REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISC.CIVIL APPLICATION NO. 278 OF 2017

KENYATTA INTERNATIONAL CONVENTION CENTRE (KICC)...APPLICANT

-VERSUS-

GREENSTAR SYSTEMS LIMITED.....RESPONDENT

RULING

[1] This Ruling is in respect of two applications. The first application is the Notice of Motion dated **14 June 2017**. It was filed on **23 June 2017** under a Certificate of Urgency by **Kenyatta International Convention Centre (KICC)** (hereinafter the Applicant for the purposes of the two applications), pursuant to **Section 35** of the **Arbitration Act, No. 4 of 1995** and **Rule 7 of the Arbitration Rules, 1997.** The second application was filed by **Greenstar Systems Limited,** (the Respondent for purposes of both applications). It was filed on **14 July 2017** under **Sections 36 and 37(2)** of the **Arbitration Act, 1995** (as amended by **Arbitration (Amendment) Act No. 11 of 2009**, and **Rules 6 and 9** of the **Arbitration Rules, 1997**, for the enforcement of the Arbitral Award as a Decree of this Court. It was supported by the affidavit annexed thereto, sworn by the Respondent's Managing Director, **Mr. John Ibae**, on **14 July 2017** and the annexures thereto as well as the Supplementary Affidavit of **Jacqueline Munyiva Munyao**, sworn and filed on **29 September 2017.** Granted the correlation between the two applications, directions were given by the Court on **17 July 2017** for the applications to be urged simultaneously, hence, written submissions were invited from the parties in respect of both. The Applicant's written submissions were filed on **2 October 2017**, while the Respondent's written submissions were filed on **11 October 2017**.

[2] The agreed facts of the matter are that the Respondent, **Greenstar Systems Limited**, is a youth owned firm that is duly registered under the Access to Government Procurement Opportunities (AGPO) under the Women Category of Disadvantaged Groups. The parties are in agreement that on or about **14 September 2015**, the Respondent placed a bid in respect of the Applicant's **Tender No. KICC/58/15-16** for the refurbishment and customization of the KICC Tower Block Offices in readiness for the World Trade Organization Conference that was scheduled to be held in Nairobi, Kenya later in the year. Accordingly, the Respondent was awarded the said tender in the sum of **Kshs. 76,320,500/=.** There appears to be no dispute that the project was successfully completed and that the Respondent handed over the works to the Applicant on **12 December 2015**.

[3] However, a dispute soon thereafter arose between the parties after the Applicant failed to settle invoices issued by the Respondent in respect of the contractual works. Consequently, the Respondent invoked the dispute resolution clause under the Contract and had the matter referred to arbitration. It is

not contested that the Tribunal, upon hearing the parties, made an Award in favour of the Respondent. Thus, having given due consideration to the respective applications, the written submissions aforementioned and the applicable law, I now proceed to consider each application in turn.

The Notice of Motion dated 14 June 2017

[4] The Notice of Motion dated **14 June 2017** (the First Application) seeks the following Orders:

> **[a]** That the application be certified urgent, and heard *ex parte* in the first instance; (Spent)
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> **[b]** That pending the hearing and determination of the application, the Court be pleased to stay enforcement of the arbitral award published on **17 March 2017**; (Spent)
>
> **[c]** That the Court be pleased to set aside the arbitral award published on **17 March 2017**;
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> **[d]** That, in the alternative to prayer 3 above, the Court be pleased to make such further or other order(s) as it may deem appropriate including remitting the Final Award for corrective action on the impugned portion of the award namely, the award of **Kshs. 57,419,029.86** on unsupported quantum, Value Added Tax and interest; and the dismissal of the Counterclaim so as to eliminate the grounds for setting aside the arbitral award;
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> **[e]** That in the alternative to prayer **[c]** above, the Court be pleased to make such further or other order(s) as it may deem fit with regard to all or part of the Award published on **17 March 2017** including remitting the Award for corrective action on any aspect the Court may deem appropriate and on such condition as it will impose so as to eliminate the grounds for setting aside the arbitral award;
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> **[f]** That the costs and incidentals to the application be provided for.

[5] The application was premised on the grounds that the Arbitral Award deals with a dispute not contemplated by, and not falling within the terms of reference to the arbitration; and that it contains decisions on matters beyond the scope of reference, and matters not pleaded by the Claimant/Respondent. It was further contended that the Award is against the public policy of Kenya, in that whereas the Arbitral Tribunal found that the impugned contract was an illegal contract, it proceeded to order for the payment by the Applicant of **Kshs. 57,419,029.86**, in contravention of the applicable statute on procurement and the **Constitution of Kenya, 2010**. Additionally, the Applicant complained that the Arbitral Tribunal condemned it to pay interest at 14.5% per annum from **2016**, yet this finding is neither supported by the contract, nor any reasonable application of discretion.

