT**

**RULING**

What is before me is the Notice of Motion dated 22<sup>nd</sup> May 2019 in which the applicant seeks orders that this court adopt and/or enter judgement in terms of the Arbitral Award dated 3<sup>rd</sup> May 2019 and that the respondent be condemned to the costs of these proceedings. On 4<sup>th</sup> June 2019 the respondent herein also filed a Notice of Motion of even date in HCMisc Appl. No. 35 of 2019 which sought orders as follows: -

**“1. (Spent)**

**2. THAT pending the hearing and determination of the instant application inter partes, there be an interim order of stay of execution of the arbitral award made by Mr. Pius Omullo on the 3<sup>rd</sup> day of May, 2019.**

**3. THAT the Honourable court be pleased to issue an order setting aside the arbitral award issued on the 3<sup>rd</sup> day of May, 2019 and all the consequent orders thereto.**

**4. THAT costs of this application be provided for.”**

This court heard the two applications together. The genesis of these proceedings is a contract entered between the County Assembly of Nyamira and the Applicant Company for the refurbishment of the County Assembly Chambers. It is not in dispute that parties entered into the contract on 15<sup>th</sup> April 2014. It is also not disputed that there is an arbitral award. It is the applicant's contention that the respondent refusal to honour its obligations despite numerous pleas prompted it to refer the matter to arbitration in accordance with the arbitration clause in the contract. The dispute was heard and the award was published on 3<sup>rd</sup> May 2019 which determined that the respondent was indebted to the applicant to the tune of Kshs. 32,423,987/35. The applicant has also contended that since it is a requirement that such an award can only be enforced through an order of this court the same should be adopted by this court. The applicant contends that it stands to suffer irreparable damage if the orders sought are not granted.

On its part the County Assembly opposes the adoption of the award on grounds firstly that it was never given proper notice in regard to the appointment of the arbitrator and the arbitral proceedings and was therefore prevented from presenting its case. Secondly, that the arbitrator acted beyond his jurisdiction by determining issues that were not within the scope of the reference as the contract had already lapsed and thirdly because the variation of the contract contravened the provisions of the Public Procurement and Disposal Act and the award ought to be set aside.

It is not in dispute that the parties herein entered into a contract for refurbishment of the County Assembly Chambers. From evidence annexed to the applicant's further affidavit the project was supposed to be completed by 7<sup>th</sup> October 2015 a period of 24 weeks from the date of the contract. The contract had an **Arbitration Clause** that states: -

**“37. Settlement of Disputes**

**37.1 In case any dispute or difference shall arise between the Employer or the Project Manager on his behalf and the Contractor, either during the progress or after the completion of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty**

days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of any of the following professional institutions:

- (i) Architectural Association of Kenya.
- (ii) Institute of Quantity Surveyors of Kenya.
- (iii) Association of Consulting Engineers of Kenya.
- (iv) Chartered Institute of Arbitrators (Kenya Branch).**
- (v) Institution of Engineers of Kenya.

On the request of the applying party, the institution written to first by the aggrieved party shall take precedence over all other institutions.

37.2 The arbitration may be on the construction of this Contract or on any matter or thing of whatsoever nature arising there under or in connection therewith, including any matter or thing left by this Contract to the discretion of the Project Manager, or the withholding by the Project Manager of any certificate to which the Contractor may claim to be entitled to or the measurement and valuation referred to in clause 23.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of Contract.

37.3 Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.

37.4 Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties. Proof of such attempt shall be required.

37.5 Notwithstanding anything stated herein the following matters may be referred to arbitration before the practical completion of the Works or abandonment of the Works or termination of the Contract by either party.

37.5.1 The appointment of a replacement Project Manager upon the said person ceasing to act.

37.5.2 Whether or not the issue of an instruction by the Project Manager is empowered by these Conditions.

37.5.3 Whether or not a certificate has been improperly withheld or is not in accordance with these Conditions.

37.5.4 Any dispute or difference arising in respect of war risks or war damage.

37.6 All other matters shall only be referred to arbitration after the completion or alleged completion of the Works or termination or alleged termination of the Contract, unless the Employer and the Contractor agree otherwise in writing.

37.7 The Arbitrator shall, without prejudice to the generality of his powers, have powers to direct such measurements, computations, tests or valuations as may in his opinion be desirable in order to determine the rights of the parties and assess and award any sums which ought to have been the subject of or included in any certificate.

37.8 The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision requirement or notice had been given.

37.9 The award of such Arbitrator shall be final and binding upon the parties.

In the case of *Anne Mumbi Hinga Vs. Victoria Njoki Gathara [2009] eKLR* the Court of Appeal stated: -

*“We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act.”*

The circumstances under which this court can interfere with an arbitral award are set out in **Sections 35, 36 and 37 of the Arbitration Act**. It is clear from the documents furnished to this court by the applicant (in Misc. 33 of 2019) that the arbitrator in this case was not appointed as provided in the Arbitration Clause. The appointment of the arbitrator was by a letter by the applicant dated 17<sup>th</sup> May 2017 (Annexure EA02a to the replying affidavit in HCMisc. 33 of 2019) in which after she expressed her frustration in regard to “**over delayed payments**” – (Kshs. 13,885,401.20) notified the respondent that she would invoke the arbitration clause and was proposing Arb. Pius Omullo of

0721744479 as the arbitrator. In the same letter she invited the respondent to “**request for an arbitrator from the Institute of Arbitrators within 7 days to help initiate the process**”. Whereas **Arbitration Clause** had detailed provisions on the appointment of the arbitrator none of those provisions was followed. Notably the Institute of Arbitrators was not among those institutions listed in the contract as possible providers of arbitration. There is evidence that the arbitral process was nevertheless conducted by the arbitrator preferred by the applicant. One of the conditions precedent to arbitration was for the parties to furnish evidence that they had attempted an amicable settlement between themselves.

I have perused the bundle of documents furnished to this court by the applicant but I have not come across evidence of an attempt by the parties themselves to settle the dispute amicably with or without assistance of third parties. This contrary to **Clause 37.4** of the **Arbitration Clause** which required proof of such attempt before the matter was referred to arbitration. That notwithstanding it may be said that the respondent acquiesced in participating in the arbitral proceedings despite not having been given an opportunity in the choice of the arbitrator. I have looked at the provisions of **Sections 36 and 37** of the **Arbitration Act** and find that even then the respondent (applicant in Misc. 35 of 2019) would still be entitled to setting aside of the award on that ground under **Section 37 (1) (v)** which states: -

*“(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 -*

*(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.”*

It is also apparent from the award that the arbitrator went beyond the scope of the dispute referred to him which was whether the claimant was entitled to payment of a sum of Kshs. 13,885,401/20 instead he awarded a sum more than twice that amount and while some of the issues raised by the respondent are issues of law which would be the subject of an appeal rather than application under **Section 37 of the Act**, there are good grounds to set aside the award.

I find merit in the respondent’s application not to recognize the award for the reasons set out above. The same is set aside.

As costs follow the event, the applicant (in Misc. 33 of 2019) shall bear the costs of these proceedings. It is so ordered.

**Signed, dated and delivered in Nyamira this 29<sup>th</sup> day of July, 2019.**

**E. N. MAINA**

**JUDGE**