REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISON

MISC APPLICATION. NO.506 OF 2012

CENTURION ENGINEERS & BUILDERS LTD.....PLAINTIFF/CLAIMANT

VERSUS

KENYA BUREAU OF STANDARDS…….....DEFENDANT/RESPONDENT

RULING

1. This Decision concerns the Award of the Learned Arbitrator Onesimus Mwangi Gichuiri dated 5th May, 2015.

2. It involves two Applications. The Application dated 9th June 2015 for setting aside and/or varying of the Award. And the Notice of Motion dated 10thAugust 2015 filed pursuant to Section 36 of the Arbitration Act seeking to have the Award recognized by the Court and adopted as its Judgement.

Background

3. Kenya Bureau of Standards (The Respondent) is a State Corporation established under the Standards Act (Cap 496 Laws of Kenya. Desirous to refurbish its existing Bio-Chemical Laboraties, it invited bids for building works under Tender No. KEBS/T054. Centurion Engineers and Builders Limited (The claimant), a Limited Liability Company incorporated in Kenya was among the bidders and emerged successful.

4. Although the Claimant was the main Contractor, the refurbishment project constituted other subcontracts with independent agreements. For instance, Neliwa Builders and Civil Engineers Ltd was the Mechanical Installation subcontractor, Ultimate Engineering Ltd was the Electrical Installation subcontractor, while Snow Peak Refrigeration and General Contractors Ltd was the Air Conditioning and Ventilation subcontractor.

5. Important for the matter at hand is that, in respect to the main contract an agreement dated 27th April, 2009 was signed between the Claimant and the Respondent. The scope of engagement was builders works for the proposed alterations and extensions to laboratory including builders works in connection with specialist Installation and Construction. The Contract period was 24 weeks commencing from 27th April, 2009 and ending on 31st October 2009. The contract sum was agreed at Kshs.79,910,440/= (Kenya Shillings Seventy Nine Million, Nine Hundred Ten Thousand, Four Hundred and Forty).

6. The Building works commenced but as sometimes happens, variation to the works were necessary. Upon the request of the Respondent, a Supplementary Contract was signed between the parties making

provision for extra work and incorporating the required variations. The Parties herein are not agreed as to the effect and purport of the Supplementary Agreement and their disagreement was one of the reasons that gave rise to the Dispute that was eventually referred to Arbitration.

7. The Respondent took, and still takes, the view that the Supplementary Agreement has two components. It provides for variation works under the original contract for Kshs.11,810,820/- and new additional works worth Kshs.20,137,017.00. Further that the contract**"clarified that the extra works listed thereon were the only extra works necessary to complete the project. Accordingly, it rules out any further variation under the Supplementary Contract itself while capping all variation under the original contract at Kshs.11,810,820.00."**

8. The Claimant did not think that the Supplementary Agreement was as restrictive as suggested by the Respondent and argued that with respect to the final account, the Agreement provided that:-

> **"Upon completion of the project, the works will be measured and evaluated by Consultants from the Ministry of Public Works and any necessary variations will be addressed accordingly".**

9. Anyhow, the Claimant carried out the works including variations and completed the project in July 2010. Upon submission of its claim, the Respondent declined to pay. An aggrieved Claimant moved to the High Court and through a Plaint dated and filed on 8th August 2012, in these proceedings, the Claimant sought the following Prayers:-

> **a) Kenya Shillings One Hundred Seventy Eight Million, six Hundred Ninety Two Thousand, Three Hundred Eighty Four Hundred, Cents Thirty Five only (Kshs.178,692,384.35) together with interest thereon at the prevailing Kenya Commercial Bank Interest rate or such other rate as the court may deem fit until payment in full.**
>
> **b) Compensation and damages for disappointment arising out of the breach of the Contract herein by the Defendant.**

10. Allowing an Application of 7th September 2012 by the Respondent, Havelock J. on 8th October 2013 ordered as follows:-

> **(i) THAT the suit filed herein by the Plaintiff/Respondent be and is hereby stayed pending its determination through arbitration as provided for in the Agreement that was entered into between the Parties to this suit.**
>
> **(ii) THAT the dispute between the Parties be referred to arbitration.**
>
> **(iii) THAT costs be in the cause.**

11. Upon appointment of an Arbitrator, the Claimant presented its claim through a Statement of Claim dated 15th July 2013 in which the Claimant sought the following Prayers:-

