**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**COMMERCIAL AND TAX DIVISION MILIMANI COURTS**

**MISCELLENOUS APPLICATION NO 355 OF 2014**

**MASOSA CONSTRUCTION LIMITED……..…...……..…APPLICANT**

**VERSUS**

**OLOOLAISER WATER AND SEWERAGE COMPANY LIMITED…....RESPONDENT**

**RULING**

## INTRODUCTION

1. The Applicant's Notice of Motion application dated 30th July 2014and filed on 31st July 2014 was brought under the provisions of Section 35 of the Arbitration Act, 1995 and Rule 7 of the Arbitration Rules, 1997and all enabling provisions of the law. It sought the following orders:-

a. **THAT the Arbitral Award dated 6th June 2014 and issued on 25th June 2014 by Eng Lucas N. Ochieng, be set aside.**
b. **THAT the costs of this application be provided for.**

## THE APPLICANT'S CASE

2. On 30th July 2014, Maxwell OkemwaMogere, the Applicant's Managing Director swore a Supporting Affidavit on behalf of the Applicant. On the 7th October 2014, the Applicant filed written submission and List & Bundle of Authorities on even date.
3. The brief facts of this case were that the Applicant and the Respondent entered into a Contract (hereinafter referred to as "the Contract") dated 14th December 2012 wherein the Applicant undertook to construct two (2) Public Sanitation facilities with septic tanks at Ongata Rongai and Kiserian markets at a contract price of Kshs 7,728,540/= inclusive of taxes. A dispute arose out of the said Contract whereupon the same was referred to arbitration.
4. Lucas A.N Ochieng was appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter) as the sole arbitrator to deal with the said dispute in line with Clause 9.0 of the said Contract which stated as follows:-

**"Should any dispute or difference of any kind whatsoever arise between the parties, the parties shall use their best endeavors to settle the matter in question amicably. However when such settlement cannot be reached, the matters shall be referred for settlement by a single arbitrator as shall be appointed by the Chairman for the time being of the Institute of Arbitrators (Kenya Chapter) in accordance with the Arbitration Act 1995. The decision of such arbitrator shall be conclusive and binding to all parties."**

5. The Applicant contended that the award published ought to be set out by this court as the said Arbitrator's Award dealt with a dispute that was not contemplated by or did not fall within the terms of reference of the arbitration. It also said that the said Final Award was uncertain and amounted to a wrong exposition of the law and erroneous findings of fact and as such, offended public policy. It was also its contention that the said Arbitrator had grossly misconducted himself. It therefore urged the court to set aside the aforesaid Arbitral Award.

**THE RESPONDENT'SCASE**

6. In response to the said application, on 18th September 2014,Wilson Munguti, the Respondent's Acting Commercial Manager swore a Replying Affidavit on behalf of the Respondent. The same was filed 19th September 2014.The Respondent's written submissions were dated 20th October 2014 and filed on 21st October 2014.
7. The Respondent confirmed that the Applicant's claim in the Arbitration proceedings was premised on an alleged breach of a contract for construction of two (2) sanitation facilities with a septic tank under contract number OWSC/WSTF/UPC 5/03/2012. Particulars of the breach of contract and Special Damages were itemised in the Applicant's Statement of Claim. The particulars of damages were for Kshs 2,915,578/= together with a further claim of loss of profits at 25% of 7,728,540/= which was Kshs 1,932,135/=.
8. It stated that the aforesaid Arbitrator applied the right principles in his determination of the issues that were placed before him and that the Applicant had not met the threshold set under Section 35 of The Arbitration Act to warrant the setting aside of the Arbitration Award. It further averred that the Applicant was given the opportunity to present its case but failed to establish a case on the balance of probability. It therefore urged the court to dismiss the Applicant's present application with costs to it.

**LEGAL ANALYSIS**

9. The Applicant filed its Statement of Claim on 7th November 2013. It prayed for the following reliefs:-

a. **Special damages of Kshs 4,847,713/=.**
b. **Costs of the Arbitration.**
c. **In the alternative, and without prejudice to the foregoing, an order for specific performance.**
d. **Interest on (a) and (b) above from the date of filing claim until payment in full.**
e. **Any other relief that this Honourable Tribunal may deem fit to grant.**

10. The Respondent's Statement of Defence and Counterclaim was filed on 27th November 2013. It sought the following reliefs:-

a. **Special damages of Kshs 59,121,540/=.**
b. **Cost of the arbitration.**

11. The following issues were settled for determination by the Arbitrator:-

i. **Whether the Claimant was entitled to its claim in Application for interim payment Certificate No 1.**
ii. **Whether the Claimant was entitled to its claim for special damages for unlawful/wrongful termination of the contract.**
iii. **Whether the Claimant was entitled to its claim for orders for specific performance.**
iv. **Whether the Respondent was entitled to its Counterclaim for special damages for breach of Contract.**
v. **Interest (sic).**
vi. **Costs (sic).**

