THE REPUBLIC OF KENYA

THE HIGH COURT AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLAENOUSAPPLICATION NUMBER 372 OF 2012

SANTACK ENTERPRISES LIMITED……APPLICANT

VERSUS

KENYA BUIDLING SOCIETY LIMITED……RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 26th June 2012 and filed on 3rd July 2012 was filed pursuant to the provisions of Section 35 (2)(a)(iv), (b) (ii) and (4) of the Arbitration Act No 4 of 1995 and Rule 7 of the Arbitration Rules, 1997. It sought the following prayers:-

1. **THAT this Honourable Court do set aside that part of the Arbitral Award made on 14th April 2012 by Norman Mururu and Bernadette Quadros, as joint arbitrators directing that the Applicant in this suit shall pay the Respondent Kshs 23,453,145/= with interest at 12% from 1st November 2007 until payment in full.**
2. **THAT costs of this Application be provided for.**

2. In the Arbitral proceedings between the parties herein, the Respondent herein was the Claimant while the Applicant herein was the Respondent.

THE APPLICANT'S CASE

3. The application was supported by the Affidavit of Elesh Gheewala that was sworn on 26th June 2012. The Applicant's Written Submissions were dated 26th November 2014 and filed on 27th November 2014.
4. A brief background of the case herein was that on 14th July 2004, both the Applicant and the Respondent entered into a Joint Venture Agreement (hereinafter referred to as "the JVA") relating to the development of that parcel of land known as L.R. No Nairobi/Block 113/44/R Komarock (hereinafter referred to as "the subject property"). The Respondent then issued notice terminating the JVA which the Applicant objected to leading to the referral of the dispute between them to arbitration.
5. The dispute was heard and determined by Norman Mururu and Bernadette Quadros (hereinafter referred to as "the Arbitral Tribunal"). The award of the said Arbitral Tribunal was set out in detail in Paragraph 21.0 of its Final Award that was made on 11th April 2012. However, the Applicant was aggrieved by Paragraphs 21.5 and 21.6 of the Final Award, which were now the subject of its

application herein.

6. Its case was that the Arbitral Tribunal dealt with a dispute that was not contemplated by or not falling within the terms of the reference to the arbitration for the reason that it awarded interest at the rate of twelve (12%) per cent per annum with effect from 1st November 2007 whereas the Respondent had sought interest from 27th March 2008, being the date of filing of the Amended Plaint, at prevailing market rates for which no evidence was adduced.
7. It averred that the award of interest by the Arbitral Tribunal was contrary to public policy when it awarded the sum of Kshs 23,453,145/= and the interest as aforesaid and simultaneously granted possession of the subject property to the Respondent herein. It stated that this amounted to unjust enrichment and was inconsistent with the Laws of Kenya.It therefore urged the court to allow its application as prayed.

THE RESPONDENT'S CASE

8. In opposition to the said application, Joseph Kania, the Respondent's Company Secretary swore a Replying Affidavit on 26th July 2012. It was filed on 28th July 2012. The Respondent's Written Submissions were dated 18th December 2014 and filed on 14th January 2015.
9. The Respondent averred that the Applicant ceded possession of the subject property following communication exchanged between it and the Applicant and that in any event, it was the owner of the subject property by virtue of a Sale and Development Agreement between it and the Applicant.
10. It also stated that the issue of unjust enrichment had been adequately canvassed before the Arbitral Tribunal which only recognised and enforced the contractual obligations between the parties and that an award of interest was at the discretion of the said Arbitral Tribunal.
11. It contended that this application was an attempt to appeal against the said Arbitral Tribunal's findings and decisions which were by law final and binding on points of law and facts, which was not permitted. It pointed out that the Applicant had filed the present application as it was not in a position to pay the balance of the sum of Kshs 4,972,841/= together with costs and interest thereon.
12. It therefore sought the dismissal of Applicant's present application with costs to it as it was in the interests of justice that litigation be brought to an end.

LEGAL ANALYSIS

13. From the Applicant's and Respondent's Written Submissions contained on pp 13 - 171 of the Respondent's Replying Affidavit, it was clear that the pleadings at the time of conclusion of the reference herein were as follows:-

a. **The Claimant's Amended Statement of Claim dated 9th October 2008.**
b. **The Respondent's Re-amended Statement of Defence and Counter-claim dated 13th May 2010.**
c. **Claimant's Reply to Defence and Counter-claim dated 25th March 2010.**

14. It was evident from Paragraph 1.2 of the said Final Award that Norman Mururu was jointly appointed by both parties vide a letter dated 29th October 2007 while Bernadette Quadros was appointed by a joint letter dated 20th December 2007. Following several preliminary meetings, both parties exchanged their respective documentation and the hearing was fixed for 8th February 2008. Hearing was conducted over a span of fifty eight (58) days and was concluded on 3rd November 2010. The site visit was on 10th November 2010 whereafter both parties tendered their submissions on 19th July 2011 and 27th July 2011.
15. The court found it necessary to set out the chronology of what initially happened when the dispute was referred to arbitration with a view to establishing whether or not the Arbitral Tribunal dealt with an issue that outside the scope of the reference and contrary to public policy as had been contended by the Applicant. This was pertinent as the Applicant had submitted that the Respondent herein had sought interest from the date of filing the claim, 27th March 2008, at

prevailing market rates and for which no evidence was adduced.