> **(a) Kenya Shillings Three Hundred and Seventy One Million, Sixty Six Thousand, Fifty Four, Cents Fifty Nine only (Kshs.371,066,054.59) together with interest thereon at the prevailing Kenya Commercial Bank interest rate or such other rate as the court may deem fit until payment in full.**
>
> **(b) Further and in the alternative to but without prejudice to paragraph (a) hereof compensation and damages for disappointment arising out of the breach of the contract herein by the Respondent.**

12. This Statement of Claim was filed with the Arbitrator notwithstanding the already filed Plaint. Notably, the claim was no longer for Kshs.178,692,384.35 but for a substantially higher sum of

Kshs.371,066,054.59. One of the complaints by the Respondent is that the claim as presented and considered by the Arbitrator was different and outside the scope of the Dispute referred to him by Court!

13. In reply to that Statement of claim, the Respondent filed a Memorandum of Reply dated 2nd August 2013. The Claimant filed an answer to that Reply on 13th August 2013. The stage was set for the hearing to proceed.

14. And the hearing proceeded and the Arbitrator made an Award dated 28th November 2013. The Respondent was displeased and moved the High Court with a Notice of Motion dated 20th January 2014 seeking to set aside and/or vary the said Award. The Grounds upon which the Respondent sought the Orders will have some implication on the outcome of the matter at hand. After hearing parties on the Motion Havelock J. made the following ultimate Orders on 26th June, 2014;-

> **"As a result, I set aside the Award of the Arbitrator dated 28th November 2013. I direct that this matter be referred back to the Arbitrator in order for him to take into account the contents of the aforesaid paragraphs 5 and 6 and to hear evidence in relation to the allegations made herein".**

It was after this second referral that the present Award was made.

15. The Court proposes to deal with the Application for setting aside and/or variation first as its outcome will substantially determine whether or not the Court will recognize the Award and enforce it. Indeed Section 37 of the Arbitration Act on enforcement and recognition in subsection 2 suggests that this would be the way to proceed, it reads:-

> **"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."**

16. The Motion for setting aside is premised on three Grounds:-

> **a) That the Arbitrator entertained and purported to determine a dispute falling outside the terms of the Reference to Arbitration.**
>
> **b) That the Arbitrator's Award contains decisions on matters beyond the scope of Reference.**
>
> **c) That the Arbitrator's Award is in conflict with the Public Policy of Kenya.**

17. After reading the Application, the Response to it and the written Submissions of Counsel as highlighted orally, the Court formed the view that it should bear in mind the following board principles as it determines the matter.

18. The intervention of Court in Arbitration matters is limited and the Arbitration Act (hereafter **the Act)** is unequivocal on this. Section 10 thereof provides:-

> **"Except as provided in this Act, no Court shall intervene in matters governed by the Act".**
>
> As an emphasis that the role of Court is facilitative Section 32A reads:-
>
> **"Except as otherwise agreed by the Parties, an Arbitral Award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act".**
>
> Article 159 2(c) of the Constitution directs the promotion of alternative forms of dispute resolution

including Arbitration. It would therefore be inimical to National Policy if the Courts were to invoke an intrusive and involved scrutiny or review of the Arbitration process that oversteps the limits prescribed by the Arbitration Act.

19. However both sides of the divide accept that one of the restricted ways in which the High Court can intervene is the recourse set out in Section 35 of the Act which provides as follows:-

"Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if—

(*a*) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the 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:

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award."

20. It was emphasized and this Court accepts that as a general rule Arbitrators are the Masters of the facts and Courts cannot interfere with findings of facts by an Arbitrator. Counsel for the Respondent also drew the Courts attention to this useful passage from the decision of Havelock J. in **Kenya Research Foundation vs. Kenchuan Architect ltd** [2013] eKLR.

"In the case of MORAN v. LLOYDS [1983] 2 ALL ER 200 it was reiterated that the Courts

cannot interfere with findings of facts by an arbitrator. The Court's intervention is limited to errors of law. The Court's intervention is limited to such errors of law which are apparent in the face of the Award. It is only when an erroneous proposition of law is stated in the Award that a Court can set aside the award or remit it to the arbitral tribunal for re-consideration on the grounds of such error or law apparent on the face of the record. The Court will not interfere with the Award unless some real injustice or substantial diversion from the law can be proved".

