REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 375 OF 2014

AFRICA PROJECT CO-ORDINATION AGENCY....PLAINTIFF

-VERSUS-

THE GOVERNMENT OF KENYA

THROUGH THE PERMANENT SECRETATRY,

MINISTRY OF LOCAL GOVERNMENT

ATTORNEY GENERAL.....RESPONDENT

RULING

1. The **Notice of Motion** Application by the Applicant is undated, but is filed herein on 20th August 2014.

The application seeks to secure the following orders;

a. ***That the arbitral and award by Lucas A. N. Ochieng dated 31st October 2013 and delivered on 22nd May 2014 be set aside.***

b. ***That the dispute between the Applicant and the Respondent be sent back to the sole arbitrator for consideration.***

c. ***That the costs of this application be provided for.***

2. The application is premised on the grounds set out therein, that the award is inconsistent with the law of contract; that it is contrary to justice and morally; and that the arbitrator misapplied clause 6.5 of the special conditions of contract to deny the applicant interest.

3. The Respondent has opposed the application vide Grounds of Opposition dated 10th October 2014 and filed herein on 14th October 2014. The Respondent raises three issues in its objection, that the application is defective for want of compliance with provisions of section 35 (3) of the Arbitrations Act; that the orders sought are not available as the application offends section 39 of the Arbitration Act; and that the application is incompetent and misconceived as it does not raise any public policy issue and is therefore an abuse of the process of this court.

4. Parties with the leave of court filed submission to the application. I have considered the application and opposing submissions and I raise the following issues for determination.

i. ***Whether the application raises any public policy issues***

ii. ***Whether the application satisfies the relevant sections of Arbitration Act.***

5. The Applicant has submitted that the award is inconsistent with the public policy of Kenya. To begin with, the Applicant submitted that the award is inconsistent with the Kenyan law of contract in that the arbitrator failed to identify the ambiguity in the description of the scope of the works and thereby to interpret the alleged said ambiguity against the Respondent, who had drafted the contract. The Applicant contended that one of the issues for the tribunal's determination was whether works in respect of **Madogo** was part of the contract. It had been the Applicant's position that the contract did not include **Madogo** while the Responded had argued that it did. The Applicant submitted that to determine this issue, the tribunal reproduced the paragraph in the description of works that defined the scope of works on page 12 of the award as follows:

> ***"peri-urban zones with serious signs of urban sprawl outside the established boundary (e.g other planning areas (Madogo) across the Tana River with special planning needs relating to Garissa town)" … the informal settlement river Tana and its outlying areas along the Nairobi-Garissa road in Tana River district … and the Tana river flood plain". Madogo was specifically mentioned in the contract, and I find that work in respect of Madogo was an integral part of the work that the Claimant undertook to do under the contract.***

6. The Applicant submit that nothing should have been easier during the drafting of the standard contract by the Defendant than for it to include **Madogo** directly in the scope of works instead of including it in brackets and as an example. Indeed, the Applicant avers that the clause 2.0 cited above by the tribunal confirms this lack of clarity in the scope of the contract in that it does not mention **Madogo** by name. They therefore submit that the tribunal's finding that the Claimant did not indicate that there was no ambiguity in the contract is not supported by the evidence before it, and that said finding contradicts the fact that the lack of directness in Clauses 2.0 and 3.3 regarding Madogo are actually evidence of ambiguity in the scope of works. The Applicant cited the case of ***United (EA) Warehouses Limited vs Care Somalia and Southern Sudan (2015) eKLR.*** In that case, the Applicant had sought to set aside an award for being in conflict with the public policy of Kenya for failing to hold that parties must be held to the terms of agreements that they had entered into freely. The court had this to say on the concept of public policy:

> ***Public policy was considered by Ringera J. (as he then was) in the case of Christ for all Nations v. Apollo Insurance Co. Inconsistent with the constitution or other laws of Kenya an act is contrary to public policy if it "(a) Inconsistent with the constitution or other laws of Kenya, whether written of unwritten;***

The Applicant submitted that in the instant case the award abrogated Kenya's Public Policy.

