REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC CASE NO. 279 OF 2016

COMFORT HOMES INTERNATIONAL LIMITED.....APPLICANT

- VERSUS -

JOSEPH GEORGE MBUGUA T/AGEM CONSTRUCTION COMPANY.....RESPONDENT

JUDGMENT

1. Comfort Homes International, herein after referred to as **Comfort Homes**, entered into a contract for building works with ***Gem Construction Company***, herein after referred to as **Gem**. The contract involved Gem constructing a residential development on property **Nairobi Block/97/78 Tassia**. That property belongs to Comfort Homes. The contract reflected that the cost of construction would be **ksh 27,806,010.** Clause 45 in that contract provided that when a dispute would arise the parties would refer the matter to an arbitrator.

2. The parties to the contract had a dispute which was referred to a sole arbitrator, **John Okerosi**, who gave his final award dated **7th March 2016**. By that award, the arbitrator found Comfort Homes liable to pay Gem **Ksh 3,547,811.70.**

3. Comfort Homes has filed a chamber summons dated **27th May 2016** seeking to set aside and to vary the award given by the arbitrator.

4. Once the parties have entered into a contract, bearing an arbitration clause, the court is required to be cautious and to act only in accordance to the Arbitration Act Cap 49. This is well set out in Sections 10 and 32 A of Cap 49. Section 10 provides:

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

Section 32A provides:

> **"except as otherwise agreed by the parties, an arbitration award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this act."**

5. In this case, the parties re-emphasized that statutory provision in paragraph 45.10 of their contract whereby they provided:

> **"the award of such arbitrtor shall be final and binding on the parties."**

6. Comfort Homes has moved under **Sections 35 (2) (a)(iv), section 35 (2)(b)(ii), 39(1)(b),39(2)(a)(b),and 39(3)(b) of Cap 49**. It is pertinent to note that under **section 39 of Cap 49**, there is a requirement that before the provisions of that section are invoked, that parties be in agreement or consent for it to be invoked. Comfort Homes did not show to this court such an agreement and accordingly that section will not be considered by me any further in this judgment.

7. Section 35(2)(a)(iv) provides that an arbitral award may be set aside by the High Court if there is proof that:

> **"the arbitration award deal 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 decision on matters referred to arbitration can be separated from those not referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside."**

8. Further **Section 35(2)(b)(ii)** which was cited by Comfort Homes provides that arbitral award may be set aside by the High Court if that court finds:

"the award is in conflict with public policy of kenya".

9. Before embarking on the issues raised by Comfort Homes, it is important for this court to remind itself the limits within which it should consider those issues as stated in the **Court of Appeal Case Kenya Oil Company Limited & another Vs Kenya Pipeline Company [2014]eKLR** where it stated thus:

> "The court in that case was dealing with an appeal under section 1 of the English Arbitration Act, 1979. It is necessary to quote at length the words of Lord Justice Steyn, who, while addressing the limits of the jurisdiction of the court hearing an appeal under that Act, had this to say:
>
> **"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.....***Lord Justice Steyn went on to emphasize the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrator's finding of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged."*

10. Comfort Homes by its written submissions, submitted that the arbitrator by his award went beyond the scope of the terms of reference by introducing his own issues which had not been raised by the parties and in particular the question of ***'time'*.**

11. Not only is that issue raised by Comfort Homes an issue of fact but further, I find it has no basis for when one looks at the award, one finds that the arbitrator in considering that issue, obtained it from the submissions of the parties. The arbitrator, made specific and clear reference to the submission of Comfort Homes and Gem when he referred to the issue of time. It follows that the arbitrator did not refer to an issue not raised by the parties before him.

12. Comfort Homes also sought to set aside the award on the basis that the arbitrator failed to consider whether there was breach of agreement between the parties and that also failed to consider whether there was delay on the part of Gem.

13. The arbitrator in his award considered both those issues and in so doing first referred to the parties evidence and submissions before him then proceeded to make a determination.

14. In my view, the issues raised by Comfort Homes are issues of fact to which this court is forbidden to tred since the arbitrator is the master of facts. It is irrelevant to consider facts as stated by **Steyn LJ** in the case of **Georgas S. A. Vs. Trammo gas Limited 1993/Lyoyd Law Report 227**. It is clear that Comfort Homes seeks to set aside the award on matters other than those contemplated in Cap 49. See the case of **Century Oil Trading Co. Ltd Vs Kenya Shell Ltd Misc. Civil Application No. 1561 of 2007**, where it was held:

> **"...this court takes cognizance of the fact that, in determining this application, it is not sitting on appeal against the decision of the arbitrator. This is in view of the fact that the parties herein agreed by consent that the decision of the arbitrator would be final. In the present application, it is evident that the applicant seeks to set aside the arbitrator's award pursuant to the provisions of section 35(2)(a)(iv) and 35(2)(b)(ii) of the Arbitration Act. The Arbitration Act prohibits this court from entertaining any matter arising out arbitration proceedings other than in the manner contemplated by Section 35(2) of the Arbitration Act."**

15. I do find the allegations by Comfort Homes that the award was against public policy to be spurious. It was argued that the arbitrator sought to re-write the contract between the parties. Comfort Homes however, failed to elaborate how the arbitrator did so in his award.

16. It is also not correct to say that the arbitrator ignored express and unambigous admissions nor are there errors apparent in the award. It is wrong on the part of Comfort Homes to submit that the arbitrator ignored provisions of the contract or that there was evidence that the arbitrator was partial.

17. The apt response to the issues raised by Comfort Homes were well captured in the decision of **Ringera J**, (as he then was), in the case ***Christ for all Nations Vs Apollo Insurance company Ltd [2002]2EA 366*** as follows:

> "**.....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...."**

18. It is this court's finding that there is no basis laid by Comfort Homes why the arbitral award should be set aside. Accordingly, the Chamber Summons dated ***27th May, 2016*** is **dismissed with no orders as to cost** because Gem Construction did not file any documents in opposition.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **24th** day of **May** 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

…….....…….……for the Applicant

……....……for the Respondent