21. On Public Policy consideration there was aconsensus by the parties that this holding by Ringera J.(as he then was) in **Christ for all Nations vs. Apollo Insurance Co. Ltd** is a beauty to behold:-

"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award could 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 or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals".

Is Award outside the terms of Reference?

22. Let me start by making an observation that may well be obvious. Clause 45.0 of the Agreement of 27th April 2009 was an Agreement by the parties herein to refer any dispute or difference between them to Arbitration. However the scope of the Arbitration Clause is not the same thing as the scope of the matter referred to Arbitration. But it must be granted that the matters referred to Arbitration must necessary fall within the Arbitration Clause. The scope of the Dispute should be easily discerned by the Pleadings placed before the Arbitrator.

23. The position taken by the Respondent is that the terms of Reference to Arbitration were encompassed in the Order of Havelock J. of 8th October 2012 referring the matter to Arbitration and that the question was whether the sum of Kshs.178,692,384.3 was owing from the Respondent to the Claimant as alleged in the Plaint dated 8th August 2012. The Respondents' therefore assail the Award which determined a question whether the Respondent owed the Claimant the sum of Kshs.371,066,054.59 as asserted in the Statement of Claim dated 15th July 2013.

24. The Claim presented to Court by the Claimant is the Plaint of 8th August 2012 which was for the following Orders:-

a. Kenya Shillings One Hundred Seventy Eight Million, six Hundred Ninety Two Thousand, Three Hundred Eighty Four Hundred, Cents Thirty Five only (Kshs.178,692,384.35) together with interest thereon at the prevailing Kenya Commercial Bank Interest rate or such other rate as the court may deem fit until payment in full.

b. Compensation and damages for disappointment arising out of the breach of the Contract herein by the Defendant.

25. Following an Application by the Respondent, Havelock J. on 8th October 2012 made the following Order:-

"1. THAT the suit file herein by the Plaintiff/Respondent be and is hereby stayed pending its determination through arbitration as provided for in the agreement that was entered into between the parties to this suit.

2. THAT the dispute between the parties be referred to arbitration.

3. THAT costs be in the cause."

26. The first part of that Referral Order was as clear as could be. What was to be determined through arbitration was the suit that had been filed. And the order was an answer to the Respondents Notice of Motion of 7th September 2012 which specifically requested for the Prayer that was granted. The effect of that Order, in my view, was that it identified the dispute referred to the Arbitrator to be that presented in the Plaint of 8th August 2012. In that sense, the Referral Order defined the scope of the Arbitration.

27. Upon an agreement of and appointment of the Arbitrator, the Claimant appeared to have abandoned its earlier claim when it filed its statement of Claim dated 15th July 2013 now seeking as a main prayer a sum of Kshs.371,066,059.59 and not Kshs.178,692,284/= sought in the Plaint.

28. How did the Respondent react to this 'new' Claim? The Respondent filed a Memorandum of Reply to the Statement of Claim. The memorandum is dated 2nd August 2013. In it the Respondent did not raise the issue of the Plaint at all. The Respondent did not challenge the 'new' claim as being outside the scope of arbitration that had been referred by Court. It would seem that at this point, the Claimant had successfully taken the Respondent into a trajectory away from the Pleadings filed in Court.

29. That the Parties were to firmly stick to this new path is demonstrated by the proceedings before the Tribunal and even better still in the Application of the Respondent dated 20.1.2014. In this Application the Respondent sought the setting aside and/or variation of the Award that had been made by the Arbitrator on 28th November, 2013. In the Affidavit in support of that Application Mr. Charles Gachahi, the then Acting Managing Director of the Respondent Corporation, set out what the Respondent understood to be the question referred to the Arbitrator. In paragraph 22 of his Affidavit sworn on 20th January, 2014, he stated that:-

"22. THAT the questions referred to the Arbitrator for determination were:

a) Whether the alleged variations of the Contract which were operated to inflate its value from Kshs.79,910,440/= to the claimed value of Kshs.371,066,054 were lawful and proper.

b) What was the correct value of the work done by the Contractor.

c) Whether the Contractor was lawfully entitled to the claimed sum of Kshs.371,066,054.59.

The Respondent was well aware that as parties they had redelineated the bounds of the Reference by filing the Statement of Claim and the Memorandum of Reply to the Statement of claim.

