



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE 246 AND 410 OF 2017

LIMELIGHT CREATION LTD.....1ST CLAIMANT

ALLAYS SOUTHERN CORPORATION LTD.....2ND CLAIMANT

GLOBAL TRADE MARKETS PLACE (E.A) LTD.....3RD CLAIMANT

VERSUS

RURAL ELECTRIFICATION AUTHORITY.....RESPONDENT

R U L I N G

I N T R O D U C T I O N

This is a ruling on two applications.

The first application dated 30th May 2017 was filed by the Claimants herein seeking to have the final award dated 16th May 2017 adopted and enforced as the decree of this Court.

The second application dated 11th October 2017 was filed Rural Electrification Ltd (hereinafter referred to as RESPONDENT) filed application in file No.410 of 2017 seeking to partially set aside Arbitral Award.

I will first consider the application dated 11th October 2017. Counsel for the Respondent submitted that the Respondent was entitled to retain 10% of the contractual sum being damages for late completion. He submitted that Clause 27.1 in the contract provides for the Respondent to invoke a penalty. That the Respondent waived the right to 10% by failing to issue notice to the Applicant.

Counsel further submitted that the Claimants/Applicants seek to enforce an award, whose claim has been paid and has therefore been overtaken by events; and there is nothing to enforce.

Counsel for the Applicants/Claimants opposed application dated 11th October 2017 in file 410 of 2017. He relied on averments by Samuel Kangethe Mburu in Replying Affidavit dated 6th February 2018, Further Affidavit filed on 28th May 2018 and Supplementary Affidavit dated 20th November 2018.

Counsel for the Claimant submitted that this Court is not appellate Court in respect to Arbitration and should not therefore go into the merits of the Arbitral Award. He submitted that the award delivered on 16th May 2017 being challenged is final under the provisions of Arbitration Act. He argued that under Section 35(3) of the Arbitration Act, any application to challenge an Arbitration Award should be filed within 90 days from the date the decision was made and the application challenging the award herein should have been filed on 14th August 2017.

He further cited authority **Kenyatta International Convention Center (KICC) V Greenstar Systems limited [2018]eKLR** where the Court held as follows:

“it is well settled the date of delivery and receipt is the date of arbitration...

He submitted that the Court ought to dismiss the application for being time barred.

Counsel for the Claimant further submitted that the application is incompetent for challenging finding of facts and law by Arbitrator, which is not the province of the High Court. He argued that Section 35(2a) of Arbitration Act does not allow the Court to go into findings by Arbitrator.

He cited authority (no.4) **Intol Vs Total (k) Ltd & 3 others [2013] eKLR** where the Court held as follow:-

“Arbitrator is entitled to make error on fact but it cannot be elevated to breach of public policy.

He urged the Court not to interrogate facts.

He argued that, if the Arbitrator exceeded jurisdiction, the Respondent ought to have invoked Section 17(3) of Arbitration Act, has failed to do that and cannot therefore come to say the Arbitrator exceeded jurisdiction; that challenging jurisdiction at this stage is an afterthought.

On whether the Arbitrator erred Counsel for the Claimant submitted that the contract provided for extension of contract, which were mutually agreed by the parties. He added that the Applicant confirmed that the price is as per original contract and never indicated that there were penalties. He said the Respondent allowed the contract to be extended and confirmed that the contract is the same; that this is evidence that they had waived penalty of 10% and were therefore estopped from invoking the provision; further that the provision for penalty was negated by clause 29.3 of the contract as it says clause 27.1 which is about penalty is suspended by employer (Respondent).

He submitted that the Arbitrator found that the Respondent had taken over the project and was not entitled to penalty. He said all these were issues and facts before Arbitrator and he made findings on them; he found that Claimant did not cause delays.

Counsel further submitted that for penalty to be invoked under clause 27.1, notice of intention has to be given by the Respondent and that it was a condition precedent to give notice.

He argued that the award is not contrary to public policy as that has not been shown; that it has not been shown that the award is in breach of terms of the contract; that he never exceeded terms of reference nor made erroneous conclusion.

On application in file, No 246 of 2017 he submitted that at the time of filing, the Respondent had done no payment of award of Kshs. 101,427,844.27. He added that interest at 12% was to run from 12th May 2014 and by 2018 interest had reached 152,472,827.38 and no payment had been paid.

In January 2018, Kshs. 33,484,418.55 was paid and Kshs. 13,825,011.24 leaving a balance of Kshs. 105,164,398.59 and as at May 2017 it was 109,370,974.54.

