REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 114 OF 2015

CAPE HOLDINGS LIMITED.....APPLICANT

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITED.....RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 126 OF 2015

SYNERGY INDUSTRIAL CREDIT LIMITED.....APPLICANT

VERSUS

CAPE HOLDINGS LIMITED.....RESPONDENT

RULING

1. Before the court are two applications. The first in time is a Notice of Motion dated 25th February, 2015 by Cape Holdings Limited (hereinafter the Applicant). The same seeks for the Court to set aside the final arbitral award made by the arbitrator on 30th January, 2015.

2. The second one is a Notice of Motion by the Synergy Industrial Credit Limited (hereinafter the Respondent) dated 4th March, 2015. It seeks for the enforcement of the award as a decree of the Court.

3. My view is that when applications under section 35 and 37 of the Arbitration Act are presented together, the Court should determine the one for setting aside first, and then determine the one for recognition and enforcement of award afterwards.

4. The said order and sequence makes sense as the decision in the application under section 35 will determine the course of the application for recognition and enforcement of award.

5. If the Court were to commence with the hearing of the one seeking the enforcement of the award, the Court may find itself in an embarrassing situation of making two contradictory decisions. Accordingly, I propose to deal with the Notice of Motion dated 25th February, 2015 first.

Background

6. In 2008, the Applicant was in the process of developing six office blocks along Riverside Drive Nairobi on its property known as LR. No. 209/19436 Nairobi. In the year 2009 or thereabouts, the Respondent became interested in purchasing the same and thereafter approached the Applicant.

7. After discussions, the Respondent proceeded to make down payments to reserve one office block known as SYNERGY SQUARE, the agreed purchase price being Ksh. 700,000,000/=.

8. After further negotiations between the advocates to the respective parties, 14 formal agreements were entered into between the parties. All the 14 agreements were dated 8th February, 2011 where the aggregate sum of the purchase price of Kshs. 700,000,000/= plus Kshs. 3,200,000/= for the parking silos was agreed.

9. In the course of time and during the period of development of the office blocks, a dispute arose between the parties. The same was referred to Arbitration, wherein the Respondent filed a Statement of Claim dated 31st October, 2011 and the Applicant filed a Statement of Defence and Counterclaim dated 8th December, 2011.

10. Mr. James OchiengOduol was appointed as the sole Arbitrator and proceeded to hear and determine the dispute. The final award was published on 30th January, 2015 were the Applicant was to pay a collective sum of Kshs. 1,666,118,183.00/=. Compound interest at the rate of 18% per annum in respect of the whole or part of the said Kshs. 1,666,118,183.00/= that shall be unpaid from 1st January, 2015 until full payment is made was also awarded.

11. Dissatisfied with the award, the Applicants filed a Notice of Motion dated 25th February, 2015 asking the Court to set aside the arbitral award made by the arbitrator. The application is expressed to be brought under Section 35 (1), 35(2) (a) (iv) & (b) (i) &(ii) of Arbitration Act, 1995, Rule 7 and 11 of the Arbitration Rules , 1995 as amended and Order 9 Rule 9 of the Civil Procedure Rules together with all other enabling provisions of the law.

12. The application is supported by the Affidavit sworn by the Applicant's Director VinaySanghrajka. The affidavit sets out the principal grounds for the application and the same can be summarized as follows: That the award contains decisions and matters beyond the scope of reference to the arbitration;That the tribunal did not decide the reference in accordance to the terms of contract between the parties and contemplated by the 14 agreements dated 8th February, 2011;That the Arbitrator denied the Applicant equality of arms and opportunity as required under section 19 of the Arbitration Act, 1995 as amended which includes denying the Applicant an opportunity to question and test the veracity of the Independent Accounts' Report introduced through the Claimant's written submissions;And that the Honourable Arbitrator allowed an alleged claim of USD 1, 526,888.00/= without any evidence and which alleged payments were admitted by the Claimant's witnesses to be illegal and against public policy.

13. The Applicant also seeks to challenge the award on the basis that the Honourable Arbitrator awarded outrageous sums of money including a compound interest rate of Kshs. 750,476,683/=, repeated interest of Kshs. 107,459,229/=,Income opportunity Loss of Kshs. 147,825,034/= and foreign exchange Loss of Kshs. 50,200,000/= despite the fact that the only part payment that the Applicant had received from the Respondent was Kshs. 577,200,000/=.

14. That essentially, out of the award of 1,773,577,412/= the sum of 948,501, 717/= awarded by the Arbitrator consisted of interest and damages.

15. The above grounds were amplified in the written as well as oral submissions filed and made by Counsel for the Applicant. The submissions are quite elaborate and are part of record.

16. On 5th October, 2015, Mr. Mwangi, Learned Counsel for the Applicant made oral submissions in court and emphasized several areas of the grounds in support of the application. He reiterated contents of the affidavit in support of the application.

