REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. 472 OF 2012

IN THE MATTER OF THE ARBITRATION ACT 1995,

THE ARBITRATION (AMENDMENT) ACT 2000

AND THE ARBITRATION RULES 1997

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

N.K. BROTHERS LTD ..... CLAIMANT/APPLICANT

VERSUS

THE MINISTRY OF REGIONAL DEVELOPMENT

AUTHORITY (THROUGH THE OFFICE OF

THE ATTORNEY-GENERAL) ..... RESPONDENT

RULING

1. This Ruling relates to a Chamber Summons Application dated 1st August, 2012, brought under the provisions of Sections 17, 19, 29 (3), (4), (5), 35 (1), (2) (a) (iv) and (vi), 35 (2) (b) (ii), 35 (3) , 37 (1) (a) (iv), (vi), (vii), 37 (1) (b) (ii), 39 (1) (b), 39 (2) (a) and (b), 39 (3) (b) of the Arbitration Act, No. 4 of 1995, Rules 1, 4(1) (2), 7 and 11 of the Arbitration Rules 1997, Section 3 of the Judicature Act (Cap. 8), of the Laws of Kenya and Sections 1A, 1B, 3A of the Civil Procedure Act (Cap 21), and the Constitution of Kenya, 2010.

2. The Applicant is seeking for orders that:

a) *the Arbitral Award dated 22nd November 2011, of Mr. Steven Gatembu Kairu, FCI Arb, Sole Arbitrator delivered on the 4th day of May 2012, be set aside;*

b) *The Honourable Court be pleased to give appropriate directions/orders and/or the said Award herein be reviewed and be decided by the Honourable Court.*

c) *Further and in the alternative, and in the interim, part of the Arbitral Award in particular the findings at Paragraphs A, B, C, and D at Page 67 of the Final Award be enforced to minimize the continuing loss and damages that the Claimant is enduring pending the hearing and determination of the Application herein; and*

d) *The costs of this Application be paid to the Claimant.*

3. The background facts of the matter are that, the Applicant, entered into a Building Contract (herein “the Contract”), with the Respondent

for the erection and completion of Lake Basin Development Authority Headquarters and staff houses at Kisumu. The contract was for a sum; of Kenya Shillings, Three Hundred Ninety Six Million, Six Hundred and Fifty Thousand, Two Hundred Eighty Three Only (Kshs. 396,650,283) or such other sum as became payable in accordance with the conditions between the parties. The Contract was reduced into writing, vide the Standard Form, published by; the *Standard Republic of Kenya, Contract Agreement (1970 Edition) with Quantities, (being "The Contract Agreement Q. D46/LBD").*

4. The Applicant avers that, the Project works stalled in the year 1992, due to lack of funds and although, the Applicant remained on site presumably that funds would be available, that did not happen and eventually, the Project reverted back to the Ministry (herein " the Respondent") following a mutual winding up conducted in the year 1999.

5. It is averred that by the time the Project stalled, Interim Payment Certificates, numbers (1) to (8) had been issued for payment and partly honoured. However, a demand for the balance was not honoured thus provoking a dispute. As a result whereof, the Chairman of the Architectural Association of Kenya, on 24th August 2010, appointed Mr. Steven Gatembu Kairu, as a Sole Arbitrator to determine the same.

6. The Applicant's claim before the Arbitral Tribunal was for the alleged outstanding and undisputed amounts as here below stated:-

a) certified sum of Kshs. 74,408,067.80;

b) agreed final account sum of Kshs. 199,362,445.10, and signed on or about early November 1999;

c) interest as agreed and/or at common law, in the aggregate of the sum of 476,494,164.85, as claimed under paragraphs 22 and 23 of the Amended Statement of Claim dated 15th March 2011,

d) further, and in the alternative, award for special damages, in the sum of Kshs. 152,246,705.83, as claimed under Paragraph 24 of the Statement of Claim, and

e) further, and in the alternative, award in the sum of Kshs. 902,511,383.58 , under Paragraph 29 of the of Claim .

7. Subsequently the dispute was heard and culminated in the Arbitrator's final Award, dated 22nd November 2011, delivered on the 4th day of May, 2012 and filed in Court on 31st July 2012.

8. However, the Applicant is dissatisfied with the decision rendered allegedly on the grounds inter alia that;

i) the Arbitral award dealt 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;

ii) the Arbitrator misapprehended both the contractual documents and the applicable contract law and failed to appreciate that the parties were bound by their contractual terms, and/or to the terms and conditions as mutually agreed between them;

iii) the Arbitrator went on a frolic of his own beyond the boundaries of the contract between the parties, trade or usages applicable and he made a finding contrary to the evidence adduced; and therefore exceeded his jurisdiction;

iv) the Arbitrator failed to decide the matter in terms of the contract between the parties and against the clear provision of Section 29 of the Arbitration Act and displayed clear bias in treating parties equally contrary to Section 19 of the Arbitration Act;

v) the computation of the Award was erroneous; and contain on face of it inconsistencies, contradictions and errors of fact and law and material issues;

vi) the Arbitrator erred when he made an award of simple interest at 12% instead of compound interest from the respective date of default to the date of payment;

vii) the Arbitrator unfairly denied the Applicant costs in view of the specific findings when he made an order that the fees and expenses of the Arbitral Tribunal shall be borne by parties in equal shares;

viii) the Award is clearly and plainly in conflict with public policy of Kenya;

9. The Applicant argues that as a result of the aforesaid, the final Award is laden with legal and factual misapprehensions and the Applicant stands to suffer irreparable prejudice and hardship, if the Award is not set aside. It is therefore, in the interest of justice that, the Honourable Court gives effect to the parties' intentions by deciding the matter in accordance with the Contract between the parties and notions of natural justice.

