REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CASE NO. 193 OF 20118

POWER PUMP TECHNICAL COMPANY LIMITED.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT

RULING

1. This Ruling relates to a Chamber summons Application dated 20th April 2018, brought under the provisions of Sections 36 & 37(2) of the Arbitration Act, 1995 (as amended by Arbitration (amendment) Act Number 11 of 2009) and Rules 6 and 9 of the Arbitration Rules, 1997), and all other enabling provisions of the Law.

2. The Applicant is seeking for orders as here below reproduced;

> *(a) That the Applicant be granted leave to enforce the Final Award made on the 8th December, 2017, by the sole Arbitrator herein, Honourable Mr. E Torgbor , as a Decree of this Honourable Court;*
>
> *(b) That pending hearing and determination of this application, this Honourable Court do direct the Respondent to deposit the entire Award sum of Kshs. 22,502,712.00, in an interest earning account in the joint names of the Advocates for the parties at Cooperative Bank of Kenya Limited, City Hall Branch, Nairobi.*
>
> *(c) That costs of this application be paid by the Respondent.*
>
> *(d) That the said Respondent be ordered to pay all costs and expenses incidental to the enforcement and execution of the decree aforesaid.*

3. The application is premised on the grounds on the face of it and an affidavit dated 20th April 2018, sworn by Kioko Kathenge, the Managing Director of the Claimant (herein "the Applicant). He deposed that, on or about July, 2008, the defunct County Council of Kitui, awarded, the Applicant a contract for the construction of a slaughter house at Kabati Market.

4. Subsequently, a dispute arose in the course of the execution of the said contract, as a consequence whereof, the Applicant invoked the dispute resolution clause of the contract and the Honourable Mr. Justice Torgbor was duly appointed as the sole Arbitrator.

5. That, the original dispute involved Power Pump Technical Company Limited, as the Claimant and County Council of Kitui, as the Respondent. The Transition Authority (TA) was enjoined therein, purely on account of the fact that, at the material time, it was the oversight body charged with the transition process from National Government, to the County Governments.

6. Be that as it were, the Arbitral process commenced whereupon all parties except the 2nd Respondent, filed their respective pleadings and document in accordance with the deadlines stipulated by the Tribunal. At the hearing of the dispute, the Applicant called one witness while the Respondent called two witnesses. Thereafter the Arbitrator, reserved the final Award, to be published on notice to the parties' Advocates.

7. Subsequently, the Arbitrator, by a letter dated 8th December 2017, duly notified the parties' Advocates that, the final Award was ready for collection, upon payment of his outstanding fees. On 9th December 2017, the Claimant wrote to the Tribunal requesting for the correction of the published award, under Section 34(1) of Arbitration Act and on 21st December 2017, a formal application was filed praying for the same. The Application was allowed by consent of the parties as prayed, save for a correction in respect of the award of costs. On 16th January 2018,

the Arbitral Tribunal published the corrected consent Award to be read as part and parcel of the original Award dated 8th August 2017.

8. That in the corrected Award dated 16th January, 2018, the Arbitrator rendered a decision in favour of the Applicant as against the Respondent as follows:-

i) That the Award No. 1 of sum of Kshs.3,791,415.96 with interest at the rate of 14.5% p.a with effect from 1/9/16 is corrected to read 3,792,415.96, together with interest at the rate of 14.5%p.a with effect from 20/5/11 until payment in full;

ii) That Award No. 2 of the sum of Kshs.2,405,340/- in respect of the watchman's wages accrued at the rate of Kshs. 9,000/- per month watchman, as at 30/7/14 is amended to read that, the salaries accrued at the rate of Kshs. 27,000 per month with effect from 30/7/2014, together with the interest at the rate of 14.5% p.a with effect from 3/7.2014, until payment in full;

iii) That the award of costs is amended and awarded as follows:

a) The costs of the reference is assessed at the sum of Kshs. 3,176,797 and the 1st Respondent is directed to reimburse the Claimant 50% of the said sum i.e. Kshs.1,588,398/- already paid to the Tribunal within thirty(30) days of the publication of this corrected award;

b) The costs of the arbitration is assessed pursuant to Section 32B of the Arbitration(Amendment)Act, 2009, at the sum of Kshs. 1,500,000 to be paid by the 1st Respondent to the Claimant within thirsty(30)days of publication of this corrected award;

iv) That each party do bear its costs of the application to amend the award.