17. Additionally, it was his submission that the Arbitrator exceeded his mandate when he dealt with issues pertaining to the pre-contract negotiations and resultant oral agreements.

18. According to Mr. Mwangi, the Arbitrator was duty bound to stick to the 14 agreements and interpret the matters of breach as pleaded by each party.

19. Mr. Mwangi further urged to the court to consider the fact that the said agreements were thoroughly negotiated between the parties and that additionally, they invoked the Law Society's conditions of sale. That accordingly, special Condition D stated clearly that the Claimant had not received any representations or warranties from the Applicant to enter into the agreements.

20. Further, it was Learned Counsel's assertion that the parties had agreed on Special Condition T which outlined that the agreement was legally binding between the parties.

21. It was therefore Mr. Mwangi's submission that in view of the foregoing, it was not open to the Arbitrator to invoke any alleged oral agreements between the parties existing before they entered into the 14 agreements.

22. That in so doing, the Arbitrator admitted parole evidence to effect changes and significantly vary the agreements.

23. Mr.Mwangi also submitted that though the arbitration clause was couched in wide terms, the Arbitrator was not entitled to abandon the terms and conditions and deal with the pre- contract negotiations.

24. It was also learned Counsel's submission that it was impossible for the Arbitrator to deduce a written agreement from the statement of claim as claimed in the award. That such a deduction was equivalent to re-writing the 14 agreements.

25. It was also the opinion of the Applicant that the Arbitrator lacked the mandate to make finding with regard to the validity of the 14 agreements as the Respondent in its statement of claim did not seek any declarations with regard to whether the same were void or voidable.

26. Essentially, it was the Applicant's claim that after misapprehending his mandate, the Arbitrator made findings not reasonably contemplated by the parties. The case of Milimani HCCC no. 913 of 1999 (2009) e KLR Rural Housing Estates Ltd –vs- Eldoret Municipal Council was cited in support of this argument.

27. Conversely, the Applicant also argued that the Arbitrator also overlooked the fact that the oral agreement (s) which he christened as ATPs could not have given the Arbitrator the mandate to undertake the arbitration as section 4(2) of the Arbitration Act, 1995 is explicit that an arbitration agreement shall be in writing.

28. On the payment of Kshs. 577,200,000/= Counsel to the Applicant submitted that the Arbitrator misapprehended the same as advanced payment as opposed to a deposit of the purchase price pursuant to the 14 agreements.

29. He went further to add that under the sale agreements, before the Respondent could terminate the agreement for delay in completion, it was mandatory for it to send a completion notice of 21 days to the Applicant.

30. That in this instance, the Respondent did not issue the completion notice as required and therefore the amount of Kshs. 577,200,000/= awarded by the Arbitrator was erroneous since such a refund could not arise on an agreement which the Respondent had breached.

31. Mr. Mwangi also took issue with Kshs. 729,858,262/= awarded as interest of Kshs. 577,200,000/= which constituted initial payments after the execution of the 14 agreements.

32. According to the Applicant, such an amount could only be paid if there was a delay on the part of the purchaser in settling the purchase price as contemplated in condition 8 of the LSK conditions of sale. Counsel relied on the case of Global International Expo –vs- ACS Computer Pte (2000) 3 LRC 275 in support of this submission.

33. The Arbitrator is also said to have exceeded his scope by awarding compound interest and interest on interest. It was submitted that this was tantamount to re-writing the contract between the parties.

34. Mr. Mwangi further argued that the decision of the Arbitrator to award the additional interest was based on an expert report prepared by Messrs. B.C Patel & Co. Certified Public accounts dated 17th October, 2011, where the financial experts were duly examined and cross- examined.

35. That however, the Respondent in its written submissions to the arbitration attached another revised Independent Accounts Report dated 13th January, 2014. The same, in the opinion of Mr. Mwangi, contained evidence on additional interest.

36. According to Counsel, the Applicant was not given an opportunity to cross examine the Respondent on the contents of the same. That as such, the same was an ambush and against public policy.

37. On the issue of Income Opportunity Loss, it was contended that the Arbitrator did not have the mandate to entertain the same. According to the submissions of the Applicant the award of Kshs. 147,825,034/= as income opportunity loss should not have been awarded since it was not foreseeable by the parties in view of the 14 agreements;And that the same was based on a financial report dated 17th October, 2011 which clearly showed that the same was a calculation of interest but cleverly baptized as income opportunity loss.

38. Similarly, it was the submission of Mr. Mwangi that part of the Income Opportunity Loss included the sale of another Block of Offices known as BELGAVIA which was not part of the dispute between the parties herein.

39. Furthermore, the Applicant contended that the Arbitrator went beyond his mandate by awarding exchange rate fluctuation loss of Kshs. 50,200,000/=. In the argument of Mr. Mwangi the Arbitrator's reasoning in awarding the same due to the fact that the Claimant had sourced money for purchase of the Office blocks in USD 9,000,000, was erroneous.