10. However, the Application was opposed by the Respondent vide a Replying Affidavit dated 16th November 2012, sworn by Moses Kipkemoi Kipkosgei, the State Counsel who has conduct of the matter on behalf of the Office of the Attorney General and the instructing client the Ministry of Regional Development. He deposed that indeed a dispute arose between the parties and was referred to Arbitration, heard by the Arbitrator, Mr. Steven Gatembu Kairu, and the final award rendered on 4th May 2012. That the Applicant was awarded approximately Kenya shillings Thirty three Million (Kshs. 33,000,000.00) consisting of certified amounts, refund of retention sums and interest thereon, however a huge portion of the claim was rejected by the Tribunal, on the basis of the submissions, the evidence and the

pleadings filed by the parties.

11. The Respondent further argues that, the prayers in the Application seeking to set aside the Award or in the alternative, the Court review the same and further in the alternative, a portion of the award be enforced, are diametrically opposed and therefore the Court cannot grant them. The Applicant will need to make a choice to enable the Respondent effectively respond. Further in any event, the orders sought cannot be granted in that, they do not meet the test of the law, and the Court is not seized of sufficient powers to review an Award issued in Arbitral proceedings. The Applicant has not satisfied the conditions and procedure and grounds for setting aside an award and the entire Application is premised on a wrong interpretation of the mandate of the Arbitrator under the contract.

12. It is also argued that the Applicant has failed to appreciate the role of the office of the Arbitrator under the contract and the grounds upon which the Application is premised is an unfortunate attempt at casting doubts as to the nature and effect of the evidence presented by the parties as well as the submissions filed. Finally, the Respondent argued that the office of the Attorney General and its instructing client, the Ministry of Regional Development has considered the Arbitral award and are in the process of satisfying it and the Applicant notified of the same. Therefore the alternative prayer is thus without basis and ought to be rejected.

13. The parties agreed to dispose of the Application by filing written submissions. The Applicant submitted that, the Respondent's witness Mr. Alfonse Okweto Nyagilo conceded during cross examination that the contract entered into by the parties was "binding" and the applicable conditions outlined therein were observed. That The Applicant claims were discussed and agreed on by the Contractor, the Consultants and Representatives of the Respondent. Further, all the interim certificates as raised by the Respondent's Consultants were properly computed, and followed the Government procedure to the letter in raising them. Consequently, the Applicant prepared the final accounts, on the basis of "as is" which included, claims for extended preliminaries and standing time of equipment and labour as well as interest.

14. The final accounts were discussed and certified by the technical officers at Kenya shillings One hundred and Ninety nine Million (Kshs.199,000,000.00) and further by Ministry of Works, which reduced the figure from, Kshs. 199 million to Kshs. 67 million and recommended that amount for payment. Therefore, with due respect, since that amounts to at least Kshs. 67 million that had been certified by all concerned, and supported by the evidence of Mr. Nyagilo for the Respondent, save for his refusal to sign the accounts, should have been awarded as there was no need to "reprove" items already passed, unless the Arbitrator requested for the same and was not supplied with the evidence.

15. The Applicant submitted that, despite the overwhelming oral and documentary evidence adduced by the Applicant, the reason the Arbitrator gives for rejecting Certificates 9 to 11 is that, the calculations and back-ups for the claims were not put in evidence. Similarly the amounts Kshs. 74,408,067, for the outstanding certificates was not objected to by anyone at the time, the only objection raised by the Respondent during the course of the Arbitral proceedings was that, the figure included interest. Even then, the issue of interest was discussed and agreed on by the Applicant, the Consultants and Representatives of the Respondent, and so the said amount was also payable to the Applicant.

16. It was thus submitted that the Arbitrator ignored probative evidence, went on a frolic of his own, outside the contemplated dispute and the terms of reference and made a finding contrary to the evidence adduced, thus creating a dispute where none existed. The Applicant further submitted that under the Contract, the Ministry of Works required certification to be initiated by the Project Quantity Surveyor and confirmed by the Project Architect who was also appointed DR. The Respondent's role was only to pay after due Certification. The Respondent was not required to *"ratify", "approve"* or *"endorse"* the Certification. However, the Arbitrator appears to have fallen into the error of thinking that, the Respondent had a role in the certification process beyond making the payment. Therefore, on this score alone, the Arbitrator did not decide the dispute, in accordance with the terms of the Contract and the evidence presented, as required by S. 29(5) of the Arbitration Act.