9. The Applicant avers that, thereafter the Respondent vide its letter of 21st December 2017, gave its irrevocable undertaking for payment of the Award sum within one (1) month in order to take possession of the slaughter house. However, the undertaking lapsed on 21st January 2018, but despite demand having been made the Respondent has refused, neglected and/or otherwise failed to comply with any of the orders made by the Arbitrator, nor pay as per stated undertaking. Yet to date, no order has been made by the Honourable Court, setting aside or staying the enforcement of the said corrected final Award. That Award was filed in Court vide a letter dated 11th April, 2018.

10. The Applicant avers that, it is imperative the Respondent be compelled to deposit the entire award sum into a joint interest earning account as prayed, pending the hearing and determination of the main application as the failure to grant of the orders sought, will render the whole object of the Arbitration and the final Award rendered, therein nugatory.

11. However, the Application was opposed based on the Replying Affidavit dated 10th May 2018, sworn by Alexander Kimanzi, the Acting County Secretary of Kitui County Government. He deposed that the Respondents have filed an Application under Section 35 of the Arbitration Act, seeking to set aside the Arbitral Award published on 8th December 2017 and Amended on 16th January 2018. Therefore, it is only proper and procedural that the Court first determine the issue of setting aside of the Award, before the issue to enforce the Award.

12. The Respondent argues that the application filed to set aside the Award, is based on the grounds that, the Arbitrator dealt with issues beyond his scope and that the Award is against the public policy, in that it contravenes and is inconsistent with the Public Procurement and Disposal Act.

13. It was argued that the issue of deposit of the decretal sum cannot be determined at this point, until the Application for setting aside the award is determined. That even then, the budgetary allocation of the Respondent, for the financial year 2017/2018 has been exhausted and the Respondent does not have such huge sums to deposit in Court if so ordered.

14. The Respondent averred that, several issues have been raised in setting aside the Application, as follows:-

i) That the Respondent was represented by J.K. Mwalimu and Company Advocates, who did not advise them accordingly hence the mistake of counsel should not be visited upon the Respondent;

ii) That J.K. Mwalimu Advocates did not have express instructions from the Respondent to enter into consent dated 9th January 2018, to vary the Award issued on 8th December 2017, upwards. The previous Advocates only notified the Respondent after the consent had been filed and the Award corrected;

iii) That as a result, the said Consent Judgment herein is contrary to law and public policy of the Republic of Kenya. That the Arbitrator did not have jurisdiction to adjudicate and grant relief in aid of an illegality;

iv) 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 more specifically payment of extra sums the scope of 15% as contemplated by the contract dated 19th June 2008 and payment of watchmen's wages;

v) That the contract dated 19th June 2008 does not provide for payment of watchmen's wages to the tune of Kshs. 27,000 per month with effect from 30th July 2014, together with interest at 14.5% but the Arbitrator ventured to issues that were not provided for by the contract thus exceeding his mandate;

vi) That the Tender was for a value of Kshs. 4,427,863.80 but the Arbitrator has awarded an award which is five times the value of the tender being Kshs. 22,502,712.00, which is against public policy and this award is aimed at wasting County resources and money and which is not in the best interests of the people of Kitui County;

vii) That the award is against the public policy of Kenya in that it contravenes and is inconsistent with the Public Procurement and Disposal Act and Contrary to justice and morality.

15. The Respondent then invited the Court to further consider the contents of the Affidavit sworn in support of the Application to set aside the Award and dismissed the Application to enforce the Award with costs.

16. The parties agreed to file submissions to dispose of the Application. The Applicant reiterated that, it is not in dispute that, the final Award was published by the Sole Arbitrator Honourable Justice E. Torgbor on 8th December 2017; and was amended pursuant to an application by the Claimant lodged on 21st December 2017 and a consent entered into by parties on 9th January 2018. That even the undertaking to settle the Award sum within 30 days has not been honored.

17. Further, the Application dated 10th May 2018, made by the Respondent to set aside the said final Award was struck out by the Honourable Court on 5th June 2018, for being incompetent. Similarly, the grounds urged in the Replying Affidavit sworn by the Respondent, on 10th May 2018, were summarily rejected by the Honourable Court vide the ruling delivered on 5th June 2018. Therefore, effectively, this application with all practical purposes is unopposed.

18. The Applicant submitted that from the foregoing; only two issues arise for determination namely; whether the Applicant is entitled to enforce the Award herein as a decree of the Court and whether the Award sum ought to be deposited.

19. It was argued that the Chamber summons dated 20th April 2018 is merited in that, it has been brought under the correct provisions of law and the Applicant has granted the Respondent every indulgence in order to honour the Arbitral Award, but to no avail as the Respondent has not shown any inclination towards settling the sum awarded.