40. It was submitted that the rate of currency prescribed by the 14 agreements was in Kenya Shillings. That in the foregoing, the award of Kshs. 50,200,000/= was outside the scope of the Arbitrator and the same should therefore be set aside.

41. The Applicant also contended that it was against public policy for the Arbitrator to have awarded the sum of USD 1,526,888 allegedly paid to ICARUS EQUITIES INC which existence or connection with the Applicant was never proved.

42. In Mr. Mwangi's submission, if such payment was made, the same was both illegal and fraudulent as the same was made outside the official books as was indicated during the testimony of the Respondent's Financial Expert Mr. MihirChalsazar during the arbitral proceedings.

43. In conclusion, the Applicant submitted that the Arbitral award was plainly wrong due to the reasons stated above and the same should be set aside.

44. In opposing the application, the Respondent filed the Replying Affidavit of Vishal Shah sworn on 16th March, 2015. The Respondent's view is that the Applicant is in essence seeking an appeal of the arbitration given the grounds advanced to set aside the award.

45. That the Applicant was pursuing to introduce new evidence before the honourable court and to urge this court to hear the dispute afresh, which is not allowed under an application for setting aside.

46. It was further averred that the it was within the Arbitrator's full jurisdiction and power to award any amount found due, plus interest at the rate of interest the Arbitrator would decide to meet the circumstance of the case as pleaded and proved by the respective parties.

47. The Respondent further added that had the Applicant wanted to know how the sum of interest was arrived at, nothing would have been easier than to seek a clarification from the Arbitrator pursuant to section 34(1) of the Arbitration Act which allows for correction and interpretation of the Award.

48. In addition to this, the Respondent denied that the financial expert's report was introduced in evidence irregularly. According to the deponent, the document complained of was an up to date submission of the financial claims up to 31st December, 2013 made by the Respondent in its statement of Claim.

49. With regard to the Applicant's position that the Arbitrator had no jurisdiction to determine matters other than those in the 14 agreements, it was the Respondent's position that the since the parties herein did not frame agreed issues for determination, it was upon to the Arbitrator to look at the implication of the pleadings and determine the matters for determination which included whether or not the Claimant was entitled to the reliefs sought.

50. That further the Arbitrator was also entitled to interpret the Arbitration clause and determine its scope. The same included whether the prior discussions between the parties concerning the purchase of the building blocks by the Respondent;And whether advance payment made by the Respondent pursuant to those discussions before the agreements were signed, were issues that fell before him for determination. The Respondent also refuted the Applicants' claim on the award having elements of illegality.

51. The Respondent filed written submissions on 8th April, 2015. Mr. Ahmednassir (S.C) and Mr. Namachanja made oral submissions on behalf of the Respondents. It was argued that the Application before the court was actually an appeal which was clothed as an application to set aside the award.

52. It was further argued that in some instances, the Applicant attempted to introduce new evidence to beef up its case for setting aside the award which is not allowed under the Arbitration Act.

53. In particular, Learned Counsel Ahmednassir (S.C) for the Respondent pointed out that the Applicant has sought to introduce new evidence via the Law Society Conditions of Sale, that the interest was not payable under the said conditions which formed part of the sale transaction.

54. According to the arguments of the Respondent, such material evidence not having been put before the Arbitrator during the arbitral proceedings, cannot be introduced and relied on at this stage.

55. Moreover, the Respondent submitted that the complaint of the interest awarded by the Arbitrator is misplaced. It was the Respondent's assertion that the Applicant should have sought a clarification on the computation of the same under section 34 of the Arbitration Act.

56. It was also pointed out that the interest awarded was justified and was based on the Arbitrator's discretion under section 32C of the Arbitration Act.

57. With regard to the Oral Agreements, the Respondent was firm that the Arbitrator had the jurisdiction to consider the same as there was a question for determination on whether the oral agreements were affected and/or modified by the 14 agreements dated 9th February, 2011.

58. That further the Arbitrator correctly found that the 14 agreements at the center of the dispute were entered under duress. The Respondent therefore dismissed the Applicant's claim that the Arbitrator disregarded the provisions of the said agreements

59. It was also submitted that the Arbitrator acted within his jurisdiction in awarding the payments of USD 1,526,888 as he considered the dealings between the parties prior to the signing of the agreements.

60. That the Arbitrator was allowed by the arbitration clause to make a finding and determination of the aforementioned issue.

61. It was further pointed out that all the issues that the Applicant complains of were pleaded by the Respondent in its Statement of Claim and the Arbitrator made specific findings with regard to the same.

62. Counsel to the Respondent further added that the financial report introduced during the submission stage did not have the impact of prejudicing the Applicant as correctly pointed out by the Arbitrator during the arbitral proceedings.

63. The Respondent therefore contended that the same was admissible since the Arbitrator being the master of the procedure decided that there was no material introduced to warrant rejection of the report, or recalling the expert to be cross examined.

64. Furthermore, learned counsel to the Respondent sought to persuade the court that the requirements under section 35 of the Arbitration Act with regard to setting aside an arbitral award have not been satisfied especially those touching on jurisdiction and public policy.