17. The Applicant argued that the Arbitrator having found that, the Certificates withheld were correctly due for payment and further that the Respondent was in breach of the Contract, the Award of simple interest at 12%, is without doubt manifestly contrary to the law and the public policy of Kenya and an affront to the particular facts of the case. It was further submitted that the Applicant is entitled to an award of compound interest, from the respective dates of default to date of payment for the reasons that:

> *i) the existing case law which was overlooked by the Arbitrator stipulates that the award of interest in commercial cases should be at commercial rates, the measure being the rates applicable to the Claimant's Bank.*
>
> *ii) the Chartered Institute of Arbitrators Arbitration Rules, in particular at rule 16 C 11, empowers the Arbitral Tribunal, to exercise its discretionary power to award compound interest in appropriate cases.*

18. The Applicant submitted that similarly, that the Arbitrator disallowed the substantial claims for interest as agreed and/or at common law, in the sum of Kshs. 474,494,164.85, and special damages in the sum of Kshs.152, 246,705.83, despite the clear and unequivocal admission by the Respondent of payment during the hearing of the Arbitral proceedings, when the Respondent abandoned payment of Kshs. 7,521,397.00 and instead admitted as owing to the Claimant the sum of Kshs. 67,274,524.00. By the Arbitrator making a finding that the fees and expenses of the Arbitral Tribunal shall be borne by the Parties in equal shares, unfairly denied the Applicant costs of the Award in view of the specific findings, thereby occasioning it substantial injustice.

19. It was also submitted that the Arbitrator failed to treat the parties equally contrary to Section 19 of the Arbitration Act. That the clear bias is demonstrated by the total ignorance of the overwhelming oral and written evidence adduced by the Claimant. In the premises, the failure by the Arbitrator to consider all the pleadings is a fundamental and substantial error of law, for which this Honourable Court should now intervene and set aside the Arbitral Award. That a Court of law should not allow enforcement of an Award that is inimical to basic ends of justice as "An Arbitration award is a determination on the merits by an Arbitration Tribunal in Arbitration and is analogous to a judgment in a Court of law." And that in the instant matter, the Arbitrator decided matters strikingly outside his jurisdiction.

20. That the Arbitrator went outside the confines of the Contract, wandered far away from the allotted task and an error arose going to the root of his jurisdiction, as he asked himself the wrong question, disregarded the Contract not by misreading or misconstruing or misunderstanding it, but by acting in excess of his authority and awarding in excess of what was agreed. The Applicant further contends that the Arbitrator drew inferences from other facts that are incapable of being themselves findings of fact and made determination thereon, and in the above circumstances, the Court has no option but to assume that there has been some misconception of the law responsible for the determination and intervene to uphold the basic minimum principles of Arbitration Practice and Procedure. That, parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal is minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point.

21. Further, 'if the Arbitrator decides the case on a point he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer." The Applicant reiterated that the Arbitral Award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decision on matters beyond the scope of the reference to arbitration in that, the Arbitrator made a finding that, the works were handed over to the Respondent "subject to conditions overleaf", however those conditions were not made available to the tribunal. That at no time did the Arbitrator request for these conditions from any party, but more importantly, the Tribunal did not put forward this issue to the parties to address it on the same. The Arbitrator seems to have fallen into grave error by failing to consider the purport of Page 1052 and 1053 of the Respondent's documents compromising the said conditions, thus the Tribunal decided the issue unilaterally and deprived the Applicant of an opportunity of fairly presenting their case.

22. It was argued that the Honourable Arbitrator erred both in fact and law having failed to consider the substance of the dispute in accordance with to the principles of justice and fairness. Ultimately, the above analysis leaves little doubt that the Final Award is laden with legal and factual misapprehensions, that go into the core of the ingredients of public policy, both international and Kenyan and which results in the Arbitral Award being clearly and plainly in conflict with the public policy of Kenya. The Court should in considering issues concerning public policy of Kenya examine the Award even at the stage of enforcement to determine whether or not the Arbitral Tribunal had jurisdiction in respect of the disputes relating to the underlying Contract.

23. It was further submitted that, the Court cannot just recognize an Award merely at face value or merely rubberstamp its affirmation. It has a constitutional duty to expend substantive justice under Article 159(2) of the Constitution of Kenya, 2010. That the Court's jurisdiction in this regard, in any event, is well anchored within Section 35, 36 and 37 of the Arbitration Act, 1995 and therefore the Court can review the matter in dispute even when the parties have agreed to Arbitration. The Applicant submitted it stands to suffer irreparable prejudice and hardship and it is in the interest of justice that the Honourable Court gives effect to the intention of the parties by deciding the matter in accordance with the agreement between them and notions of natural justice.

24. However, the Respondent filed response submissions and argued that

although the Applicant seeks that, the Replying Affidavit should be struck out for having been sworn by an Advocate, it is conceded that, the only limitation barring Advocates from swearing an Affidavit is that they should not depose to matters which are in dispute in the suit. But the subject Affidavit raises issues of facts and law within the knowledge of the deponent and that there is no provision in the Civil Procedure Rules or in any authorities cited where Advocates for parties are barred from swearing Affidavits.