20. That the enforcement of the Arbitral Award is an all-important public policy in Kenya, as clearly laid out in the case of; *Kenya Shell Ltd vs Kobil Petroleum Limited, Civil Appeal No. 57 of 2006* where the Court underscored the importance of the principle of finality of Arbitral Awards and stated as follows:-

> *"The Arbitration Act, which came into operation on 2nd January 1996, and the Rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to courts.....The message we think, is a pointer to the public policy the country takes at this stage in its development.....At all event, the tribunal was bound to make a decision that did not necessarily sit well with either of the parties. It would nevertheless be a final decision under Section 10 of the Act, unless either party can satisfy that court that, it ought to be lawfully set aside. In this case, the decision was final. We do not feel compelled therefore to extend the agony of this litigation on account of the issues raised by the Applicant."*

21. Further that, the same principle of finality is reiterated in the case of; *National Cereals & Produce Board vs Erad Suppliers & General Contractors Limited, (2012) eKLR*, where the Court observed as follows:-

> *"one of the principles underlying the Model law and in turn the Arbitration Act is the severe restriction on the Section 35 of the Arbitration Act is itself underpinned by that principle. Our Courts have, since the coming into force of that statute, observed and given effect to that principle."*

22. The Applicant argued that, it is undoubted that the parties agreed that all disputes arising from the Agreement dated 19th June 2008 would be resolved by Arbitration. That the Honourable Arbitrator was presented with all the relevant material evidence and facts which were adduced before it by the parties and then the Arbitral Tribunal exercised its jurisdiction properly and duly considered the pleadings and evidence before rendering the final award.

23. Therefore, there is no justification as to why the Honourable Court should not adopt the Award herein as a decree of the Court in order to pave way for its enforcement. Similarly, there is no jurisdiction as per Section 10 of the Arbitration Act 1995, for the Court to interfere with the Award or come up with its own findings on the matter

24. That be that as it were, that the Respondent has failed to honour its undertaking, which is clear proof that, the Respondent is a recalcitrant party, with no inclination to observe its very own undertakings and therefore the Applicant is likely to be involved in a long-minded push to enforce the Award as a decree of Court and thus the monies awarded be deposited into a joint interest earning account in the names of the two law firms, to avoid further delay and mischief by the Respondent.

25. However, the Respondent filed response submissions and referred to the provisions of Section 37 of the Arbitration Act, which sets down the grounds for refusal of recognition or enforcement of an Arbitral Award and reiterated that, the Arbitrator dealt with issues that were not contemplated by or not falling within the terms of reference, as stated in the Replying Affidavit and the Application dated 10th May 2018, which was struck out for being incompetent.

26. The Respondent relied on the case of; *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited [2015] eKLR*, where the Court stated that;

"Accordingly, 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 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. See the literary work of Mustill and Boyd, Commercial Arbitration on the word ''disputes'''"General words such as these confer the widest possible jurisdiction. They must, however, be construed by reference to the subject matter of the contract in which they are included. Thus, the inclusion in a mercantile contract of an arbitration clause in general terms would not endow the arbitrator with jurisdiction over disputes between parties concerning, say, personal injuries caused by one to the other, or over allegations of libel."

27. It was argued that, the amended final Award by the Arbitrator purportedly entered through Advocates consent was procured through fraud, abuse and lack of authority, dishonest and in flagrant breach of the law. Therefore, the Court should not allow such an Award to stand.

28. The Respondent further submitted 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. Thus in ***Christ for all Nations Vs Apollo Insurance Co. Ltd. (2002) EA 366, Ringera, J***, (as he then was), considered the concept of public policy from the prism of **Section 35 (2)(b)(ii)** and stated as follows:-

"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."

29. Similarly in the case of *Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR* the Court stated that:-

" although public policy is a most broad concept, incapable of precise definition,…an award could be set aside under section 35(2) (b)(2) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

(i) Inconsistent with the Constitution or other laws of Kenya whether written or unwritten or

(ii) Inimical to the national interest of Kenya, or

(iii) Contrary to justice and morality".

30. The Respondent submitted that the principle of finality has to be given a go by and a case can be re-examined where decisions were passed without jurisdiction or in violation of the principles of natural justice, violation of any fundamental rights, gross injustice and against public policy. Therefore, in the case of manifest illegality and palpable injustice the Court has inherent powers conferred to it by the Constitution not to allow or adopt any award that causes an injustice to the people of this country especially the people of Kitui County.

31. That justice is a virtue that transcends all barriers, neither the rules of procedure nor technicalities of law can stand in its way; therefore, due to the grave irregularities highlighted, the Court should not adopt the award.