65. The court was reminded about the finality of arbitration which precluded the courts from interfering with an arbitral award.

66. It was also the submission of the Respondent that the applicant cannot raise any issue in regard to jurisdiction at this juncture as the same should have been raised at the arbitral tribunal at the first instance in accordance to section 17 of the Arbitration Ac

67. It was submitted that some of the issues raised by the Applicant touch on actual finding of fact made by the Arbitrator of which cannot warrant court to interfere with the arbitral tribunal's finding.

68. That this include the scope of the arbitration clause including its interpretation, existence and terms of the oral agreements, findings on the payments made by the Respondent to the Applicant, including the dollar payments and credibility of the witnesses.

69. The Respondent relied on inter alia the cases of **Anne MumbiHinga vs. Victoria NjokiGathara Civil Appeal No. 8 of 2009,- Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] e KLR,- NyutuAgrovet Limited –vs- Airtel Networks Limited Civil Appeal (Application) No. 61 of 2012, and National Oil Corporation Ltd –vs- Prisko Ltd [2014] e KLR** in support of its submissions. In conclusion, the Respondent urged the court to dismiss the Application to set aside the award with costs.

Analysis and determination

70. After reviewing the Affidavits on record as well as the submissions of Counsels, and the authorities relied on the court finds the issue for determination in respect of the application is **whether the applicant has established sufficient grounds to persuade this court to interfere with the award made by the arbitrator and consequently set it aside.**

71. The jurisdiction of the Court under section 35 of the Arbitration Act in setting aside an arbitral award is a strict one. **Section 35 (2) (a) and (b) of the Act reads thus ;**

> **"(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;**
>
> **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 contains decisions on matters not referred to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

b. the High Court finds that –

i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. the award is conflict with the public policy of Kenya"

72. A reading of the above provision reveals that the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration.

73. The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend limits imposed by law; parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be heard. See the case of **Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] e KLR.**

74. The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.

75. Further, the court cannot interfere with the findings of fact by an arbitrator. See the case of **DB Shapriya and Co. Ltd VsBish International BV [2003] 2EA 404**.

76. From the pleadings and the arguments presented to the court, it is clear that the applicant predicated its application seeking to set aside the award of the arbitrator on **Sections 35 (2) (iv) and 2 (b) (i) & (ii).**

77. The same provisions grants this court jurisdiction to set aside an arbitral award where it is established by the aggrieved party that the arbitrator dealt with a dispute that was not contemplated by or not falling within the terms of reference to arbitration;that the award is in conflict with the Public Policy of Kenya and the subject-matter of the dispute is not capable of settlement by arbitration under the Laws of Kenya.

78. The Court will thus examine the arguments by the Applicants to see whether they fit or prove the grounds proffered. The Applicants therefore bear the onus of proof in this application.

79. The arbitrator dealt with a dispute that was not contemplated by or not falling within the terms of reference to arbitration.

80. Under this heading, the applicant flags out several issues.

- That firstly, the arbitrator dealt with pre- contractual matters and oral agreements between the parties before they executed the 14 agreements.

- That in so doing, the arbitrator completely disregarded the terms and conditions of the said agreements.

- The other aspect the applicant complains about was on interest awarded. It was the contention of applicant that the arbitrator acted outside his scope when he awarded a compound interest of kshs. 750,476,683/= and an interest on interest of kshs. 107,459,229/=

- Furthermore, the Applicant took issue with the fact that the Arbitral Tribunal awarded an income Opportunity loss of Kshs. 147,825,034/= and a foreign exchange loss of Kshs. 50,200,000/=.

81. The court, will therefore deal with each of these issues in turn as hereunder.

82. The Applicant asserts that the arbitrator dealt with matters not within the 14 agreements dated 8th February, 2011. The Applicant in particular pointed to the fact that the Arbitrator exceeded his mandate when he purported to examine the pre – contract negotiations and oral agreements between the parties before the 14 Agreements were executed.

83. The Respondent submits that, the Arbitrator did not exceed the scope of his mandate at all simply by juxtaposing the Applicant's complaints in its Grounds in support of the Application and the Affidavits, against the specific issues that the Arbitrator sought to address.

84. The basis upon which the Arbitrator considered the aspect of the oral agreement flows directly from the pleadings filed by the parties and the issues therefrom.

85. The court has gone through the respective award. I have made observations in particular, paragraphs 17.31 to 17.34 of the same.

86. In those particular provisions, the Arbitrator found that the arbitration clause was an all dispute resolution clause and that the same was wide enough in terms and encompasses any dispute between the parties touching on the transaction between the parties.

87. That the same included whether or not there were any oral agreements between the parties in connection to the purchase of the office complex.