25. The Respondent faulted the Application terming it as incompetent and submitted that although the Application is said to be supported by the Affidavit made and sworn by Pravin M. Khoda, the Finance Director of Applicant, the Respondent has never been served with the same. Failure to serve the Supporting Affidavit means the Applicant has not complied with Rule 7 of the Arbitration Rules 1997, hence the Application is defective and should be struck out. That provisions of; Rule 7 of the Arbitration Rules 1997, provides that:

> "*An Application under section 35 of the Act shall be supported by an Affidavit specifying the grounds on which the party seeking to set aside the Arbitral Award and both the Application and Affidavit shall be served on the other party and the Arbitrator."*

26. The Respondent also relied on the words of Sir Udo Udoma CJ, (as he then was), in the case of; *Salume Namukasa vs Yozef Bukya (1966) EA 433* where he observed that:

> "*counsel must understand that the Rules of this Court were not made in vain. They are intended to regulate the practice of the Court. Of late, the practice seems to have developed of Counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the need of justice not be better served by this defective, disorderly and incompetent application being struck out?"*

27. The Respondents further submitted that the ends of justice are better served by striking out the Application, because the Applicant's omission to serve an Affidavit in support of its Application is not a technicality which can be saved by the provisions of Article 159(1) (d) of the Constitution. That the required justice be administered without undue regard to procedural technicalities but rather a failure to comply with a rule of substantive procedure which should not and cannot be ignored.

28. It was reiterated that the Applicant's prayer number (iii), is not opposed and the Office of the Attorney General is currently processing payment in settlement of the Final Award, in terms of the findings of paragraph A, B, C, and D.

29. The Respondent however submitted on a without prejudice to the above that the Applicant is seeking to enforce part of the Award that is favourable to it, and therefore it is not open to it to challenge the entire Arbitral Award, as the Application to set aside an Application and enforce an Arbitral Award cannot run parallel to each other as they are mutually exclusive, and one is the mirror image of the other, they do not have a point of convergence.

30. That the Arbitration Act provides very specific and exhaustive grounds upon which an Arbitral Award can be set aside. These grounds are catalogued under Section 35 of the Arbitration Act which reads 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 compositions 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 the 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 laws or Kenya; or*
>
> *ii. the award is in conflict with the public policy of Kenya*

31. The Respondent reiterated that for the reason aforestated, the Application is clearly defective and oppressive, as it does not meet the test of law as envisaged by the provisions of the Arbitration Act. The law does not permit a party to approbate and reprobate, and the Applicant cannot therefore "have its cake and eat it too". The net effect of those elections disentitles the Applicant to the prayers sought in the Application.

32. However in Reply submissions, the Applicant stated that the Respondent was served with the Supporting Affidavit of Pravin M. Khoda on 13th August 2012, as evidenced by their Rubber Stamp on the Supporting Affidavit and in relation to the payment being processed, it was submitted that the Respondent vide its letter dated 14th May 2013, from the Ministry of Regional Development Authorities, confirmed payment in the sum of Kshs. 33,671,539.50 as having been sent by Electronic Funds Transfer (EFT) to the Honourable Attorney-General's Chambers, and the same was duly acknowledged as received by the Applicant's Advocates vide a letter dated 14th November 2013. However, to-date, the Respondent has not paid the balance of Kshs. 3,068,088.14, which the Respondent promised would be paid in the Financial Year 2014, due to Budgetary Provision as stated in the said letter. The Respondent has also defaulted in settling the payment on the interest due and payable on the unpaid principal sum and interest accrued thereon from 2nd July 2012 till 31st October 2013, Kshs. 4,146,342.10 and Kshs. 1,457,202.00 respectively, giving aggregate sum of Kshs. 5,603,544.00. No payment has been made despite the very many reminders written.

33. In reply to the submissions on the Orders sought in the Application, the Applicant submitted that Prayer 3 is sought as; "further and in the alternative", and in the interim, that part of the Arbitral Award in particular the findings at Paragraphs A, B, C, and D be enforced to minimize the continuing loss and damages that the Applicant is enduring pending the hearing and determination of the Application. The Applicant reiterated that the Award on the specific findings including the dismissal of the substantial claim in the sum of Kshs. 902,511,383.58 and also on the issue of interest and costs contains on its face inconsistencies, contradictions and errors of fact on material issues and serious misinterpretations of the Contract conditions. It offends the notions of justice in the construction industry, is contrary to public policy and has occasioned a substantial miscarriage of justice.

34. Further that the Arbitrator liberally granted the figure of Kshs. 6,386,887.20 and release of retention in the sum of Kshs. 3,702,936.80 for payment of certified sums, when no evidence was produced by either party of this abstract figure based purely on assumptions and contrary to the contract conditions between the parties; thereby shaking the foundation of the initial Award, yet there is no clear legal basis for the discounts on damages. Finally the Applicant prayed that the Honourable Court do enter an award on the whole claim as prayed in total sum of Kshs. 902,511,383.58, or such other sum as becomes payable in accordance with the Conditions, and/or to Award such other sum as becomes payable as mutually agreed between the parties of total sum of Kshs. 902,511,383.58, and/or the Honourable Court be pleased to give appropriate directions/orders and/or the said Award herein be reviewed and be decided by this Honourable Court.

35. The Applicant cited several authorities including but not limited to the cases of;

a) *Tanzania National Roads Agency V Kundan Singh Construction Limited & Kenya Commercial Bank Limited [2004] eKLR*

b) *Christ for all Nations Vs Apolio Insurance Co. Ltd. [2002]EA 366*

36. At the conclusion of the arguments and submissions by the Parties, I have considered the Application, Affidavit in support and the Affidavit in opposition thereto and I find that several issues have arisen for determination namely whether:

a) there is an Affidavit in support of the Application and if so whether it was served on the Respondent;

b) the Affidavit sworn by the Respondent's counsel should be struck out of the record;

c) the Applicant has met the requirements of setting aside an Arbitral Award;

d) the prayers sought are capable of being granted as prayed; and /or

e) the Application should be allowed as prayed.