30. By acceding to the filing of the Statement of Claim, the Respondent was, either consciously or unconsciously, accepting that the Claimant had by conduct, amended its claim. While such informality may not be tolerated in Court litigation, it may be acceptable in the less strict process of Arbitration as long as the objects of Pleadings are not defeated or compromised. These objects are, inter alia,:-

a) To inform each party of the case it has to meet before and at trial and to give a fair and proper notice to the opposite side of the case it has to meet to enable the party to frame and prepare its own case.

b) To define with clarity and precision the issues or questions in disputes and which fall to be determined by the Court or Arbitrator.

31. Through the Statement of Claim, the Respondent was informed, with clarity, the case it was to meet. The Respondent responded to it through its own pleadings and the hearing of the Arbitration proceeded on the basis of the larger claim. Looking at the Award the Arbitrator framed the dispute questions on the basis of the Claimant's claim and the Respondent's Reply. The Respondent did not suffer any prejudice nor was the scope of the Dispute uncertain. I find no merit in this first Ground.

Of the Determination of a question beyond the scope of Reference.

32. The submission by the Respondent in this respect is that:-

> **"In the Arbitration proceedings, the Arbitrator entertained a Claim based on an alleged certificate of payment dated 25th September 2013. This certificate referred to as Certificate No.10 was issued well after the suit herein was instituted, and long after the reference was made".**

33. This is how the Arbitrator dealt with the matter in the award,

> **"I have already made a finding that all the Interim Certificates No. 1 to 9 as well as the Final Certificate were properly issued and served upon the Respondent. In my finding what mattered was whether the Respondent had been served with the Certificates, when and if they were authentic. All this was confirmed by the Project Architect in the affirmative".**

The Final Certificate is the now controversial Certificate No.10.

24. The Arbitrator made this finding after observing that both sides had accepted the Certificate as binding in the course of the hearing. The Arbitrator made reference to Min.06.00 which showed the presence of Mr. J.O Arwa for the Respondent. Mr. Arwa himself argued the matter before me but made no reference to those proceedings. To allow the argument by the Respondent that the said certificate could not be a basis for the determination would be to allow the Respondent to resile from a position it had tacitly accepted. I need not say more of the matter. I find no merit in this complaint.

Award against Public Policy

35. An argument by the Respondent is that the award requires the Applicant to do something unlawful and to commit a crime. It is submitted that,

> **"If the Applicant were to comply with the Award then it would be in violation of the law as the award recognizes variation which are beyond 15% of the Contract. That this would be in clear violation of Section 4,5, 47 and 88 of the Public Procurement and Disposal Act and Regulation 31 of the Public Procurement and Disposal Regulations."**

36. In response the Claimant is of the view that the above arguments by the Respondents in support of its Public Policy arguments are grounds for appeal on a point of law which can only be taken up in an appeal under Section 39 of the Arbitration Act. That they do not fall within the ambit of Public Policy as envisaged under Section 35 of the Arbitration Act.

37. It was also the position of the Claimant that the Arbitrator had properly determined the same issues when they were raised before him. The Claimant concurs with the Arbitrator's evaluation and finding in respect to the Public Procurement and Disposals Act.

38. Then the Claimant cited the High Court decision in **Kenya Sugar Research Foundation vs. KenchuanArtitects Ltd** [2013] eKLR. The Claimant was of the view that similar arguments in respect of Sections 47 (a) and (b) of The Public Procurement and Disposal Act (2000) and Section 31 (a) (b) and (c) of the Public Procurement and Disposal Regulations 2006, were rejected by Court.