88. Clause (U) provides for Dispute Resolution. The same provides:-

> *95. " Any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the Arbitration Act 1995 of Kenya as amended by the Arbitration (Amendment) Act 2009 or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by the agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto"*

89. I have carefully examined the said clause together with clauses D and T of the special conditions of the contracts.

90. The arbitration agreement talks of ……. "Any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party ……." It would appear on the face of it that all disputes of whatever nature touching on the transaction between the parties were to be referred to arbitration.

91. Further the clause seems not to differentiate between disputes from the pre – contract stage or after the contract stage.

92. However, once you read it together with clauses D and T of the contracts, the question which comes to the mind is whether the terms of references were confined to the four corners of the contracts (14 agreements).

93. Clause D provides **"…this agreement constitutes the entire agreement between the parties and any representations, warranties or statements whether written, oral or implied and whether made before or after this agreement is expressly excluded"**

b. Clause T of the same agreements states that;

"Each of the parties hereby, agrees and confirms for the purposes of the law of contract Act (cap 23 of L.O.K) that it has executed this agreements with intention to bind itself to the contents hereof"

94. The Arbitrator held that, the Arbitration clause gave him a wide berth to adjudicate on any dispute between the parties in connection to the transaction without reference to the content of clause D above.

95. Further the Arbitrator made a finding that, the agreements dated 8th February, 2011 were procured under duress and therefore voidable.

96. under section 17 of the Arbitration Act, the arbitrator is empowered to decide on the existence and validity of an arbitration agreement, however, the arbitrator is bound by the terms of the reference and the issues in dispute must be "contemplated by the parties in the agreement to arbitrate as a subject of a reference.See**Settling Disputes Through Arbitration In Kenya By Dr K Muigua page 93"**.

97. In the reference to the arbitration, the Claimant invoked the 14 agreements for lease. The agreements are in writing and therein spell out the respective terms and conditions of the parties. I have perused some of the more relevant terms and conditions of the contract for purposes of this dispute.

98. This would appear to be a typical agreement for sale of immovable property and therefore the provisions of the Law of Contract Act demanded that the agreements for sale of the 14 office units by the Applicant to the Claimant be in writing, be signed by all parties, the signatures be attested by a witness who is present when the contract is executed and crucially, that no suit could be sustained on such a contract without a written agreement.

99. After setting out the arbitration clause, the Hon. Arbitrator ruled as follows;

100. Para 17.32 "My interpretation of this clause is that this is an all dispute resolution clause and therefore I find that contention by the Respondent (Applicant herein) that the Tribunal should restrict itself to the contents of the agreements of 8th February 2011 to be restrictive interpretation of the dispute resolution clause ".

101. Para 17.33 "I find and hold that the arbitration clause in the agreement is wide enough in terms and encompasses any dispute between the parties touching on the transaction between the parties."

102. Having found that he had power to deal with the pre-contract negotiations and terms, the Hon. Arbitrator proceeded to find that the oral agreements or negotiations between the parties were the terms of the agreement between the parties. He states as follows:Para 18.20 "I therefore find as follows in respect of the above issues. That the Agreed Terms of Purchase ("ATP") as set out fully in the Statement of Claim on pages 6 and 7 paragraph 13 items (d) to (k) reflect the true terms of the oral agreements between the parties, that is…….. "

103. After going through the parties agreements pleadings and the submissions the court, makes a finding that ,Clause D of the contract did set the scope of the arbitrator's mandate and no amount of construction

of the arbitration clause could expand the arbitrator's jurisdiction to include the so called oral agreements nicknamed as Agreed terms of purchase (A T P).Clause D provides in part, thus;"agreement constitutes the entire agreement between the parties and any representations, warranties or statements whether written, oral or implied and whether made before or after this agreement is expressly excluded"

104. Further, the agreements referred to as the ATPs were not contemplated by the parties in view of clause T in special conditions on application of the provisions of **Law of contract Act ,(cap 23)** and the binding effect of the agreements stipulated therein.

105. The Hon. Arbitrator's findings as above with respect expanded his mandate completely outside the contemplation of the parties who referred the 14 agreements to him to arbitrate over a dispute.

106. The Hon. Arbitrator was duty bound to stick to the 14 agreements and interpret the matters of breach as pleaded by each party and if he found that there was breach, determine what damages, if the same are pleaded and proved, were payable to the injured party.

107. The 14 agreements were agreements for sale of land (offices). They consisted a full package of the terms and conditions of the agreement between the parties.

108. There was clear evidence before the Hon. Arbitrator that the agreements were negotiated fervently and consciously between the parties and their advocates.

109. They incorporated the Law Society's Conditions of Sale. Special Condition D stated clearly that the Claimant had not received any representations or warranties from the Applicant to enter into the agreements.

110. Most importantly, the parties had agreed under Special Condition T that the agreement was a legally binding agreement between the parties.

111. It was not thus open to the Hon. Arbitrator to invoke alleged oral agreements between the parties "existing before" they entered into the 14 agreements.

112. Importantly, when invoking the arbitration clause, the Claimant relied on the written agreement and NOT on what the Hon. Arbitrator christened ATPs.