37. In relation to the first issue, I find that although the Respondent alleged that it had not been served with the supporting affidavit sworn by Pravin M. Khoda on 13th August 2012, the Applicant rebutted the same by producing evidence that the Respondent was served and acknowledged service, as evidenced by its Rubber Stamp on the same. The Respondent did not refute the stamp, therefore any arguments that the Application is incompetent for want of the Supporting affidavit fall by the way and the issue rests at that.

38. The second issue concerns an Affidavit sworn by an Advocate representing the Respondent. I have already analyzed the averments therein and the submissions of the parties on the same. The law is settled that, an Affidavit can only be properly accepted as evidence where the Court is satisfied that the person swearing it has "means of knowledge" of the facts set out in the Affidavit. Thus the deponent should be the person who best and most directly knows of the matters dealt with in the particular affidavit.

39. The Procedural provisions of Order 19 Rule 3 of the Civil Procedure Rules stipulates that:

3(1) "affidavits shall be confirmed to such facts as the deponent is able of his own *knowledge* ***to prove."***

40. Similarly, Rule 9 of the Advocates Practice Rules prohibit an Advocates from appearing as such in a case wherein he might be required to give evidence either by an Affidavit or even orally. By swearing an Affidavit on behalf of his client where issues are contentious, an Advocate's affidavit creates a legal muddle with untold consequences (see ***Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR).***

41. However in the case of; ***Kamlesh M.A. Pattni Vs Nasir Ibrahim Ali & 2 Others CA 354/2004***, the Court had this to say on the admissibility of an Affidavit sworn by Senior Counsel Paul Muite that:

"... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information..."

42. Therefore where an Advocate has direct personal knowledge of all of the facts set out, he or she can safely swear an affidavit on a client's behalf. I have considered the averments in the Affidavit sworn by the learned State Counsel Moses Kipkemoi Kipkosgei, and I find that he deposes on matters of facts and law. The factual issues relates to the chronology of events relating to the nature of the contractual relationship between the parties, and the circumstances under which the dispute arose. He then deposes on the issues relating to the subsequent Arbitral proceedings. In my considered opinion these are not matters in dispute and are indeed supported by the record.

43. However as aforesaid it is not professionally right for an Advocate to elect at the first instance without an explanation to depose on matters that are well within the knowledge by his client without a reasonable explanation. Whatever the case may be, it is a practice to be discouraged. Be that as it were, I find that the Affidavit does not prejudice the Applicant's case and I shall not strike it out or disregard it.

44. The third issue concerns the merits of the Application. The case basically seeks that the Arbitral Award herein be set aside. In the case of; ***Nyutu Agrovet Limited v Airtel Networks Limited, Civil Appeal (Application) No. Nai 61 of 2012,*** **the Court held inter alia that; a**n Arbitral Award is final and binding on the parties and the intervention of the Court in such an Award is limited strictly to the grounds set out in Section 35 of the Arbitration Act. It is noteworthy that Section 35 does not confer on the Court dealing with an application under the section Appellate jurisdiction. The Court is not entitled to review the decision of the Arbitrators for the purposes of substituting its own view or conclusions with that of the Arbitral Tribunal even if the Court itself, on the facts as proven, might have reached a different conclusion. The court should respect the fact that the parties opted to go to an Arbitral Tribunal instead of the Court. This is based on the fact that the Court should recognize the fact that Arbitration Act of Kenya is modeled on the UNCITRAL Model Law and in compliance with its International obligations, it must uphold, respect and enforce the arbitral process and the Court's intervention must further and not hinder the Arbitral process.

45. The provisions of Section 35 of the Arbitration Act which deal with setting aside of an Arbitral Award have already been referred to and reproduced herein. From the facts and grounds stated in support of the Application I find that only two cited grounds herein fall under Section 35 namely;

a) *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; and*

b) the award is in conflict with the public policy of Kenya.

46. To deal with these issues, regard must be held to the proceedings before the Arbitral Tribunal. I note that the proceedings before the Arbitral Tribunal indicate that the Advocates representing the parties framed the issues for determination and submitted a statement of agreed issues dated 24th January, 2011. In total, twenty eight (28) issues were framed and are reproduced under paragraph 13 of the Final Award and are indeed very comprehensive.

47. The question that arises is whether the Arbitrator considered all of these issues. The issues determined are found at paragraph 111 of the Final Award. The 1st and the 2nd issues were considered together and were in relation to the nature of the relationship between the Claimant and the Respondent and/or the contract between the parties and the terms and conditions thereof. The learned Arbitrator made a finding on these issues under paragraph 136 of the Award to the effect that; the relationship is contractual, and is governed by the Contract Agreement (1970 Edition) Terms and Conditions as set by the Parties. This finding is in agreement with the submissions of the Applicant. The third issue was in relation to the sum of the Contract. It is dealt with at paragraph 140 of the Final Award, and the Arbitrator held that, the sum of Kshs 396,650,283.00 was based on the Bill of Quantities. Similarly, this finding is in agreement with the submissions of the parties.