39. The arguments taken up by the Respondent had been similarly made before the Arbitrator who dealt

with it as follows:-

- **"This is a matter beyond the reference. I will however make my finding as stated because the parties have made submissions on it.**
- **The question of compliance or non-compliance of the Public Procurement and Disposal Act and the regulations made there under, is not an issue referred to me for determination.**
- **In my opinion, this is a matter touching on public policy and which can properly be considered by the Court, after delivery of the award if any party alleges that the award is contrary to public policy.**
- **The Claimant is a Contractor within the meaning of the Public Procurement and Disposal Act while the Respondent is a Procuring Entity within the meaning of the Act.**
- **Section 85 relied on by the Respondent does not apply to the contracts in dispute as it applies to contracts resulting from a Procurement by a request for proposals.**
- **Request for proposals are covered under PART VI – ALTERNATIVE PROCUREMENT PROCEDURES, (C) titled requests for proposals, section 76 running through Section 85.**
- **The contract under dispute is covered under PART V- OPEN TENDERING.**
- **No evidence has been tendered by the Respondent to support the contention that section 47 of the Act was breached. I accordingly reject that submission.**
- **I have read through the Act, IT IS MY FURTHER FINDING that the Act does not make provisions relating to contracts performed to completion.**
- **There are three bodies involved in the regulation of Public Procurement.**
- **The first one is the Public Procurement Oversight Authority whose major function is to ensure that the procurement procedures established under this Act are complied with.**
- **The second is the Public Procurement Oversight Advisory Board whose major function is to advise the authority generally on the exercise of its powers and the performance of its functions.**
- **The Third and final body is the Public Procurement Administrative Review Board. The act states that, the Public Procurement Complaints, Review and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 is continued under this Act as the Public Procurement Administrative Review Board.**
- **Section 93 provides for administrative review of the Procurement Proceedings, while section 98 sets out the powers of the review Board and Section 99 states that the right to review is an additional right.**
- **It is my finding that the invocation of the application of the Public Procurement and disposal act and regulations is belated. The Respondent ought to have invoked the act at an appropriate stage if there were reasons to do so. Apparently, no proceedings were taken to the board. No investigation was conducted if there was wrong committed in terms of the act.**
- **Looking at this matter, as a matter of Public Policy, I am in agreement with the submissions by the Claimant and I rely on the High Court cases following: Kenya Sugar Research Foundation v. Kenchuan Architects Ltd [2013] eKLR and Nyayo Tea Zones Development Corporation v. Njuca Consolidated Co. Ltd [2014] eKLR.**
- **I find that the Claimant is a local contractor within the meaning of the Act.**
- **The Claimant carried out the works under reference to completion. He says that he took loans to complete the project which loans remain unpaid.**
- **On the other hand, the Respondent received the renovated premises and has since put them to use.**
- **I find that it will be against Public Policy to deny the Claimant what shall be assessed to be due to him under this dispute, and in the circumstances of this case that may include wrongful enrichment to the Respondent and breach of the Constitutional right of the Claimant and defeating the objectives of the Public Procurement and Disposal Act if I were to find otherwise.**
- **Further I find that if there is any breach of the Act, then the Respondent's accounting officers should be investigated by the Kenya Ethics and Anti-Corruption Commission, under Section 105 of the Act and be made to compensate the Respondent for any economic loss it may suffer as a consequence of this award."**

Although the Arbitrator had entertained the thought of leaving the matter to Court, he nevertheless made a determination of it. He must be commended for not shying off from the matter. The effect of the Arbitrator's decision was that to uphold the variations would not be a breach of Public Policy.

40. Under Section 35 (2)(b) the High Court can interfere and set aside an Arbitral Award if it finds that:-

- **The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
- **The award is in conflict with the Public Policy of Kenya.**

Although there is respect for Party Autonomy when parties choose to submit their disputes to Arbitration, the mandate of the Arbitrator is not unbridled. An award that is in conflict with or against the Public Policy of Kenya cannot and should not be allowed to stand. An award on a dispute barred by law from settlement by Arbitration receives the same treatment.

41. It is for this reason that an Arbitrator is duty bound to interrogate an allegation that he/she has been asked to make an award that is against Public Policy or in respect to a dispute that is legally barred from settlement by Arbitration. It matters not that these two issues are not pleaded. And the stage of the proceedings at which they are brought to the attention of the Arbitrator is irrelevant. It can never be too early or too late for an Arbitrator to take cognizance of a Public Policy question. And if on the material before him, an Arbitrator is unable to decide the question then he/she should invite more evidence and /or arguments on the point. The issue is so fundamental to Arbitration proceedings that it is akin to the question of jurisdiction in relation to Courts.

42. This Court accepts that, even in examining whether an award is in conflict with Public Policy of Kenya, it shall be very slow to question the Arbitrators findings of fact. Secondly, the Court pays heed to the following caution sounded by the Court of Appeal in **ANNE MUMBI HINGA V. VICTORIA NJOKI GATHARA** [2009]eKLR;

> **"…….although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised".**

43. As far as is relevant for this discussion, the Arbitrator made the following salient findings. First, that the Respondent is a State Corporation within the meaning of the word in the State Corporation Act. Second, the Claimant was a contractor and the Respondent a Procuring Entity within the meaning of those words in the now repealed Public Procurement and Disposal Act (PPD Act) which was in operation at the material time. The Arbitrator also found that the contract in dispute was an open tender under Part V of the PPD Act. And let me observe that on my own evaluation of the evidence, the findings of the Arbitrator cannot be faulted.