[6] In support of the application, reliance was placed on the affidavit of the Legal and Regulatory Manager of the Applicant, **Ms. Maureen Chogo Chahale**, sworn on **14 June 2017,** which is, in essence, a reiteration of the grounds set out in the body of the Notice of Motion. She averred that the dispute revolves around an illegal contract that wasawarded to the Respondent purportedly for the refurbishment of the Applicant's offices in readiness for the World Trade Organization Conference that was held between **15-18 December 2015**. According to her, the contract was awarded in contravention of the **Public Procurement and Disposal Act, 2005** and that, whereas the Award published on **17 March 2017** upheld the Applicant's submission that the contract was illegal, the Arbitral Tribunal nevertheless proceeded to award the Respondent an amount of **Kshs. 57,419,029.86** in enforcement of the impugned contract. Annexed to the Supporting Affidavit as Volume A are copies of the Final Award, the Applicant's procurement Plan for 2015 and correspondence exchanged between the parties, as well as written submissions filed before the Arbitral Tribunal. In Volume 2 of the annexures, the Applicant exhibited, *inter alia*, copies of the Statement of Claim and the response thereto, the contract and invoices pertaining thereto as well as the Arbitral Proceedings.

[7] The Respondent, on its part, relied on the Replying Affidavit of its Managing Director, **Mr. John Ibae**, sworn on **13 July 2017,** in which it was affirmed that this dispute is indeed in connection with a

contract entered into on **14 October 2015** between the Applicant and the Respondent, whereby the Applicant engaged the Respondent to refurbish and customize offices on six floors of the KICC Tower block in readiness for the World Trade Organization Conference which was to be held on **15-18 December 2015**. It was further deposed that the contract was entered into after a competitive tender process and that the works were undertaken by the Respondent in good faith and pursuant to the terms of the contract, whereupon the refurbished and customized offices were handed over to the Applicant on **12 December 2015,** and were successfully used to host the WTO Ministerial Conference.

[8] It was further averred by the Respondent that on **13 November 2015,** the Applicant made part payment of **Kshs. 10,000,000/=** against an invoice for **Kshs. 22,850,000/=;** and that subsequent invoices remained unpaid as the Respondent's efforts to claim the outstanding balance from the Applicant under the terms of the contract proved futile. Consequently, the Respondent declared a dispute, which was referred to **Mr. Geoffrey Imende** for arbitration. It was the averment of the Respondent that the Arbitrator, in his award, acknowledged that the tendering process was flawed, but also found that, the Applicant was solely to blame for the illegality; and therefore was relying on its own admitted illegality as a sword for personal gain rather than a shield for public good. It was therefore the contention of the Respondent that the Arbitrator was conscious of the law and public policy considerations as articulated in various judicial precedents that he took into account in his award. In particular, Paragraph 73 as well as Paragraphs 77-80 of the Award were cited as evidence of this consciousness. Thus, the Respondent averred that the Applicant cannot be heard to argue that the Award is contrary to public policy when it has continued to benefit from the use of the refurbished offices for three major global conferences, namely, the **WTO, UNCTAD 14** and **TICAD VI,** at the expense of the Respondent.

[9] It was further the averment of the Respondent that it was at risk of losing its assets used to secure a loan to finance the subject project; and urged that it would be in the interest of justice for the Court, in exercise of its discretion under **Section 37(2)** of the Arbitration Act, to order the Applicant to provide security for the claim by depositing the whole of the Award sum of **Kshs. 47,419,029.86** plus interest accrued to date, into an interest earning account in the joint names of the Applicant and the Respondent; or in the joint names of their advocates, pending the hearing and determination of the applications herein. This aspect of the application is however spent, the Court having ruled on it on **11 October 2017.**

[10] In its Further Affidavit sworn on **4 September 2017**, the Applicant reiterated its posturing that the subject contract is an illegal contract and that it should not be countenanced by the Court. It was further averred that since restitution was not prayed for in the arbitral proceedings, it was against public policy for the Arbitrator to frame it as an issue *suo motu* and proceed to make a determination thereon, for this offends the Constitution and the right to a fair hearing. In similar vein, the Arbitrator was faulted for having awarded the Respondent VAT, when no such claim was made or proved to have been paid. The same averment was proffered in respect of interest.

[11] Needless to say that arbitration is one of the alternative dispute resolution mechanisms that now has pride of place in **Article 159(2)(c)** of the Constitution; and, as was pointed out by the Court of Appeal in **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR,** where parties opt for arbitration, it is to be understood that they expect nothing but finality and due expedition from the process. The Court of Appeal underscored this prospect thus in the **Nyutu Agrovet Case** (supra):

> **"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."**

[12] Thus, it is for good reason therefore that courts defer to the arbitral process. Indeed, **Section 10** of the **Arbitration Act, No. 4 of 1995** expressly stipulates that:

> **"Except as provided in this Act, no court shall intervene in matters governed by this Act."**

In **Prof. Lawrence Gumbe & Another Vs. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004, t**he above provision was explicated by **Nyamu, J. thus:**

> ***"Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented..."***

[13] With the foregoing caution in mind, I have looked at the material placed before me for consideration. It is common ground that the Applicant invited bids in respect of a tender for the refurbishment/customization of six floors of the Tower Block Offices at the Kenyatta International Convention Centre, being **Tender No. KICC/58/15-16.** It is also common ground that the Respondent's bid was successful and that a contract was accordingly entered into between the parties dated **14 October 2015** whereby the Respondent was to undertake the works at the total cost of **Kshs. 76,320,500/=.** The said Agreement is at page 780-793 of the Applicant's Volume B of the Notice of Motion and it is explicit, at **Clause 28** thereof that any dispute arising out of the Agreement would be resolved by way of arbitration. That Clause reads as follows in part:

> **"Should the parties be unable to reach agreement on the meaning and interpretation of any of terms set out hitherto or any other matter arising out of this agreement, the matter shall be referred to an independent arbitrator appointed by the chairperson of the Institute of Chartered Arbitrators; such arbitration shall be held under the Arbitration Act No. 4 of 1995..."**

[14] There is a clear demonstration by the Respondent herein that it carried out the works satisfactorily and handed over the same to the Applicant. The documents at pages 805-810 confirm that the works were handed over to the Applicant on **12 December 2015**. In particular, the WTO letter dated **15 January 2016** (at page 809 of Volume B) is telling; for by it, the WTO Project Coordinator complimented the Respondent for the work done. It reads:

> **"I wish to officially thank you and compliment you for the excellent work and services that you and your company Greenstar, have accomplished for the 10th Ministerial Conference of the World Trade Organization, held at the Kenyatta International Conference Centre (KICC) in Nairobi, Kenya, from 15 to 18 December 2015.**
>
> **Despite our demanding requests and many last minute changes, you have been able to fully deliver all the items in your terms of reference, within the deadlines, and meeting - if not exceeding - our most optimistic quality requirements...painstakingly working night and day for the success of our event..."**

[15] Having satisfactorily undertaken the works, the Respondent, naturally, expected prompt and full settlement of their invoices. However, other than a payment of **Kshs. 10,000,000/=** by the Applicant on **13 November 2015** against an invoice of **Kshs. 22,895,150/=,** no other payment was made. Consequently, a dispute was declared pursuant to **Clause 28** of the Agreement and referred to the Arbitration of **Mr. Geoffrey Imende**; who having heard the parties, made and published his Final Award on **17 March 2017**. That Award is in the following terms:

> **[a] The Respondent shall pay to the Claimant the sum of Kshs. 47,419,029.86, such payment to be made within 21 days of the date on which this Award is taken up by either party. Interest (simple interest) will accrue thereon at the rate of 14.5% per annum from 31st August 2016 to 17 March 2017. Thereafter interest (simple interest) at the rate of 14.5% per annum will accrue effective from 21 days after the Award is taken up by either party if payment is not made within the said period until payment in full.**
>
> **[b] Each party shall bear their own costs of this Reference.**

[c] The balance of the costs of the Arbitral Tribunal is assessed at Kshs. 1,098,200/= which is to be shared equally between the parties. Payment of these costs shall be made in full by the parties before the Award is collected, failing which it is to be paid in full by either party before the Award is collected. In the event that one party has paid the full cost of the Arbitral or any part thereof that is more than half of the costs of the Arbitral Tribunal, the other party shall reimburse the amount that that party should have paid with interest thereon at the rate of 14.5% per annum from the date of payment by the party that paid the costs of the Arbitral Tribunal until the date of such reimbursement in full.

[16] Thus, the parties having opted for arbitration, were expected to strictly comply with the Award in all its terms. In particular, the Applicant herein was required to pay the sum of **Kshs. 47,419,029.86,** that was awarded to the Respondent, within 21 days of the date on which this Award was taken up by either party, together with interest at the rate of 14.5% per annum. Instead, the Applicant moved the Court for the setting aside of the Award, vide its application dated **14 June 2017**. That application was brought pursuant to **Section 35(1) and (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."

[17] In the premises, it is indubitable that the First Application, having been brought on grounds that the Award dealt with matters not contemplated by the parties; that the decision of the Arbitral Tribunal went

beyond the scope of the reference; and that the Award is in conflict with the public policy, raise matters that fall squarely within the provisions of **Section 35** aforestated, in particular, **Section 35(2)(a)(iv)** and **2(b)(ii)**of the **Arbitration Act.**

[18] It is notable, however, that an objection was raised by **Mr. Kyalo Mbobu** for the Respondent, touching on the competence of the application, which requires consideration as a preliminary issue. It was the submission of **Mr. Mbobu** that the application ought to be dismissed contending that it was brought in contravention of **Section 35(3)** of the **Arbitration Act**, in that it was filed on **23 June 2017**, and therefore outside the 3 months' window provided for in **Section 35(3).** Counsel further submitted that no explanation had been proffered by the Applicant as to why the application was filed late; and further that no application for enlargement of time had been made with a view of curing the defect. He accordingly urged for the dismissal of the application contending that it is an application that has no legs to stand on. He relied on the cases of **Bulk Transport Corporation vs. Sissy Steamship Co. Limited Lloyd's Law Report 1979 Vol. 2 p. 289; High Court Miscellaneous Application No. 238 of 2003: Transworld Safaris Limited vs. Eagle Aviation Limited & 3 Others** and **Nancy Nyamira & Another vs. Archer Dramond Morgan Ltd [2012] eKLR**, to support his argument that the time limits set out in the **Arbitration Act** ought to be strictly enforced.