113. Further, there was no way the Hon. Arbitrator could deduce a written agreement from a Statement of Claim as he did in paragraph 18.20 of the award. This position was tantamount to writing or re-writing the 14 agreements on the date of the trial.

114. The Hon. Arbitrator literally discarded the 14 agreements and thereby nullified the parties' contracts. The Hon. Arbitrator stated as follows in the award:Para "20.17 I therefore find that the Claimant had no option but to sign the 14 agreements so that it could have something in writing to protect the funds that had been advanced".

115. Para "20.18 I further find that the terms of the said agreement were not freely agreed upon and the Claimant had been boxed into this situation by the Respondent to safeguard itself against its illegitimate conduct".

116. Para 20.21 "I find that the agreements of 8th February, 2011 were prepared at the tail end of the transaction and were designed to afford protection to the Respondent for its acts and omissions ".

117. Para 20.22 "I further find that the Special Conditions D was meant to sweep under the carpet and sanitize the various acts of default by the Respondent as a property developer".

118. Para 20.23 "I find also that the Special Conditions D were not part of the oral agreements between the parties under which the advance payments were made".

119. The findings by the Hon. Arbitrator fly off in the face of the testimony of Mr. Bhalla Advocate who negotiated the agreements and who admitted under cross-examination, that the agreements were binding upon the parties.

120. It is worth noting that, the Claimant in its Statement of Claim did not disown the 14 agreements. Instead, the Claimant pleaded as follows in the Statement of Claim:"Paragraph 80. At all material times the Claimant was ready, able and willing to fulfill its obligations in accordance with the agreements."

121. Paragraph 81. "That by a letter dated 28th March 2011 the Claimant, through its previous advocates informed the Respondent that it was ready to fulfill all its contractual obligations in accordance with the agreements ……. "

122. Paragraph 84. "As a result of the said breaches of the agreements by the Respondent and repudiation of the same by the Respondent, the Claimant as it was entitled to do, accepted the Respondent's repudiation and terminated the agreements".

123. Paragraph 85. "The Respondent did not accept the claimant's termination of the agreements".

124. Paragraph 86. "Subsequent to the termination of the agreements as aforesaid the claimant on 11th July 2011 …….. Issued to the respondent fourteen (14) separate Notices of Arbitration pursuant to each of the agreements".

125. To buttress the issue, the Claimant in its Statement of Claim, did not seek for any declaration (s) that the 14 agreements be declared void or voidable or that there be declarations that the amounts paid as documented on the 14 agreements, were obtained from it by false pretenses.

126. Nowhere in the prayers by the Claimant in the reliefs sought is a prayer for any nullification of the contracts. Instead, all the prayers are pleaded as damages for breach of the contract.

127. It is thus apt to hold that the Hon. Arbitrator lacked mandate to make the findings he made regarding the validity of the 14 agreements. After misapprehending his mandate, he opened a door through which he could make all sorts of findings NOT REASONABLY CONTEMPLATED by the parties to a sale of immovable property.

128. On this issue, I rely on the decision of Kimaru J in**MILIMANI HCCC No. 913 of 1999 [2009] eKLRRURAL HOUSING ESTATES LTD vs ELDORET MUNICIPAL COUNCIL.**

129. In that case, the parties had entered into a joint venture for the development and sale of property in which the Defendant Council would borrow funds from the National Housing Corporation to facilitate development on the Plaintiff's properties measuring 207 Acres.

130. The Joint Venture failed due the inability of the Defendant to secure the loans. When the Joint Venture failed, the Plaintiff lodged arbitration proceedings and the arbitrator awarded the Plaintiff damages in the sum of Kshs. 11,284,317/= with interest at the rate of 26% per annum until full payment.

131. The Plaintiff applied for leave to enforce the award while the Defendant sought setting aside of the award on grounds similar to the application filed by the Applicant herein.

132. Kimaru J, while setting aside the award, stated as follows at pages 5 to 6 of the ruling:

> *"I have carefully read the joint venture agreement together with the annexed loan agreement. It was clear that the agreement did not specifically provide for the payment of damages in the event of failure of the project. In fact, under clause 3.04 (b), it was only the defendant who was entitled to be paid liquidated damages in the event that the Plaintiff would fail to perform its part of the joint venture agreement……. It is trite law that where a contract does not provide for payment of damages, then, such damages, unless liquidated and reasonably foreseeable from the conduct of*

the offending party, may not be awarded by the tribunal hearing the dispute.Upon evaluation of the arguments advanced on behalf of the Plaintiff and the Defendant, it was clear that the Defendant is on firm ground when it submitted that the arbitrator dealt with a dispute not contemplated by or not falling within the terms of reference to arbitration.…… The arbitrator fell into serious error of the law when he purported to hold the Defendant liable on the basis of subsequent unsuccessful negotiations that were held between the Plaintiff and the Defendant after the failure of the project with a view to resuscitating the project. In my view, the basis of the agreement between the Plaintiff and the Defendant was the joint venture agreement and any subsequent negotiations that did not result in further agreement being entered into, cannot, by any stretch of imagination, be considered as a basis of contractual relationship between the Plaintiff and the Defendant".