44. The Respondent takes the position that the contract price in the original contract was Kshs.79,910,440/=. Subsequently, the parties entered into a Supplementary contract which had two components. It varied the original contract with works worth Kshs.11,810,820 and provided for new additional works (which were not part of the original contract) worth Kshs.20,137,017.20. The argument by the Respondent is that any variation beyond 15% of the Contract price breached the provisions of Section 45,47 and 85 of the PPD Act as read with Regulation 31 of the Public Procurement and Disposal Regulations (PPD Regulations).

45. The Claimant's take on the matter is articulated in paragraph 12 of the affidavit of Eng. Samay Singh sworn on 16th October 2015 in which he states:-

> **"THAT I aver that it is not true that the Supplementary Agreement capped all variations at Kshs.11,810,820.00. I aver that instead variations beyond 15% of the original contract were**

allowed by the Defendant through the Supplementary Agreement that allowed a variation of Kshs.31,947,837/20 which is 40% increase from the original contract sum of Kshs.79 million. All variations were at the request of the Defendant and complied by the Plaintiff. The Supplementary Contract further provided that upon completion of the works, the works will be measured by the Ministry of Public Works and any variations will be addressed accordingly. I aver that the said variations were effected beyond 15% of the original contract by the Defendant directly as early as at the time of signing the Supplementary Agreement and therefore should not shift goal posts to either the Project Architect or the Contractor the Plaintiff herein".

46. In the award, the Arbitrator rejected the Respondent's submissions that the supplementary Contract was a separate and independent contract from the original contract. He further found that 'the Supplementary Agreement was not meant to supplant the original contract but to supplement it'.

47. Another important finding of the Arbitrator is that the Revised contract sum was Kshs.228,768,660.32 and in doing so held,

"I find that Certificate No.10 was properly prepared and in accordance with the Contract between the parties, the original Contract read together with the Supplementary Agreement. The Certificate was properly served upon the Respondent".

48. Accepting that the Arbitrators findings was correct, then the original contract of Kshs.111,858,176 had been varied to Kshs.228,768,600, almost double the original. Was this an infraction on the regulations on Procurement? As correctly held by the Arbitrator, the Contract was governed by PPD Act. Section 47 of the Act provides:-

"An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if—

(*a*) the amendment has been approved in writing by the tender committee of the procuring entity; and

(*b*) any contract variations are based on the prescribed price or quantity variations for goods, works and services.

While Regulation 31 of the PPD Regulation reads:-

"For the purposes of section 47 (*b*) of the Act, any variation of a contract shall be effective only if—

a) the price variation is based in the prevailing consumer price index obtained from Central Bureau of Statistics or the monthly inflation rate issued by Central Bank of Kenya;

b) the quantity variation for goods and services does not exceed ten percent of the original contract quantity;

c) the quantity variation for works does not exceed fifteen percent of the original contract quantity and;

d) the price or quantity variation is to be executed within the period of the contract."

49. In its Application the Respondent made reference to Price Variation (see grounds 3(a) (b)& (c))and also what would amount to Quantity Variation. In respect to the latter would be paragraphs 12, 16, 17, 18 and 20 of the Supporting Affidavit of Charles Ongwae.

50. The Claimant on the other hand was certainly more clear and categorical that,

> **"It is not price variations but increase in work scope. I aver that this was brought about by the input of the Ministry of Public Works as supported by the Supplementary Agreement allowing variations**
>
> (paragraph 18 of Affidavit of Eng. Samay Singh of 16th October 2015)
>
> This also would be in line with its Statement of Claim (see paragraphs 6 and 7).

51. Crucially, the Arbitrator found the variations to be for additional work. That is that they were quantity variations.

52. Given these set of findings of facts by the Arbitrator (and which seems to have resulted from a proper and correct evaluation of the evidence), the inescapable finding of the Arbitrator would have been that the quantity variation of works that doubled the original Contract quantity was a bold violation of Section 47 of the PPD Act as read with Regulation 31 (c) of the PPD Regulations. This was because that substantial variation was not subjected to new procurement.