12. The Arbitrator's Award was in the following terms:-

i. **The Claimant's claims for special damages for wrongful termination and for an order for specific performance all failed;**
ii. **The Respondent's Counterclaim for special damages for breach of contract failed;**
iii. **The Respondent would, within fourteen (14) days from the date that the award was taken up, pay to the Claimant Kshs 232,228.59 in respect of the value of work completed, together with simple interest thereon at 18% per annum calculated from the date that the award was taken up to the date of payment.**
iv. **The Respondent was to pay to the Claimant all reasonable costs reasonably incurred by the Claimant in relation to the adjournment of the hearing of 7th March 2014, the amount of such costs if not agreed was to be determined by the Arbitrator on the standard basis (that is with any doubt as to reasonableness being resolved in favour of paying party) while for all other costs, each party was to bear its own costs;**
v. **The Arbitrator determined that the total amount of his recoverable fees and expenses was Kshs 800,040/= of which Kshs 65,000/=was in relation to the adjournment of the hearing on 7th March 2014. The Respondent was to be liable for Kshs 432,995/= while the Claimant would be liable for Kshs 367,495 all together with simple interest thereon at 18% per annum calculated from the date of the Award until payment. If either party had already paid any sum in excess of their liability, the other party was to forthwith reimburse the sum so paid.**

13. The Applicant contended that the Arbitrator determined the dispute on the basis that it had abandoned the construction sites for a period of twenty eight (28) daysyet he had found that **as a fact** (emphasis court) that the Respondent delayed in hand over of the sites to the Applicant for a period of forty five (45) days. It was its submission that the said Arbitrator's finding was contrary to the clear and unequivocal evidence that had been placed before him which caused him to come to the erroneous conclusion that it had committed a fundamental breach of the Contract.
14. It objected to Arbitrator's finding that it was in fundamental breach of the Contract and that the Respondent was not required to serve it with a termination notice under the terms of the said Contract. It also stated that the termination notice served by the Respondent was inconsistent with the Contract itself and could not have lawfully terminated the Contract between the parties.
15. It pointed out that the Contract entered into by the parties clearly provided for service of a termination notice, as a result of which the Arbitrator's findings on this issue of the termination was uncertain and based on wrong principles of the law.
16. On its part, the Respondent submitted that the said Arbitrator found, on a balance of probabilities, that the Applicant had not established that the Respondent had breached the contract. It contended that the Arbitrator proffered reasons and detailed all essential facts that were placed before him and consequently, he hadduly performed his duty.
17. The court carefully considered the Final Award and found that the said Arbitrator dealt with the issue of the termination notice under Paragraphs 67- 73 of his Final Award. He set out the circumstances under which a termination was required. He determined that the Respondent terminated the said Contract due to a breach of contract by the Applicant.
18. He pointed out that under Clause 8.0 of the Contract, the Employer or the Contractor could terminate the contract if the either party caused a fundamental breach of the contract. He set out the last paragraph of the Respondent's letter of termination dated 15th May 2013 where the Respondent had stated as follows:-

**"Accordingly and in consideration of breach of contract, the purpose of this communication is to notify you of the company's decision to evoke clause 8.0 and 8.3 of the contract and Clause 56.1 of the general conditions of contract, consequently (sic) the construction of 2 No. (sic) public sanitation facilities at Ongata Rongai and Kiser1an markets contract between Oloolaiser water and sewerage company limited and Masosa construction Limited is terminated with effect from 16th May 2013 and pursuant to clause 56.5 of the general conditions of contract, you shall stop work immediately, make the site safe and secure, and leave the site as soon as reasonably possible."**

19. In respect of that notice of termination, the said Arbitrator made the following finding of fact:-

**"… The termination in this case was therefore done under clauses 8.0 (for fundamental breach) and 8.3 of the contract Agreement and Clause 56.1 of the general conditions of contract; and based on my foregoing analysis, I am satisfied that notice was not required and so I find."**