7. In response, the Respondent in their submission defined public policy as a system of laws, regulatory measures, course of action, specific legislation and more broadly defined provisions of constitutional or international law. The Respondent cited ***Onyancha J in Glencore Grain Kenya Limited – vs – TSS grain millers limited (2002) KLR 606*** where the court held that … in issues concerning public policy of Kenya, this Court will in addition to what has been held herein before, examine the award even at the state of enforcement to determine whether or not the Arbitral tribunal had jurisdiction in respect of the disputes relating to the underlying contract. That it is the right of court to examine the award herein and determine whether the Tribunal issued an award contrary to the Law of Contract, Cap 23 of the Laws of Kenya. The Respondent submitted that the Award is not contrary to any provision of the Contract law or any other written law of Kenya, and that the question of ambiguity of the contract with regard to scope of works was determined by the Arbitrator who found that the same was not ambiguous. The Respondents aver that it is clear that the Applicants are seeking an appeal against the award on a question of fact. They urged the court to dismiss the application.

8. I have carefully considered the issue of the public policy. I have not seen how the Kenya contract Law has been violated by the arbitrator. The arbitrator merely set the boundaries of works. If the Applicant was not happy with that boundary, the Applicant had the right to appeal on that issue under S. 17 (3) of the Arbitration Act. This application is based on a faulty section of the Arbitration Act. Ideally, since the Applicant is alleging that the arbitrator expanded the scope of the works by failure to identify the alleged ambiguity in the description of the scope of the works and thereby including **Madogo** area in the scope, the Applicant ought to have challenged this inclusion under S. 17 (3) which states thus;

> ***"A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."***

9. That plea can still be raised later. The arbitrator may decide on the issue, and where any party is unhappy, that party has the right to appeal to the High Court within 30 days, of the arbitrator's decision, and the decision of the High Court shall be final. There is no evidence that the applicant herein raised the issue of excess jurisdiction with the arbitrator, or that the arbitrator decided on the issue to the detriment of the Applicant who then appealed to the High Court. This court finds that the complaint raised herein has nothing to do with either the Kenya Law of Content or Kenya Public Policy. Therefore in answer to issue number one herein it is the finding of this court that the application does not raise any public policy issues.

10. Further, it is the finding of this court that despite there being no contravention of the contract law, the court ought not to interfere with an award only because it would have reached a different view from that of the Arbitrator. ***Ringera J in Christ for All Nations vs Apollo Insurance Co. Limited (2002) 2 E. A. 366 held … a court will not interfere with an award of the arbitrator on the question of public policy on the ground that there is an error of law apparent on the face of the record even if the view taken by the Arbitrator does not accord with the view of the court.*** The court however went on to hold that an award may be set aside for being inconsistent with public policy if it was shown that the award was (i) inconsistent with the constitution or other laws of Kenya (ii) inimical to the national interest of Kenya or (iii) contrary to justice and Morality. Those exceptions to not apply to the matter at hand.

11. The second issue is whether the application has satisfied the relevant sections of the Arbitration Act. As this court has already observed, the Applicant ought to have objected on the alleged expanded scope under S. 17 of the Act. The Applicant did not do that. Instead, the Applicant has relied on public policy provisions vides S. 35 (2) of the Act. This section clearly is not applicable to this application since this court has already found that the Applicant's grievances have nothing to do with public policy. The only other option for the Applicant, if it was dissatisfied with the award, was to appeal against the award under S. 39 of the Act on questions of law. The Applicant has not done that, and there is nothing more to say on that issue.

12. Pursuant to the foregoing paragraphs of this ruling the undated application filed herein on 20th August 2014 by the Applicant faces only one inevitable fate: the said application is herewith dismissed with costs to the Respondent.

READ, DELIVERED AND DATED, AT NAIROBI THIS 17th DAY OF MAY 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Absent for Plaintiff

Absent for Defendant

Teresia – Court Clerk