[19] In response to **Mr. Mbobu's** arguments, **Mr. Gitonga** for the Applicant conceded that the instant application ought to have been filed within 90 days, and that it was indeed filed outside the aforesaid time period. It was however his contention that the Applicant had applied, under **Section 34** of the **Arbitration Act** for an additional award and that this request had not been settled by the time the instant application was filed. He accordingly submitted that the application was well within the stipulations of **Section 35(3)** of the **Arbitration Act** and cannot therefore be deemed to have been filed out of time.

[20] There is no disputation that the Final Award of **Mr. Geoffrey Imende**, Arbitrator, was published on **17 March 2017**. Accordingly, granted the strictures of **Section 35(3)** of the **Arbitration Act,** the Applicant only had up to **17 June 2017** to challenge the Award under **Section 35,** for **Section 35(3)** of the Arbitration 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."**

[21] Thus, although Counsel for the Respondent suggested that the Court ought to have been moved for extension of time, there is no such jurisdiction, granted that the Arbitration Act does not seem to envisage such a situation. In the case of **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, the Court of Appeal expressed itself thus in connection with such applications that are not expressly provided for in the **Arbitration Act**, and which purport to rely on the **Civil Procedure Act** and the **Rules** thereunder:

> **"A careful look at all the provisions cited in the heading 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 states:**
>
> **"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. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. 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 our 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 us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo motu *because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1."*

[22] The same viewpoint was taken by the Court of Appeal in **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, wherein Mwera, JA** held thus:

"Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil-like litigation, I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:

"11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules."

The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10."

[23] *Thus, there being no provision in the* ***Arbitration Act*** *for extension of time, it is to be understood that strict compliance with the timeline set out in* ***Section 35(3)*** *of the Act is imperative, and comports well with the principle of finality in arbitration. Indeed in the* ***Anne Mumbi Hinga Case****, the* Court of Appeal proceeded to hold, in no uncertain terms, that **Section 35** of the **Arbitration Act** bars any challenge even for a valid reason after 3 months from the date of delivery of the award. And, i*t is now well settled that the time of delivery and receipt of Award is equivalent to the date of notice by the Arbitrator. In* ***Transworld Safaris Limited vs. Eagle Aviation Limited & 3 Others****for instance,* ***Nyamu J****. expressed this view thus upon an analysis of relevant precedent, with which I am in agreement:*

"Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is sufficient delivery. The interpretation of communication under Section 9 of the Arbitration Act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

[24] *Thus, the date of delivery and receipt of the Award in this instance was the* ***17 March 2017*** *when, by his letter of even date (at page 1 of the Applicant's Notice of Motion), the Arbitrator notified the parties that the Award was ready for collection; and although the Applicant alluded to a request that it made to the Arbitral Tribunal on* ***21 April 2017*** *for reconsideration pursuant to* ***Section 34*** *of the Arbitration Act, there appears to be no proof thereof herein. In the premises, I would agree with* ***Mr. Mbobu*** *that the First Application herein is incompetent, for having been filed outside the 90 day period provided for in* ***Section 35(3)*** *of the* ***Arbitration Act****. And, even assuming that there was any such proof, the application is clearly misleading in so far as it seeks the setting aside of an Award of* ***Kshs. 57,419,029.86,*** *which is not the correct sum awarded in the Final Award dated* ***17 March 2017****. That Award was for* **Kshs. 47,419,029.86,** and it recognized that **Kshs. 10,000,000/=** having been paid prior thereto, was not part of the dispute**.** Accordingly there is good cause for holding that the First Application is incompetent and therefore ought to be struck out.

[25] On the merits of the application, (assuming that a request had indeed been made to the Arbitral Tribunal under **Section 34** of the Arbitration Act which was yet to be responded to), the questions that would arise for determination, in my view, are:

> **1) Whether the Arbitral Award herein dealt with a dispute not contemplated by or falling within the terms of the Reference; and whether the Arbitrator granted a relief that was not envisaged by the Agreement and therefore not specifically pleaded before him.**
>
> **2) Whether the Award offends public policy.**

On whether the Arbitral Award herein dealt with a dispute not contemplated by or falling within the terms of the Reference; and whether the Arbitrator granted a relief that was not envisaged by the Agreement and therefore not specifically pleaded before him:

[26] I have carefully considered the application, the affidavits filed in respect thereof as well as the submissions made herein by learned Counsel for the parties. One of the issues raised by the Applicant in this connection was that the Bill of Quantities, which was used by the Arbitrator as the basis for calculating the alleged works was not an issue before the Tribunal, as there was no claim for the said sum of **Kshs. 47,419,029.86,** which is supported by the Bill of Quantities. It was further submitted by the Applicant that Bills of Quantities are merely estimates, and not quantum of works done or a true reflection thereof. According to the Applicant, the quantum of works was not an issue for determination before the Arbitral Tribunal; adding that, at some point during the proceedings, the Advocate for the Respondent was asked whether they wanted a site visit as had been proposed by Respondent, but that the Respondent was categorical that it did not want a site visit, and thereby lost the opportunity to introduce the issue of quantum of works. In similar vein, the Applicant lost the opportunity to defend the claim on the basis of quantum, which is ascertained by a Completion Certificate; and therefore it was improper for the Arbitrator to make a determination on the basis of matters which were not pleaded or tested by the parties during the hearing.