20. As was rightly submitted by the Respondent, as the said Contract was terminated due to a fundamental breach of contract, there was no need for a notice period and the Arbitrator was right in so finding. The court therefore found that no sufficient reason had been advanced by the Applicant to set aside the Arbitral Award on the ground that the said Arbitrator had failed to arrive at a conclusion that that it was the Respondent that was guilty of fundamental breach of the said Contract.
21. Under Paragraphs 38 and 39 of the Final Award, the Arbitrator clearly set out the requirements of a variation of contract. He found that there was evidence of variation of site tendered during the Arbitration and the matter could not be re-opened for determination or re-evaluation by the court as it had no power or jurisdiction to do so.
22. On the issue of an award for damages, the Applicant faulted the Arbitrator for having found that no damages were payable to it in spite of finding that the Respondent had varied the Contract. It argued that the Arbitrator had found that there were several clauses setting out different payment terms under the Contract and were thus inconsistent but he failed to resolve the inconsistency. It also averred that the Arbitratoronly considered one (1) clause to the exclusion of all the other clauses without sound and proper reasoning and thereby made a speculative and uncertain award.
23. The Respondent argued that once the said Arbitrator found that the Applicant had not established that the Respondent had breached the contract, the issue of payment of damages did not arise.
24. The failure to award damages to the Applicant could not be deemed to have been offensive or contrary to the established legal principles that when liquidated damages are provided for in Contract. This is because the said Arbitrator had found as a matter of fact that the Applicant was fundamentally in breach of the said Contract.
25. As was rightly submitted by the Respondent, once the said Arbitrator had made a **finding on a matter of fact** (emphasis court) that the Applicant fundamentally breached the said Contract, no award for damages could be made. The Arbitrator considered the provisions on payments as to the stages and intervals in Paragraphs 22-26 of the Final Award where he analysedthe same and came to the conclusion that there existed no discrepancy. The said Arbitrator also considered the arguments regarding advance payments.
26. A party could only be awarded liquidated damages if it was the other party that was fundamentally in breach of the contract. The Applicant failed to demonstrate that it had suffered specified damages. The said Arbitrator could not therefore award the sameas the same were not specifically proven.The principle of proof of special damages is the same in litigation as in arbitral proceedings.
27. On this issue,in Paragraph 77 of the Final Award,the said Arbitrator stated as follows:-

**"There is no evidence before me to show the loss the claimant had suffered. And Eng. Mogere on cross examination admitted that he had made a double claim for profits…and although he testified that the claimants loss had been worked out, he admitted that such workings were not in evidence before me…"**

28. In Paragraph 51 **o**f the Final Award, the Arbitrator further stated that:-

**"…Even if the claim is to be valued as claimed for a compensation event, the costs or losses suffered ought to be proved but this has not been done."**

29. As regards the issue of costs, whereas the Applicant contended that it had successfully defended a claim in the sum of Kshs 59,000,000/=, the Respondent did also successfully defend the claim that had been presented by the Applicant. Indeed, the said Arbitrator dismissed both the Applicant's special damages for wrongful termination and for an order for specific performance and the Respondent's Counterclaim for special damages for breach of contract.
30. The Arbitrator made an order that the Respondent was to pay the Applicant a sum of Kshs 232,228.59 in respect of the value of work completed, together with simple interest thereon at

18% per annum calculated from the date that the Final Award was taken up to the date of payment. It was therefore within his discretion to have awarded costs in the manner that he did, which was that, save for the costs for 7th March 2014, for all other costs, each party was to bear its own costs.

31. The power to apportion and determine costs of the award and costs of the arbitral tribunal is well captured in Section 32B (1) **o**f the Arbitration Act. The same provides as follows:-

**"Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and the expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34 (4)."**

32. While the court noted the holding in the case of **National Bank of Kenya Limited vs Pipelastic Samkolit & Another [2001] KLR 118** that was relied upon by the Applicant to the effect that a court cannot re-write a contract between parties, this court found that the Arbitrator ably dealt with the issues as that they were presented to him and made findings that were sound and correct. There was no evidence that was adduced by the Applicant to show that the Arbitrator had attempt to re-write the said contract. The aforesaid case was thus distinguishable from the facts of this case. Consequently, the said Arbitrator exercised his discretion to award costs on sound and established principles of law as neither the Applicant nor the Respondent strictly succeeded in the claims they had lodged at the arbitral tribunal.
33. By quantifying his fees, the Arbitrator could not have been said to have misconducted himself. The fact that the Applicant found the value of the said Arbitrator's fees to have been unreasonably high and unjustifiable more so as the arbitration was heard and completed in one day or that the said Arbitrator **"delivered a poorly reasoned and pedestrian award which was indicative of lack of proper research and analysis and there was thus no basis for payment of the sum of Kshs 800,040/= as Arbitrators fees"** was not a ground under which the court could set aside the Final Award. Indeed an allegation of professional misconduct on the part of an arbitrator must be specifically shown or proven which this court found the Applicant to have failed to do.
34. In the case of **Christ For All Nations vs Apollo Insurance Co Ltd[2002] 2 EA 366**, it was held that an Award could be set aside under S. 35(2) (b) (ii) of the Arbitration Act for being inconsistent with public policy of Kenya. However, the Applicant did not demonstrate how the Final Award herein was inconsistent with public policy in Kenya. In the absence of any evidence to the contrary, it was the finding and holding of the court that the Applicant's arguments were not convincing to persuade it to set aside the Final Award on the ground that the said Final Award was contrary to public policy or other written law in Kenya.
35. It was evident from the Applicant's case that it was dissatisfied with the Arbitrator's findings. However, the court has no jurisdiction to re-open and re-evaluate the facts that were presented before the said Arbitrator with a view to coming to a conclusion that would be perceived to be different from what the arbitrator had arrived at, a position that was rightly expounded by the Respondent. The Applicant was thus stopped from presenting to the court any material evidence and proceedings that were before the Arbitrator for re-determination by this court.
36. Appreciably, the intervention of the court in arbitral proceedings is limited under Section 10 of Arbitration Act. It stipulates as follows:-