133. In sum, I find that the Arbitrator acted outside his scope of reference when he adjudicated on matters that entailed the oral agreements. Equally I find merit in the assertion of the applicant that the Arbitrator attempted to re-write the 14 agreements between the parties.

1334. The Arbitrator wrongly found that the parties had an oral agreement and further the parties had conferred upon him the power and authority to decide outside the confines of the written agreements.

135. Further, I am of the view that the agreements of 8th February, 2011 did capture the full terms of what was agreed between the parties and in the interest of justice the oral agreement between the parties cannot be factored in the determination of the dispute.

136. I now turn to the issue of the interest. The Applicant's grievance relates from the award of a compound interest of Kshs. 750,476,683/= and repeated interest of Kshs. 107,459,229/= awarded. The said interest was said to be unconscionable and beyond the scope of the arbitrator.

137. The Applicant pointed out that parties adopted the Chartered Institute of Arbitration Rules (hereinafter referred to as "the Rules)" as the procedural rules. This is in line with Section 20(1) of the Act which provides that"-

> "Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by arbitral tribunal in the conduct of the proceedings".

138. **Section 32 (C) of the Arbitration Act** provides that an arbitral tribunal has power to award simple and compound interest. However, **Rule 16 (C) (11) of the Rules** provides that an arbitrator can only exercise that power if a party specifically seeks compound interest as special damages in its Statement of Claim.

139. I have seen the Respondent's Statement of Claim and specifically page 41 of the same under the header *"Loss of interest on advance payments computed at bank base rates"*. The same is denied in the Applicant's Statement of Defence and Counterclaim.

140. In the Arbitral Award, the Arbitrator deals with the same under clause 24 and 25 at page 61 to 65 respectively. However the court having found that the tribunal detoured out of the course of the terms of reference and in fact crafted agreement for the parties contrary to clauses no D and T of the special conditions of agreements, the court find same moot to determine it.

141. This court cannot enter the arena of finding as to whether the arbitrator's finding of awarding the interest was erroneous. In any case, the issue of the advance payments allegedly made was also something the Arbitrator tackled having found that he had jurisdiction to venture into the pre-contract negotiation phase which the court has found was out of his scope of authority under the terms of the contracts.

142. Turning to the issue of income opportunity cost, it was the Applicant's submission that the same was outside the scope of reference to the arbitrator. That the same was actually another claim of interest disguised as a different head of damage. Is there any merit to this argument?

143. It was the Respondent's contention that if the promised date of completion had been kept it would have had the use and benefit of the building and would have also accrued rental income. As such, it was argued that the Respondent suffered income opportunity loss.

144. On the part of the Applicant this claim amounted to double compensation. Once again the court finds that the allegation of failure to keep promise on completion date could have been addressed in the context of the remedies set out in the contract. Opportunity cost claim was not within the four corners of the contracts nor contemplated by the parties see clause D and T of the special conditions.

145. Clause X of the special conditions in the contract outlawed compensation or damages on account of delay beyond the completion date. Therefore, an award for such head of damages is hemmed by the arbitration clause itself and the terms of the reference.

146. That is why **section 35(2) (a) (iv) of the Arbitration Ac**t uses deliberate and carefully chosen words as highlighted herein below;

> "An arbitral award may be set aside by the High Court only if 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,…"

147. I am therefore in agreement with Gikonyo J in the case of **Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited [2015] e KLR,** when he stated thus;

> "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."(See pages 118-119)"

148. From the foregoing, it is clear that one must refer to the arbitration agreement, specifically the arbitration clause to determine whether the issue of the income opportunity loss was within the scope of the arbitrator to determine.

149. As previously pointed out, an arbitral award may be set aside by the High Court only if 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.

150. I have earlier in this analysis set out the arbitration clause. I have also alluded to the relevant part of the award granting damages on income opportunity loss.

151. Having carefully analyzed the same, I have come to the conclusion that the claim for income opportunity loss was not contemplated by clause U of the contracts as one of the disputes which were to be referred to arbitration.

152. The arbitral agreement used wide terms and permitted reference to arbitration of any dispute between the parties as

> "Any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party".

However the same was limited by the content of clauses D and T of the special conditions of the contracts.

153. I must state that how the Arbitrator arrived at the figure as illustrated in paragraph 26.3 to 26.5 of the award, where he went into the rigors of explaining how the Respondent arrived at the figure of Kshs. 147,825,034 as income opportunity loss, is moot in view of the above finding by the court.

154. This leaves me with the issue of whether it was right for the Arbitrator to award Kshs. 50,200,000/= as exchange rate fluctuation loss. The same was based on a claim by the Respondent that it had borrowed USD 9,000,000 to meet the completion date of 30th June, 2010.