32. The Respondent while responding to the issue of the deposit of Kshs 22,502,712 in Court, referred to the case of; *Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 7*4, and argued that, Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules, subject themselves to the provisions of the Government Proceedings Act, which include provisions prohibiting execution against or attachment in respect of the Government. That it was further held that:

"History and rationale of Government's immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i) the raising of revenue- (by taxation or borrowing); (ii)its expenditure; and (iii) the audit of public accounts. The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered".

33. Finally the Respondent submitted that, judicial notice should be taken of the fact that, most of the County Governments are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current Governmental set up. That taking into account their debt portfolio as against their financial resources, it is neither in the interest of this Court nor that of the Claimant that the Respondent should be brought to its knees.

34. I have considered the application, the arguments for and against and submissions by the parties, and I find that the issues that arise for determination are whether the Applicant has complied with the legal requirements for grant of leave to enforce as a decree of the Honourable Court the final award made on 8th December 2017, and whether the Court should order for deposit of the Award sum as prayed.

35. The provisions that govern the grant of the orders sought are found under Section 36 and 37 of the Arbitration Act, 1995. These provisions provide as follows:-

"36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in

writing to the High Court, shall be enforced subject to this section and section 37.

(2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish—

(a) the duly authenticated original arbitral award or a duly certified copy of it; and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified 'translation of it into the English language.

37. (1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that-

(i) 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, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the pasties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(b) if 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 recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security." (emphasis mine).

36. It follows from the above provisions that, one of the grounds upon which the Court may refuse recognition or enforcement of an Arbitral Award is where an application for the setting aside or suspension of an Arbitral Award has been made. As noted above, the Respondent herein filed an application dated 10th May 2018, to set aside the Arbitral Award herein but the same was struck out on 17th May 2018 for being incompetent having been filed out of time and without the Court's leave. As matters stand now, there is no competent application before Court to set aside the Arbitral Award herein.

37. Having made that observation, it suffices to note that most of the issues raised in the Replying affidavit and the submissions filed by the Respondent squarely deal with and relate to the application of the setting aside of the Arbitral Award. It is deposed inter alia that, the Arbitrator dealt with matters beyond the scope of his authority and that the Award is against the public policy. Indeed, the entire paragraph (8) of the Replying affidavit deals with the grounds upon which the Award should be set aside. In the same vein, paragraph (6) of the Respondent's submissions enumerates the matters allegedly dealt with by the Arbitrator which were outside the terms of Reference and paragraphs 10 to 22 of the Respondent's submissions discusses the reasons why the Award is against public policy. In my opinion, these issues can only be dealt with in an application to set aside the Award. Therefore, in the absence of such an application therefore, the application for recognition and enforcement is deemed to be unopposed.

38. Be that as it were, it is not in dispute that there is a valid Arbitral Award in favour of the Applicant. It is averred that, the Award was subsequently amended by the consent of the parties. The Respondent argues that, the legal counsel representing it did not have authority to enter into the consent. That again is not an issue that can be canvassed in this application and can only be canvassed at the time of hearing of the application to set aside the Arbitral Award if there will be any.

39. I note that the Applicant averred under paragraph 15 of the Affidavit in support of the application that, the Respondent gave an irrevocable undertaking to pay the money within one month. The said undertaking is alleged to be annexed to the affidavit and marked "KK7". However, a perusal of the annextures to the affidavit, reveals that the last annexture is marked "KK6", being a copy of the corrected award. Whether the annexture "KK7" was inadvertently omitted or does not exist, is not within the knowledge of the Court.

40. Be that as it may, I also note that the Applicant under prayer (2) of the application, sought that the decretal sum be deposited in an interest earning account in the joint names of the advocates of the parties. That prayer was sought for pending the hearing and determination of the application. It has thus been overtaken by events. That leaves prayer (1) only and taking into account that there is a valid final Award as corrected as corrected dated 8th December 2017, and it has not been set aside and therefore there is no challenge against it, especially the Respondents having failed to file a competent application after the initial one was struck out and to date the Applicant has not been paid, it is only fair and just that the Applicant be allowed to proceed and enforce the amended final Arbitral award as a Judgment and/or decree of the Court.

41. The upshot of all this is that, the application is allowed in terms of prayers 1, so that the Amended Arbitral award herein be and is hereby recognised and enforced as an order of the Court. The costs of the application shall be borne by the Respondent.

42. It is so ordered.

Dated, delivered and signed in an open Court, this 31st day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Kithi for Mr. Kyalo for the Applicant

Mr. Anyona for Mr. Kanjama for the Respondent

Dennis.....Court Assistant