**"Except as provided in this Act, no court shall intervene in matters governed by this Act."**

37. A party cannot thus rely on the provisions of Section 35 of the Arbitration Act with the expectation that the court will review and re-litigate decision of an arbitral tribunal, a position that was aptly put by Ochieng J in **APA Insurance Company Limited –vs- Chrysanthus Barnabas Okemo [2005] eKLR** where he stated as follows:-

**"…In looking at this issue, I must remind myself that this is not for me to re-evaluate the evidence, as if it were an appeal. This is not an appeal from the decision by the arbitrator. My role is to ascertain if the applicant had made out a case to warrant the setting aside of the arbitral award…"**

38. The Applicant failed to present sufficient material to the court to enable it make a determination under Section 35 of the Arbitration Act provides as follows:-

**35(i) 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). An arbitral award may be set aside by the High Court only if:-**

a. **The party making the application furnishes proof.**
    i. **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 mattes 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;**

**2. 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 in conflict with the public policy of Kenya.**

xxxix. Having considered the pleadings, affidavit evidence, written submissions and case law in respect of the parties' cases, the court came to the conclusion that the Final Award was certain and cogent similar to what had been observed in the case of **Air East Africa vs Kenya Airports Authority Nairobi [2001] eKLR**. In that case it was held as follows:-

**"For an Arbitral Award to be worth its name, it must be certain. It must be in a form that can be enforced as a judgment of this Court. If it was otherwise, in my view, be outside what is contemplated by the reference to arbitration: It would be outside the terms of reference and it would be contrary to public policy…"**

40. Indeed, the Arbitrator was certain about his reasoning in the Final Award. In Paragraph 72 of the said Final Award, he stated as follows:-

**"Although the heading of the termination letter referred to a facilities at Ongata Rongai and Ngong Markets, the closing paragraph of the letter and which communicated the termination is (to my mind)clear that what was being terminated was the contract between the parties for construction of facilities at Ongata Rongai and Kiserian; I am satisfied that there was no ambiguity as to what was being terminated…"**

41. The court found no misconduct on the part of the Arbitrator. He did not act unreasonably, irrationally or capriciously ignore the limits and the clear provisions of the contract as had been contended by the Applicant. He made findings in line with the terms of the reference to arbitration. There was no evidence that was presented before the court by the Applicant to suggest that the said Final Award contained decisions on matters that were beyond the scope of arbitration.
42. The court was thus not persuaded by the Applicant's submissions that the said Arbitrator fell into error or that he had considered issues that were outside the provisions of the reference or that it satisfied the court that it had met any or all of the grounds under Section 35 of the Arbitration Act that it was relying upon. As a result,the Applicant's present application must fail in its entirety.
43. The finality of Arbitral Awards is well captured in Section 32Aof the Arbitration Act in which it is stipulated as follows:-

**"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."**

44. The purport of Section 32A of the Arbitration Act is that an award cannot be set aside on the ground that an arbitrator has made an erroneous **finding of fact**. (emphasis court). As was evident in the Arbitration Clause, the decision of the said Arbitrator was to be conclusive and binding on both parties.
45. Instructively, the court can only entertain an appeal but only in the manner that has been provided by the Arbitration Act. Save for the determination of a question of law on appeal, an arbitrator's decision must be accepted whatever the outcome or however any party feels about the said outcome.

**DISPOSITION**

46. Accordingly, the upshot of this court's ruling was that the Applicant's Notice of Motion application dated 30th July 2014 and filed on 31st July 2014was not merited and the same is hereby dismissed with costs to the Respondent.
47. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 26th day of February 2015

**J. KAMAU**

**JUDGE**