155. That the funds were borrowed in USD primarily because local funds of this amount would not be available in absence of collateral security. That therefore due to the non- performance of the Applicant the Respondent had to repay the loan of USD 9,000,000 meant to purchase the office complex in question.

156. I agree with the submissions of the Applicant that, the Respondent herein decided on its volition to borrow the monies towards the purchase of the office blocks in foreign currency. The same was not agreed upon by the parties, neither was it a term of the contract.

157. Indeed, there was no indication by either parties on any borrowing. By awarding the forex losses the Arbitrator fell into error as the currency used in the agreements was in Kenya Shillings. By assessing and awarding the forex losses, I am of the view that the learned Arbitrator exceeded his scope and mandate.

158. I understood Mr. Mwangi to argue that the arbitrator awarded a sum of USD 1,526,800 which was allegedly paid to the Respondent as an advanced payment. According to the Applicant during the proceedings, the Financial Expert of the Claimant, Mr. MihirChalisazar stated that the said amount was outside the books abroad.

159. According to the Applicant this was patently illegal and by granting the said amounts as advance payments, the Arbitrator tainted the entire arbitral award.

160. I have considered the above submissions and the rebutting arguments by the Respondent.

161. I need not re-invent the wheel about what constitutes “Contrary to Public Policy’’ as a ground to set aside an arbitral ward. Ringera J (as he then was) in the case of **Christ for All Nations v Apollo Insurance Co Ltd, Nairobi HCCC No. 477 of 1999** stated that;

> “… I take the view that although public policy is a most broad concept incapable of precise definition, … an award will be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough.…”

162. Without a doubt, an award which is inconsistent with the Constitution or the law, written or unwritten, is said to be against public policy and it will be set aside under section 35 of the Arbitration Act.Has the Applicant successful persuaded this court that the award of USD 1, 526,888 was against public policy?

163. I have carefully examined the Award by the sole arbitrator. At page 20 to 23. The same contains the reasoning of the Arbitrator when it comes to the advance payment of the USD 1, 526,888.

164. The Arbitrator analyzes the evidence adduced before him, including the testimony by Mr. MihirChalisazar. According to paragraph 17.19, the Arbitrator stated that the fact that the advance payments were made before any sale agreement was entered into and formally concluded, and that further that part of the payment was made in US Dollars to a Third party , an entity outside Kenya ex facie, did not connote illegality.

165. However the tribunal ignored the contents of clauses D and T of the special conditions in the contract. The same alleged payment was not part of the contract nor contemplated by the parties. In any event under clause T of the contract it would fall a foul to the provisions of law of contract Act cap 23 and thus an award thereof contrary to public policy.

166. With regard to the question that the Arbitrator breached the provisions of sections 19 and 27 of the arbitration Act by admitting an expert report through submissions was against public policy; the tribunal held;

> "22.3.....I have looked at the report in question and in my mind it raises no new material which goes to the core of the Claimant's claim.

167. The report simply provided an up to date calculation of interest claims up to the date of the submission and the same is not prejudicial to the Respondent. The Claimant was entitled to make the submissions and update its claim up to the date of submission. The update was to enable the Tribunal to have a clear picture of the Claimant's claims as updated"

168. In my view the Arbitrator was not in order to make the above finding. As stated therein, the report was prejudicial to the Applicant as it up dated the claim of interest.

169. The court cannot therefore uphold the introduction of the said report at the submission stage. The introduction of the report at this stage was against the law as the applicant did not get opportunity to interrogate the same nor cross-examine the author.

170. As was rightly submitted by the Applicant when it relied on the case of **Rashid Moledina& Co (Mombasa) Limited & Others vs Hoima Ginners Limited (1967) E.A. 645,** courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute.

171. However when the arbitrator acts contrary to law by admitting document at the submission stage, the same falls afoul to the law and thus contrary to public policy.

Final Rendition

172. Accordingly, having considered the pleadings, the affidavits, the written submissions and the case law in support of the respective parties' cases, I am of the view that the Applicant has demonstrated that all the issues fell out of the scope of reference of the Arbitrator and thus, the court makes the following orders;

1. The award is hereby set aside.

2. Each party shall bear own costs of the application in view of the decision of the court.

173. It is so ordered.

APPLICATION FOR RECOGNITION AND ENFORCEMENT OF AWARD

174. As indicated in the earlier part of this finding, the court will there not consider the Notice of Motion dated 4th March, 2015 for recognition and enforcement of the award herein as a decree of the Court. Having determined the application dated 25th February, 2015 which was for setting aside the final award herein, it's obvious that there is no pending application under section 35 of the Arbitration Act. In view of the foregoing, there is no award which should be recognized by and enforced as a decree of this court.

The court thus makes the following orders;

1. **The Notice of Motion dated 4th March, 2015 is hereby dismissed.**

2. **Each party shall bear own costs.**

Dated, signed and delivered in court at Nairobi this 11th day of March, 2016.

……

C. KARIUKI

JUDGE