48. The fourth was whether the Contract entered into by the parties contravened the laws governing Government contracts. The finding thereon is at paragraph 147 of the Final Award to the effect that the Contract did not contravene the said laws. The fifth and fourteenth issues were dealt with together and were in relation to whether there were any implied terms in the Contract between the parties and not whether the implied terms were necessary to give effect to the business efficacy to the same or arising by operation of law. The Learned Arbitrator's properly held that a term will be implied in a contract if it is reasonable, equitable and gives business efficacy to the contract. The findings thereon are at paragraphs 153, 154 and 155 of the Final Award. The seventh issue dealt with the reasons under which the contractual works stalled and whether the winding up thereof was on "as- is- basis". The findings are at paragraph 169 and it states that the works stalled due to lack of funds as stated by the Applicant, and were being handed over in the state that they were.

49. The eighth issue concerned whether the claimant caused any delays in the project and if so what were the causes of the delay. The Arbitrator made a finding at paragraph 179 of the Final Award that the claimant did not cause any delay on the project. The ninth issue dealt with whether the claimant carried out the works which were either sub standard, defective and not acceptable. That issue was dealt together with issue No. 22 which concerned the question whether the taking of possession of works by the Respondent amounts to waiver of the claimant's obligation as to the practical conclusion. The findings at paragraph 178 and 179 of the Final award indicate that issue No. 8 was answered in negative and issue No. 22 in the affirmative. Issue No. 10 was considered alongside issue No. 6, 13, 15-21, 24, 25 and 27 together. These issues were merged and consolidated into one issue which is issue No. 27 namely whether the claimant is entitled to the amount sought in the amended statement of claim. After considering the pleadings, the evidence and the submissions by the parties, the Arbitrator analyzed the issue and made his final finding as indicated at paragraph 354 (A-L) of the Final Award which is the subject of this Application.

50. I have considered the final orders issued in the light of the submissions herein. However before I deal with the same, I note that the Respondent has raised several other issues which, I wish to address first. These issues include inter alia; whether the Court can grant the prayers sought as prayed. The Respondent argued that, the Court cannot grant the prayer for setting aside an Arbitral Award and at the same time partly enforce the same as claimed herein. That the Applicant has to make a choice between the two. However, the Application herein seeking for orders that the Arbitration award be set aside but further and in the alternative part of the Arbitral Award in particular the findings in paragraph A, B, C and D be enforced. It is therefore clear, the prayers are sought for in the alternative. If the Court sets aside the entire Award, then the alternative prayers will not be considered. In that regard, the submissions by the Respondent that the prayers are opposed to each other is not well founded.

51. Be that as it were, the main issue herein concerns the amount of money awarded. The Claimant had sought for several amounts in its claim. In this regard, I will first deal with the issue of the alleged and undisputed certified amount of Kshs. 74,408,067.80. The Arbitrator dealt with this issue and made a finding at paragraph 316 to the effect that the Claimant is not entitled to claim from the Respondent damages for the outstanding and undisputed certified sum of Kshs. 74,408,067.80.

52. At paragraphs 242 and 243, the Learned Arbitrator states as follows:-

" 242. I am satisfied that interim Certificate Numbers 1 to 8 inclusive represent the work done and materials on site. they were issued contemporaneously as work was progressing and I accept them as representative of the value of work done. No evidence was presented before the Arbitral Tribunal in support of or with regard to the build up of the contractual claims. I am not satisfied that the Claimant has, on a balance of probabilities established that the sum of Kshs. 74,408,067.80, that is claimed as "outstanding and undisputed certified" is indeed outstanding."

"243. I am however satisfied that the Respondent has not discharged its liability to the Claimant with respect to work done and materials supplied based on interim certificate numbers 1 to 8."

52. The Learned Arbitrator further stated at paragraph 245 as follows:-

"The value of work done as captured in interim certificate No. 8 is Kshs. 34, 030,968.00. The value of the material on site as indicated is Kshs. 2, 998,400.00. The retention is Kshs. 3,702,936.80."

53. The Learned Arbitrator then notes that Certificates Numbers 1, 2 and 3 were paid on the 31st July 1991 in the total sum of Kshs.

25,439,544. That a further payments of Kshs. 1,000,000 was made on 13th January 1994, and Kshs. 500,000 on 2nd November 1994 making a total of Kshs. 26,939,544.00. That the amount payable under Certificate numbers 4, 5, 6, 7 and 8 was not honoured and remains outstanding. Thereafter the Learned Arbitrator held that the sum payable under these certificates is Kshs. 6,386,887.20, being the total sum of Kshs. 33,326,431.20 less the amount paid of Kshs. 26,939,544.00. This sum is then awarded to the Claimant under item (A) at page 67 of the Final award. Apparently from the submissions herein, that amount of money has already been paid. I note that the figure of Kshs. 33,326,431.20 is based on the analysis Numbers 1 to 8 reflected at paragraphs 189 to 216 of the Final Award.

54. From the proceedings before the Tribunal, Mr. Khoda testified under cross examination that in relation to various certificates, amount of Kshs. 74,408,067.80 is the amount outstanding on Certificate numbers 4-12. That Certificate numbers 9, 10 and 11 have components of contractual claims while certificate number 12 is for release of Retention amount. That in relation to the contractual claims, the Quantity Surveyor will usually demand strict proof of the same and the same was supplied by the Claimant. That the relevant exchange in that regard was provided for at pages 987 to 1043 of the Respondent's bundle of documents.