53. And there is good reason why Public Policy (and statute) requires that substantial Variation to Contracts of Public Corporations needs to be subjected to new Procurement Procedure. This text from **Arrowsmith: The law of Public and Utilities Procurement** (3rd edition) quoted in the Decision of **R(on the application of Gottlieb)** vs. **Winchester City Council** [2015] EWHC 231 (Admin) sets out the following principles:-

> **"A key reason for this principle relates to the purpose of the legislation of ensuring that work is awarded in accordance with transparent procedures to prevent discrimination. If the contract awarded is later changed, there is a risk that such changes are made for discriminatory motives (for example, to award the firm more work or allow it to operate under easier terms) and that national firms, in collusion with the contracting authority or otherwise, may be able to obtain an advantage in the award procedure by tendering favourable terms in the expectation that they will be changed after conclusion of the contract. Changes to concluded contracts can also potentially undermine any policy that contracts should be undertaken by the best tenderer in order to develop the single market. If this is considered as an objective of the directive, rules to limit changes to concluded contracts are also appropriate from this perspective, on the basis that the existing contracting partner may not be the best firm to perform the revised contract. Changing a contract also potentially violates the equal treatment principle that can support such objectives. From a national perspective, changing a contract without a competition for the revised contract raises value-for-money issues as the change is made without considering whether other economic operators can offer value for money and without the terms being fixed under the pressure of completion".**

Although the above discussion is on the European Union Directive on Public Procurement, many of the principles are as valid in the Kenyan situation.

54. Variations of Contracts can be abused to give advantage to a Contractor who is already engaged and to discriminate against other potential tenderers. Variations can be used as an opaque procedure to award a tender of what is essentially a new contract without subjecting it to competition. The matter at hand is a classic example, the scope of work was increased two fold without inviting fresh bids. To allow substantial variation of Public Contracts without subjecting it to fresh procurement undermines the spirit of transparency, competition and equal treatment of tenderers that underpins the legislation on Procurement. And the violation of the law should not be permitted even where the variation could result in a good deal and value for money for the Procuring Entity.The good deal and value for money should result from a competitive process and not a closed arrangement.

55. This Court takes the view that in so far as the Award upholds a variation that is in contrary to Statute, the same is against Public Policy. This decision has been reached on the application of the law on the finding of facts by the Arbitrator. Under the provisions of Section 35 (2) (b)(ii) the mandate of this Court is examine whether an Award is in conflict with the Public Policy of Kenya. That duty cannot be performed without the Court scrutinizing the award in the context of the Public Policy questions that are raised. While there is deference to the Arbitrators findings of the facts and the law, a Court should not be bound by the Arbitrators own finding that his decision is not against Public Policy. The Court must subject that finding to its own independent Evaluation, otherwise Awards will never be subjected to review under Section 35(2)(b) (ii) of the Act once an Arbitrator self-declares that the Award is not against Public Policy. The Principle of Party autonomy can never mean that an Arbitrator's own finding that his/her award is not against Public Policy must be accepted without question; The Courts mandate under Section 35 (2)(b) (ii) would require that the Court relooks at the question and gives its independent answer. And it cannot be said that the Court has sat on Appeal over the Arbitration Award simply because it has reached a different conclusion. This is because when asked to determine a Setting Aside Application premised on Section 35 (2) (b) (ii) of the Arbitration Act, the Court must make its own finding on whether or not the Award is on the right side of Public Policy!

56. I have read the decision in **Kenya Sugar Research Foundation vs. Kenchuan Architects Ltd** [2013] eKLR but I do not read any proposition in that decision that an award that is inconsistent with the PPD Act is not contrary to Public Policy. In the circumstances of that case Havelock J. concurred with the finding of the Arbitral Tribunal that there was no breach of Statute.

57. The Court reaches its decision even in the face of the submissions by the Claimant's Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

58. If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced.

59. Given my view of the matter, I need not consider the other arguments on Public Policy raised by the Respondent.

60. The upshot I allow the Application of 9th June, 2015 and set aside the Award of the learned Arbitrator dated 5th May, 2015. As a consequence, the Application of 10th August 2015 is hereby dismissed.

61. Given the history of this matter and as the Claimant's position is that it will suffer loss if the Award is not upheld, I take the view that I should not saddle the Claimant with an Order of Costs. Each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 9th day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Arwa for the Applicant

Nyadieka for Respondent

Alex - Court clerk