[27] The second issue raised under this head, was the contention by the Applicant that the Award of **Kshs. 47,419,029.86** on the basis of restitution is improper and is a misapprehension of the law, as restitution was never an issue before the Arbitral Tribunal. It was also argued that the Applicant was denied an opportunity to submit on that issue as no claim was made or evidence led or tested in support of restitution as a remedy. It was thus the case of the Applicant that the Arbitrator went on a frolic of his own and framed issues, applied evidence that had not been adduced or tested and found that the amount stated in the Bill of Quantities was the right amount payable under the doctrine of restitution. Similar concerns were raised in respect of the Award of VAT and interest. The Applicant relied on the case of **Mahican Investments Limited & 3 Others vs. Giovani Gaida & 80 Others [2005] eKLR** in urging the Court to similarly find that the Arbitrator had gone on a frolic of his own in this instance and travelled outside the terms of reference.

[28] The Respondent on the other hand posited that the Arbitral Tribunal was guided by nothing other than the contract and the evidence as well as the submissions made before it in making its determination; and therefore that the Award ought to be upheld. It insisted that the Arbitral Tribunal empirically tested the evidence that was presented by either party and was satisfied that the works were performed by the Respondent pursuant to the contract awarded to it. Hence, it is pertinent to ascertain and circumscribe the scope of the reference; and in this regard, I would agree with the expressions of the Court in **Kenya Tea Development Agency Ltd & Others vs. Savings Tea Brokers Ltd [2015] eKLR** that:

> **"...the jurisdiction of the Arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether a claim is based on tort was contemplated by the agreement or falls within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract..."**

[29] A copy of the Respondent's Statement of Claim was exhibited at page 755 of Volume B of its Notice of Motion. It shows that the cause of action before the Tribunal was the failure by the Applicant to pay an outstanding balance of **Kshs. 66,320,500/=** in respect of the Contract for Refurbishment and Customization of Tower Block Offices (6 Floors) at the KICC in preparation for the WTO Conference. The Claim was later amended on **1 September 2016**, thereby increasing the claim amount from **Kshs. 66,320,500/=** to **Kshs. 84,123,460.17**. The Respondent also claimed interest at compounded commercial bank rates, Loss of Business, General Damages together with interest thereon, costs and any other relief that the Tribunal deemed fit to grant. In the Applicant's Statement of Defence and Counterclaim, at pages 746-748 and the Amended Statement of Defence and Counterclaim at pages 699-702 of Volume B, it denied that there was a tender as alleged by the Respondent, by which a contract was awarded to the Respondent for the Refurbishment/Customization of its Tower Block. In effect the Applicant raised the issue that the alleged contract was an illegal contract from which no justiciable rights could flow. The Applicant further averred in its Amended Defence and Counterclaim that the contract was obtained by fraud and therefore the payment of **Kshs. 10,000,000/=** was done in contravention of the law, and hence amounted to unjust enrichment on the part of the Respondent. The Applicant thus counterclaimed the said sum of **Kshs. 10,000,000/=,** and otherwise prayed for the dismissal of the Respondent's claim with costs.

[30] In his Final Award dated **17 March 2017**, the Arbitrator traced the history of the dispute through the Contract and the Arbitration Agreement. The Award shows that he looked at the documents filed as indicated at page 4 of the Award (page 8 of Volume A of the First Application). He had in mind the governing law as he reviewed the evidence adduced by each party; and, at page 13 of his Award (page 17 of Volume A of the Applicant's Notice of Motion), the Arbitrator stated as follows in connection with the issues for determination:

> **"The parties could not agree on a joint list of issues for determination. Consequently, the parties filed separate lists of issues for determination. Before the commencement of the oral hearing, I sought to bridge the gap between the parties on the issues for determination in order to have a joint list of issues for determination. The parties could not agree on the framing of issues. Consequently, it was agreed that I resolve and determine the issues for determination."**

[31] The Arbitrator then proceeded to frame the following issues for determination:

> **[a]** Whether the agreement dated **14 October 2015** signed between the Claimant and the Respondent is valid; and if not, what is the consequence?
>
> **[b]** Whether the Respondent breached the terms of the agreement dated **14 October 2015**;
>
> **[c]** Whether the Claimant fraudulently received **Kshs. 10,000,000/=** from the Respondent;
>
> **[d]** Are the parties entitled to their respective claims?
>
> **[e]** Who is to bear costs of the reference?