55. In the final analysis, the Arbitrator held that all subsequent interim certificates, that is to say, interim certificate number 9-11 are based on contractual claims as opposed to value of work done or materials on site subsequent to 30th March 1992. That the value of work done, certified as at 30th March 1992 is Kshs. 34, 030,968.00 while the value of the materials on site at Kshs. 2,998,400.00, the additional sum of Kshs. 64,318,270.80 is made up of contractual claims spanning the period 1992 through to 1999. The Learned Arbitrator accepted certificate numbers 1 to 8 inclusive as representative of the work done but held that no evidence was presented before the Arbitral Tribunal in support of or with regard to the build up of the contractual claims, and thus dismissed the claim for Kshs. 74,408,067.80.

55. It is therefore clear that the finding of the Learned Arbitrator on the claim of Kshs. 74,408,067.80 was founded on the analysis of the evidence presented by the parties. If the Court were to hold otherwise, it will amount to either exercising Appellate jurisdiction over the Arbitration proceedings and/or Award or be re-evaluating the evidence as though the Court is exercising original jurisdiction over the dispute between the parties. This position is not tenable in law in view of the fact that section 35 of the Arbitration Act limits intervention of the Courts in Arbitral proceedings on the grounds stipulated therein. I therefore uphold the finding of the Learned Arbitrator on the claims of Kshs. 74,408,067.80.

56. I shall now turn to the claim of the sum of Kshs. 199,363.445.10. This sum was claimed as the sum agreed in final accounts. The claimant's position was that, the same had been agreed early November 1999, but the Respondent denied the claim saying that it was not ratified by the relevant Ministry. However, I note that it appears as though, following subsequent negotiations between the parties, it was agreed that the final account payable was Kshs. 67,274,524.92. It also appears as though, there were further correspondences whereupon the final account of Kshs. 300,710,083.90 was revised by the Ministry of Roads and Public Works to Kshs. 168,622,163.00.

58. At paragraph 260, the Learned Arbitrator states as follows;-

> *"in view of the different figures put forward at different times as the final account, I am not satisfied that there is an agreed final account on the basis of which the Respondent is liable to the Claimant for Kshs. 199,362,445.00 as claimed. It was incumbent upon the Claimant to prove before this Tribunal on a balance of probabilities, its entitlement to this claim."*

59. It is noteworthy that, at paragraph 252 of the Final Award, the Learned Arbitrator held that;-

> *"beyond submitting the "final account" to this Tribunal as the basis on which the Claimant's claim for Kshs. 199,362,445.00 is premised, no proof or evidence was presented to this Tribunal in support of the claim."*

60. The Learned Arbitrator supported his findings on the issue at paragraphs 264 to 272 and stated inter alia; that the other reason why the claim must fail is that the Claimant did not mitigate its loss. That it should not have stayed on site for a number of years it claimed to have stayed on after it became apparent that the Respondent was persisting in its breach of obligation to pay certified amounts.

61. However, at paragraph 284, the Learned Arbitrator states as follows:-

> *"I would have been prepared to award the Claimant the loss it incurred for a reasonable period after 27th April 1992 had evidence of such loss been produced before this Tribunal. Considering that the idle plant and equipment, on the basis of which the claim is based, consisted of moveable lorries, mixers, block making machine, tractor, dumper and vibrators, I do not see why the Claimant should have maintained or kept the same on site for the duration of time claimed. "*

62. Consequently, at paragraph 285 the Learned Arbitrator held that;-

> *"the upshot of the foregoing is that the claimant has not on a balance of probabilities established the claim for 199,362,445.10 and I disallow it."*

63. The Respondent on its part submitted that the parties had agreed on the final accounts after reducing the figure from Kshs. 199,362,445.10 to Kshs. 67,274,524.92 and that at least the Arbitrator should have awarded that amount.

64. I have considered the evidence adduced in the Arbitral proceedings and Mr. Khoda states in cross examination that the Ministry gave him a final certificate for Kshs. 67,274,524.92 which was displayed at page 1067 of the Respondent's bundle of documents, and which he refused to sign as there was already a final account in the sum of Kshs. 199,362,445.10. The amount of Kshs. 67,274,524.92 was certified by Mr. Alfonce Okweto Nyangito who testified on behalf of the Respondent. In that regard, I note that at page 20, paragraph 89 of the Final Award reveals Mr. Nyangito testified that,

"the purported final account (Kshs. 199,362,445.10) is not a final account and represents professional negligence and it should not be relied upon as somebody was acting ultra vires. The Ministry checked that final account and came up with a figure of Kshs. 67,274,524.92 (at pages 1061 of the Respondent's Bundle of documents). The Claimant's attention was drawn to that figure of Kshs. 67,274,524.92 but the Claimant did not agree with it nor did the Claimant declare a dispute over it."