He further submitted that in May 2018 Kshs. 30,770,069.90 was paid leaving balance of Kshs.. 78,600,904.64. He added that there are costs of Kshs.. 1,384,500 which were reduced to 1,184,500 earning interest at 2% from 16th May 2017. That total as at May 2018 was Kshs.. 79,927,554.64 which continue to earn interest.

Counsel submitted that the award is not redundant and it is important that the award be made decree of this Court so that the Respondent can be given credit for what has been paid.

On deduction and withholding of VAT, the issue was conversed before the Arbitrator and he decide that it was upon the Claimants to receive the money and pay tax; that the Claimant should be left to meet own tax obligations. He added that the Respondent never deducted VAT at the beginning but decided to deduct from the entire amount in 2018. He added that the documents attached show they approved payments, which included VAT. Counsel, submitted that the Respondent is not a withholding tax agent. He said that the Claimant faithfully paid tax as shown by Tax Compliance Certificate issued after the contract.

Counsel submitted that the Claimant attached final award and there is outstanding balance. He urged that Court to allow the application dated 30th May 2017.

In a rejoinder Counsel for the Respondent argued that it has not been shown when the Respondent received the award. He submitted that Section 35(3) talks of date of receipt not delivery.

On jurisdiction, he submitted that the issue came up after delivery of judgment.

On application dated 30th May, he submitted that the figure relayed to Court is calculated on compound interest contrary to award which says award which says interest is in simple basis not compound.

Further it is not denied that Kshs. 71,280,810. He said it is not disputed that the amount in contention is Kshs. 30,147,094 which is 10% and additional amount relayed to Court is non consequential.

On VAT, he submitted that compliance certificate is not proof of payment. He urged Court to dismiss application File No 246 of 2017 allow application in File No.410 for 2017.

I have considered rival submissions herein. I have also perused documents attached to affidavits filed.

I wish to consider the following issues

1. *Whether the Respondent is entitled to 10% of the contract amount,*
2. *Whether the Respondent should have withheld VAT,*
3. *Whether the Arbitrator's decision is beyond scope of reference,*
4. *Whether the award is against public policy.*

1. Whether the Respondent is entitled to 10% of the contract amount

It is not disputed that the amount outstanding as at the time of highlighting submissions on the two applications was Kshs. 30,147,094 being 10% retained by the Respondent as penalty for delay. The Claimant's contention is that the Respondent is not entitled to retain the 10% as it waived it by failing to issue notice as required. From the Arbitral Award, I note that the sole Arbitrator considered the issue of penalty as evidenced on page 62 of the final award. This not being an appellate, I will not interrogate his findings. There is therefore no justification for the Respondent to retain 10% of contractual sum and the same should be released to the Claimants.

2. Whether the Respondent should have withheld VAT

The Arbitrator dealt with this issue. He found that payment of tax should be left to the taxpayer. This is not an appeal on Arbitrators finding; I will not therefore interrogate his decision.

From the foregoing, find that the amount withheld as tax should be released to the Claimants.

3. Whether the Arbitrator's decision is beyond scope of reference

In Arbitration matters, parties donate jurisdiction to the parties. Arbitrator's jurisdiction as per terms of the contract. Section 17(3) of the Arbitration Act gives arbitral tribunal jurisdiction to determine its own jurisdiction. This arises when parties challenge Arbitrator's jurisdiction either at the start of hearing or in the course of the hearing. The Respondent herein never challenged the jurisdiction of Arbitrator but instead submitted to Arbitration and proceeded to conclusion.

Further, the Respondent failed to demonstrate how the sole Arbitrator made determination on issues not agreed by the parties. Challenge of award on this ground, cannot therefore stand.

4. Whether the award is against public policy.

The Respondent failed to demonstrate any illegality in the final award or how the award is in contravention of the constitution of Kenya. This ground was not therefore proved.

FINAL ORDER

1. Application dated 11th October 2017 is hereby dismissed.
2. Application dated 30th May 2017 is hereby allowed. The final award delivered by sole Arbitrator P MWANIKI GACHOKA and published on 16th May 2017 is hereby adopted and enforced as the judgment of this Court.
3. Costs for both Applications to the Claimants.

Ruling delivered dated and signed at Nairobi this 19th day of December 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

JASMINE.....COURT ASSISTANT

Mr.kabaka Counsel For The Claimant

Ms.adunga.....counsel For The Respondent