[32] The Arbitrator thereafter proceeded on a consideration of the issues in the light of the evidence adduced by the parties and the applicable law, and made his findings whose summary is at pages 51-52 of the Final Award. His findings were, *inter alia* that, although there is a contract that was signed between the parties, the process leading to the agreement was flawed and was not in accord with the **Public Procurement and Disposal Act, 2005 (the PPDA).** He was however of the view that the Claimant did not fraudulently receive the sum of **Kshs. 10,000,000/=** from the Respondent. The Arbitral Tribunal also noted that the Applicant herein had readily conceded that it failed to adhere to the requirement of the **PPDA** in the process leading up to the execution of the contract. Accordingly, the Arbitrator came to the conclusion that:

> **"...the Contract is tainted with illegality. The Respondent readily concedes to its breaches of the law. Is the Claimant complicit to the illegality? In its written submissions, the Respondent**

has stated that given the fact that the Claimant has failed to demonstrate that the tender documents came from the Respondent, the Claimant was part of a fraudulent enterprise to defeat the express provisions of statute. Consequently, the Respondent submits that the Contract is illegal and cannot be enforced. For my part, I am not satisfied that there is sufficient evidence to justify a finding that the Claimant is complicit in the illegality that taints the Contract...As conceded by Ms. Chogo in cross-examination, it is the Respondent's duty to comply with the PPDA 2005. Consequently, from the material placed before me, I find and hold that the non-compliance with the PPDA 2005 was on the part of the Respondent and not the Claimant..."

[33] The Arbitrator, having come to the foregoing conclusion, then proceeded to give attention to the ramifications thereof, bearing in mind the proven fact that the works were satisfactorily undertaken by the Respondent herein; and that part payment had been made therefor. He then, upon a consideration of relevant precedents, came to the conclusion that:

"...it would lead to unjust enrichment if the Respondent were allowed to keep the benefit and user of the refurbished premises without having them pay for their value...the Claimant has performed its obligations under an invalid contract. The counter-performance expected of the Respondent, being payment for those works has not materialized. The Respondent has thereby been unjustly enriched. It should be noted that it is immaterial whether the counter-performance is based on a valid contract or not...It is therefore my conclusion on this issue that there ought to be restitution and the parties be taken back to where they were as if the Contract had not been entered into..."

[34] One of the authorities that the Arbitrator took into consideration in coming to the above conclusion was the decision by the UK Supreme Court in **Patel vs. Mizra [2016] UKSC 42** in which it was held that:

"Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that the person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self- defeating, condoning illegality by giving with the left hand what it takes with the right hand."

[35] The Arbitrator was guided by the aformentioned UK Supreme Court decision that, while it agreed that the subject contract was illegal, there was no logical basis why considerations of public policy should require **Mr. Patel** to forfeit the monies which were never used for the purpose for which they were paid; that such a result would not be a just or proportionate response to the illegality. The Arbitrator was further guided by the holding in **Neville vs. Wilkinson [1782] 1 Bro CC 543** which was also considered in **the Patel Case (supra)**, that:

"If courts of justice mean to prevent the perpetration of crimes, it must not be by allowing a man who has got to possession [illegally] to remain in possession, but by putting the parties back to the state in which they were before."

[36] The Arbitrator further observed that the Applicant was cognizant of this legal proposition as it sought to rely on it in its Counterclaim to recover the **Kshs. 10,000,000/=** that it paid to the Respondent under the impugned contract. This finding by the Arbitrator is borne by the Applicants written submission filed before the Arbitral Tribunal, at page 106 of Volume A of the Applicant's Notice of Motion. Indeed, in **Saunders vs. Edwards [1987] 1 WLR 1116,** which was cited with approval by the UK Supreme Court in **the Patel Case** (supra), it was held that:

"Where issues of illegality are raised, the courts have ... to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first

indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct."

[37] Clearly therefore, the twin issues of unjust enrichment and restitution, cannot be said to be extraneous issues that were inexplicably introduced by the Arbitrator; but are issues that were introduced by way of pleadings by none other than the Applicant; and they were considered by the Arbitral Tribunal as a necessary corollary to the finding that the contract was itself an illegality, for which the Applicant was to blame.

[38] Similarly, it is evident from the Award that the Arbitrator, in coming up with the Award Sum of **Kshs. 47,419,029.86** did not simply pluck the figure from the Bill of Quantities. His analysis at paragraphs 79 and 80 of the Final Award is self explanatory. He was well cognizant of the fact that restitution is not intended at profiting either party, and hence reduced the outstanding sum by the profit margin, which he worked out at the rate of 20% from the evidence that was placed before him. Thus, out of the claim for **Kshs. 84,123,460.17** which the Claimant asked for, the Arbitrator awarded only **Kshs. 47,419,029.86**; the rest of the claim was disallowed.

[39] In the same vein, the Applicant was not justified in contending that VAT was not payable. The parties envisaged and made provision for the applicable taxes in Clauses 6 and 13 of the Contract without prior proof of payment. In Clause 6 of their Agreement, the parties stated that:

> "Kenyatta International Convention Centre herein shall procure from, whereas Greenstar Systems Ltd shall Refurbish/Customize six (6) Tower Block offices (6 Floors) At Kicc, at the cost of Kshs. 76,320,500/= (Kenya Shillings Seventy Six Million, Three Hundred and Twenty Thousand, Five Hundred Only) inclusive of all taxes."

Again in Clause 13 of the Agreement, the parties were in no doubt that:

> "All amounts quoted in this Agreement are inclusive of all taxes, duties (including but not limited to value added tax, and sales taxes, import and customs duties) and charges relating to delivery such as carriage and insurance."