64. At paragraph 90, Mr. Nyangito testified further as follows:-

> *"if the claimant accepted that figure, it would have been paid. The final account is not agreed. The object of the final account is to indicate to the parties the liability and obligations at the end of the project. The claim for Kshs. 199,362,445 is not payable and is not correct. It is the Claimant's anticipation." (Emphasis mine).*

65. Similarly, at paragraph 105, the witness is quoted to have testified as follows;

> *"The Claimant did not sign for the amount of Kshs. 67,274,524.92, (at pages 1061 to 1069 of Respondent's Bundle of Documents), which is the amount the Respondent should be paying, and not any other figure."(Emphasis mine).*

66. It does appear that the Ministry certified the figure of 67,274,524.92 as payable final account and was prepared to pay. The Claimant submitted that, since the amount of Kshs. 67,274,524.92 had been certified by all concerned and supported by the evidence of Mr. Nyangito, it should have been awarded as there was no need to reprove items already passed.

67. The Respondent has conceded that it is liable to pay the sums awarded in the Final Award as items A, B, C and D, and indeed have made payments thereon of Kshs. 33,671,539.50, which has been duly acknowledged as received by the Applicant leaving a balance of Kshs. 3,068,088.14. In my considered opinion, the Ministry was ready to pay a sum of Kshs. 67,274,524.92. In that regard, that sum should have been awarded to the Claimant. If the Respondent has paid Kshs. 33,671,539.50, then the balance is Kshs. 33,602,985.42 and is thus payable to the Applicant.

69. The third claim was in relation to interest claimed in the sum of Kshs. 476,494,164.85, which was based on the claim for the certified sum of Kshs. 74,408,067.80 and the final account of Kshs. 199,362,445 which were dismissed by the Learned Arbitrator. In his Final award on this issue, the Learned Arbitrator held as follows:-

> *"I accordingly allow interest at the court rate of 12% per annum on the amount outstanding of Kshs. 10,089,824.00 being the total of the balance of Kshs. 6,386,887.20 and the retention amount of Kshs. 3,702,936.80 from 1st June 1992 to 22nd November 2011 being the date of this Award. I compute interest at Kshs. 23,581,715.50 to the date of the Award."*

70. The Learned Arbitrator accepted the submissions by the Claimant's Advocate that interest is allowable at the discretion of the Tribunal at Common law. Further, that it was common ground that the form of contract adopted by the parties namely the 1970 Edition of the Ministry of Works Contract Agreement has no provision for payment of interest. At paragraph 300 of the Award the learned Arbitrator recognized that the Claimant was entitled to interest and observed that interest is allowable at the discretion of the Tribunal and he awarded simple interest at Court rates. I am in agreement with the finding of the Learned Arbitrator that the issue of interest was not provided for in the Contractual documents between the parties. Therefore, it was awarded at the discretion of the Learned Arbitrator. There is no evidence the discretion was not properly exercised and the Court cannot interfere with the Learned Arbitrator's decision on the same.

71. The next issue is in relation to claim for loss of profit. The Learned Arbitrator found that the Claimant had failed to prove the claim on the balance of probabilities in that no evidence was produced to prove the total expected revenue from the project that would have exceeded the expenses and if so by what amount. I concur with the findings of the Arbitrator on this issue and I am inclined to uphold it that the Learned Arbitrator had the benefit of evaluating the evidence adduced on the same.

72. The other issue considered by the Arbitrator was the issue of Special damages. In this regard the Learned Arbitrator held at paragraph 310 of the Final Award that he was not satisfied the claim had been established. He observed that the claim was based on Compound interest which the Tribunal had not allowed. I also find that, if no evidence was adduced to support the claim, there is no basis to interfere with the findings thereon. In the same vein at paragraph 135 of the Final Award, the Learned Arbitrator rejected the claim for Exemplary damages and similarly I have considered the evidence adduced and I find no basis to interfere with the finding thereon.

73. In conclusion the Court makes the following orders in relation to the Chamber Summons Application dated 1st August 2012:

a) That prayer 1, is not allowed. The Final Award is thus not set aside in its entirety save for the orders made here below;

i) That in regard to the claim of Kshs.199, 362,445.10 on the account of the Final account, the Respondent shall pay the Claimant the sum of Kshs 67,279,524.92, which it conceded vide the evidence of their witness Mr. Nyangito. However, that sum shall be paid less any sum that has already been paid, either prior to or as a result of the orders in the Final Award pursuant to the order of the Tribunal under item A,B,C and D of the final Award. After the deduction, the balance shall become payable.

ii) The sum payable shall attract interest as herein awarded from the date the sum was due, in particular the date of referral of the dispute to the Arbitration to the date of full and final payment

b) Prayer 2, has been taken care of by orders given above under (i) and (ii)

c) Prayer 3 was sought for in further and alternative manner. The same has been overtaken by events in that payment has been made in furtherance to orders given under paragraph A, B, C, and D of the Final Award at page 67 save for the interest payable thereon which is outstanding. The outstanding interest will continue to attract interest at the rate awarded.

d) In view of the circumstances of this case and the findings of the Arbitral Tribunal and of the Honourable Court and in particular that all the orders of the Tribunal at page 67 to 68 are confirmed save for order (F) which has been varied as herein stated.

e) It is in the interest of justice that each Party meets its own costs and it is so ordered.

75. Those then are the orders of the Court.

Dated, signed and delivered on this 23rd day of July 2018 in an open Court in Nairobi.

GRACE L. NZIOKA

JUDGE

In the presence of :-

Mr. Billing for the Claimant

Mr. Kiarie for the Respondent

Dennis the Court Assistant