[40] It would therefore be idle for the Applicant to argue that VAT was not payable; just as it would be idle for the Applicant to contend that interest was not within the purview of the Arbitral Tribunal, yet Section 32C of the Arbitration Act is explicit that:

> **"Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award."**

[41] In any event, matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are matters over which only the Arbitrator had jurisdiction to deal; and which this Court would have no mandate to interfere. I would therefore concur with the decision in **D. Manji Construction Limited vs. C & R Holdings Limited [2014] eKLR** in which the Court observed that:

> **"The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few...those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts..."**

[42] I also find persuasive the English case of **Geogas S.A vs. Trammo Gas Ltd (The "Baleares")**

which was cited with approval by the Court of Appeal in **Kenya Oil Company Limited & Another vs. Kenya Pipeline Co. [2014] eKLR.** In that case, the question arose as to whether it was permissible to review, as an error of law, a finding of fact by arbitrators, which was challenged on the ground that there was no evidence to support it. The English Court (per **Lord Justice Steyn**) took the position that:

> "**The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact**."

[43] Similarly, in **Mahican Investments Limited and 3 others vs Giovanni Gaida & Others [2005] eKLR, Ransley J.** was of a like view when he held that:

> **"A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."**

[44] Consequently, in respect of the first issue herein, I am not satisfied that the Applicant has shown, to the requisite standard, that the Arbitrator travelled out of the confines of the reference or that he dealt with any issue that was not contemplated by or falling within the terms of the Reference; or even that the Arbitrator granted a relief that was not envisaged by the Agreement and therefore not specifically pleaded before him.

Whether the Award is in conflict with public policy of Kenya:

[45] It has often been said that public policy is an indeterminate and fluid principle which fluctuates with time and circumstances. Nevertheless**,** there is a beaten path in terms of precedents which show the key factors to take into consideration in determining whether or not an award is in conflict with public policy. In **Christ for all Nations Vs Apollo Insurance Co. Ltd. (2002) EA 366,** for instance, **Ringera, J**, (as he then was) had occasion to consider the concept of public policy from the prism of **Section 35 (2)(b)(ii)** and had the following to say:

> **"An award could be set aside under page 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.**

[46] Thus, it was the submission of the Applicant that the Award is inconsistent with **Article 50(1)** of the Constitution in so far as it dealt with matters in respect of which the Applicant was not afforded a hearing. In this regard, the case **The Hon. The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua [2010] eKLR** (among others) was cited by Counsel for the Applicant in support of this posturing. It was further the submission of the Applicant that the Arbitrator ought to have ensured fidelity and strict adherence to the law in line with the national values and principles enshrined in **Article 10** of the Constitution; and that, once there was a finding that the process leading to the signing of the subject agreement was illegal, the Arbitrator ought to have downed his tools. Counsel for the Applicant relied on various authorities, including **Total Kenya Limited vs. Kenya Pipeline Company Ltd** and **Christ for all Nations vs. Apollo Insurance Co. Ltd [2002] 2 366** in support of this argument.

[47] Needless to say that it is a constitutional precept and a requirement of natural justice that no

one should be condemned unheard. This was well articulated in Grace Keung & Another vs. NSSF HCCC No. 703 of 2010 thus:

> **"The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with the opportunity to make submissions to the case." (See also Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Ole Keiwua [2010] eKLR)**

[48] A consideration of the proceedings before the Arbitral Tribunal as well as the Award does show that, indeed, the Application was given notice of the claim, was provided with particulars as well as an opportunity to present its evidence and make submissions before the Tribunal. Its only complaint was however that in its Award, the Tribunal made orders in connection with unjust enrichment and restitution, which, according to the Applicant had not been pleaded. The Applicant also challenged award sum contending that it was hinged on unverified Bill of Quantities. However, having considered the proceedings and Award of the Tribunal, it cannot be said that the finding by the Arbitrator with regard to unjust enrichment and restitution amount to a derogation of the right to be heard. As shown herein above, the conclusions made by the Arbitrator were reached as a consequence of his finding that the underlying contract, about which the Applicant had much to say, was an illegal contract. The findings were based on veritable legal principles and an analysis thereof by the Arbitrator vis-a-vis the evidence and submissions made by the parties. In its Amended Defence and Counterclaim as well as the Amended Witness Statement and written submissions, the Applicant canvassed the issue of unjust enrichment and restitution in connection with its claim for Kshs. 10,000,000/= that was paid pursuant to the subject contract.

[49] In his Award, the Arbitrator provided reasons as to why he came to the conclusion he reached, not only in connection with the orders for restitution, but also the Award Sum. Any challenge thereto, under Section 35 of the Arbitration Act, would therefore be untenable, granted that the Arbitrator is undoubtedly the master of the facts. To my mind therefore, the impugned findings are neither an affront to the Constitution or the laws of Kenya, nor are they inimical to justice and morality. To the contrary, what would be contra-public policy would be to allow a party who admittedly did not comply with the procurement law in entering into a contract, to be allowed to retain the benefits thereof without counter-performance. The Arbitrator noted that the Applicant had conceded that the works were done at its premises; and that this was not in issue. Thus, the Arbitrator was perfectly in order to consider and make a determination that would serve the ends of justice in the matter.

[50] As was aptly observed by **Kuloba J. (as he then was) in** the case of **Equip Agencies Ltd vs the Attorney General Nairobi HCCC No. 1459 of 1999**:

> **"The Government [including state corporations] acts through its human agents. The human agents are its tool. The scope of the authority and powers of the Government servant and agent is set by the Government...An outside person is not party to the setting down of any of these things. He may not even know of them, unless aspects of them are incorporated in terms of agreements or contracts between him and Government. They cannot just be assumed to be known by the whole world and by everyone who does business with Government. Compliance with them when dealing with persons outside Government depends on Government servants. But if these internal policies and procedures are flouted by officials of Government who are supposed to protect Government and to act at all times in the interest of the Government and as a result commit the Government to contracts with other persons and those contracts turn out to be to the detriment of Government, then surely it is those officers to answer for any resultant loss to Government. In the meantime the Government must honour those contractual obligations into which its bad officers plunged it. A person dealing with the bad officers in a Ministry can only be denied any contractual benefits if it is shown that he was an accomplice to the breach of the internal Government regulatory procedures by the officers of the Government, or if it is shown that he had exercised undue influence or played fraud or tricks in the matter."**

[51] Indeed, the Tribunal was satisfied that the Respondent was not complicit in connection with the procurement breaches. Hence, it cannot be said that the Award was contrary to public policy of Kenya. Besides, it was acknowledged by none other than the Applicant that public policy can be an "unruly horse," such that the words of **Ringera, J**. in the **Christ for All Nations Case** (supra) would be most apposite herein. He expressed the view that:

> "**Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust…in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal 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 arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."**

[52] In the result, it is my finding that the Applicant has failed to satisfy the Court that there are justifiable grounds for setting aside the Final Award made by **Mr. Geoffrey Imende**, Arbitrator, dated **17 March 2017.** Accordingly, I would dismiss the Notice of Motion dated **14 June 2017** with costs to the Respondent.

It is o ordered.

The Respondent's Chamber Summons application dated 14 July 2017 (the Second Application)

[53] The Second Application is the Respondent's Chamber Application dated **14 July 2017**. It was filed herein on even date pursuant to **Sections 36 and 37(2)** of the **Arbitration Act, 1995**, as amended by **Arbitration (Amendment) Act, No. 11 of 2009**, and **Rules 6 and 9** of the **Arbitration Rules, 1997** for Orders that:

> **[a]** The Respondent herein be granted leave to enforce the Final Award made on **17 March 2017** by **Mr. Geoffrey Imende**, as a Decree of this Court;
>
> **[b]** Pending the hearing and determination of the application as well as the Applicant's Notice of Motion dated **14 June 2017** and on due information that the Respondent was at risk of loss of property charged to Equity Bank Limited in respect of the subject contract, the Court be pleased to direct the Applicant to deposit the entire Award sum of **Kshs. 47,419,029.86** plus interest accrued to date in an interest earning account in the joint names of the parties or their Advocates at Equity Bank Ltd, Fourways Corporate Branch, Nairobi. (Spent).
>
> **[c]** The Costs of the application be paid by the Applicant.

[54] The grounds raised in support of the application are that a Final Award dated **17 March 2017** by the Sole Arbitrator, **Mr. Geoffrey Imende,** had been made against the Respondent and that to date, no order has been made staying the enforcement of that Award. It was further the contention of the Respondent that the Award is yet to be settled; and that it would therefore be in the interest of justice and expediency for the Second Application to be allowed. The application was also premised on the Supporting Affidavit sworn by **Mr. John Ibae** on **14 July 2017** to which the Respondent annexed certified true copies of the Final Award and the Arbitral Agreement. It was therefore the submission of the Respondent that it had complied with the conditions precedent to the grant of the orders sought under **Section 36(3)** of the Arbitration Act. It was further the submission of the Respondent that the Applicant has not only failed to establish any of the grounds for setting aside the Award under **Section 35,** but was also time-barred and precluded from making the application, having failed to file the same within the nine-days time limit prescribed by law.

[55] The Applicant reiterated its submissions that the Award seeks to sanitize the illegalities manifest in the impugned contract, and that if the Award is allowed to stand, then it would set a bad precedent as it would be the easiest thing to fraudulently circumvent the law and thereafter rely on the doctrine of restitution as a remedy. Counsel for the Applicant accordingly urged the Court to dismiss the Second Application contending that no man should be allowed to take advantage of his wrong in line with the maxim *"Nullus commodum capere potest de sua iniuria propria."* However, having ruled on the twin grounds that were raised by the Applicant in support of its application to set aside the Award, and dismissed the First Application, it would follow that the Final Award stands and ought to be accordingly enforced as sought by the Respondent. Accordingly, I would allow the Second Application and grant orders pursuant thereto as follows:

> **[a]** The Final Award made on **17 March 2017** by **Mr. Geoffrey Imende,** Arbitrator, is hereby recognized as binding, and leave is hereby granted as prayed for its enforcement as a Decree of this Court;
>
> **[b]** The Costs of the Second Application be borne by the Applicant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2018

OLGA SEWE

JUDGE