16. Notably, parties did not annex copies of the pleadings they filed in the arbitral proceedings making it difficult for the court to establish when the Statement of Claim was really filed. A copy of an Agreed Bundle of Documents that was annexed to the Applicant's Supporting Affidavit showed that the reference was filed pursuant to a court order in HCCC No 298 of 2007.
17. In the absence of any evidence by the Applicant herein, the only logical conclusion the court could make was that by the time the matter came up for hearing on 8th February 2008, both parties must have had filed their respective pleadings.
18. While Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such power must be exercised within the parameters of Section 10 of the Arbitration Act Cap 49 (Laws of Kenya) which provides as follows:-

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

19. In that respect, a court will only set aside an arbitral award delivered by an arbitral tribunal if it is satisfied that the grounds under Section 35 of the Arbitration Act that the Applicant relied upon, exist. The said Section 35 stipulates as follows:-

35(2) An arbitral award may be set aside by the High Court only if-

a. **the party making the application furnishes proof that-**

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

(b) The High Court finds that-

(ii) the award is in conflict of public policy of Kenya.

20. Under Rule 7 of the Arbitration Rules, 1997 it is provided as follows**:-**

"An application under Section 35 of the Act shall be supported by an affidavit specifying grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator."

21. It was correct as the Applicant submitted that the Arbitral Tribunal was obligated to construe the JVA in accordance with the Laws of Kenya. The question that this court was being asked to determine was whether or not the Arbitral Tribunal made a decision that was contrary to the provisions of Section 35 (2) (a) (iv) and (b) (ii) of the Arbitration Act.
22. Notably, although the Applicant was emphatic that the Respondent herein had sought interest with effect from 27th March 2008, the court was unable to ascertain for a fact if indeed, the Respondent had sought the interest at prevailing market rates from that date which it contended was the date of filing the claim because both parties were in agreement that the Statement of Claim was amended on 9th October 2008.
23. Be that as it may, it was evident from the Applicant's submissions and Paragraph 20.0 of the Final Award herein that the claim for interest at prevailing market rates was an issue that had been placed before the Arbitral Tribunal for determination.
24. Accordingly, in respect of whether or not the Arbitral Tribunal had determined a matter that was not contemplated by or falling within the terms of the reference to arbitration or that the Final Award contained decisions on matters beyond the scope of the reference to arbitration, the court found in the negative.
25. For this reason, the court found that the case of **Civil Appeal Case No 161 of 1991 Abdul**

Shakoor Sheikh vs Abdul Majied Sheikh &Others (unreported),that was relied upon by the Applicant, in which the Court of Appeal had found the trial court had erred in making a relief that had not been sought, distinguishable from the facts of this case.

26. On the other hand, the court found itself in agreement with the Respondent's submissions that the Arbitral Tribunal had the discretion to award interest as there had been no contrary agreement by both parties on this issue and that the Arbitral Tribunal acted within the confines of Section 32 C of the Arbitration Act Cap 49 (Laws of Kenya) that provides as follows:-

"Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date and with such rests as may be specified in the award."

27. Evidently, the Arbitral tribunal exercised its discretion to award interest at simple rate in line with Section 32 C of the Arbitration Act. The basis or justification of the award could be found in Paragraph 20.0 of the said Final Award which provided as follows:-

"Both parties have claimed interest "at prevailing market rates" on amounts awarded by the Tribunal. No evidence or submissions were presented by any of the parties on the "*prevailing market rates*."

In the result, the Tribunal exercised its discretion and awards a rate of 12% p.a. simple interest basis, on the amount awarded commencing in 1st November 2007."

28. In Paragraph 21.5 of the Final Award, it was stated thus:-

"The Respondent shall pay the Claimant Kshs 23,453,145 as per para 17.3 above being loss of venture income arising from the termination of the JVA."

29. Paragraph 21.6 of the said Final Award stipulated as shown hereunder:-

"The said sums shall attract interest on simple rate at 12% p.a. from 1st November 2007 until payment in full of the awarded amounts."

30. In view of the provisions of Section 32 C of the Arbitration Act, it was clear that the Applicant's concern that the said Arbitral Tribunal ought not to have awarded interest from 1st December 2007 was misplaced as the said Arbitral Tribunal had the discretion to award interest from such date, with such rests and as such rates it would deem fit to grant.

31. Appreciably, the rate of interest at twelve (12%) per annum from 1st December 2007 was made in favour of both parties as in Paragraph 21.4 of the Final Award, the Respondent herein was ordered to pay the Applicant herein a sum of Kshs 18, 460, 304/= as per Paragraph 18.6 of the said Final Award being the value of improvements it had done on the development.

32. The Applicant could not therefore purport to enjoy from that part of the award and at the same time, deny the Respondent benefit of the same on the ground that it was contrary to public policy unless it was also contending that interest on the said sum it was awarded also ought to have been paid with effect from 27th March 2008.

33. Notably, the question of public policy is one that is well settled. In the case of **Christ For All Nations vs Apollo Insurance Co Ltd [2002] 2 EA 366** that was relied upon by both parties, an applicant has to demonstrate that an arbitral award was inconsistent with the Constitution or other laws of Kenya, or inimical to the national interest of Kenya or contrary to justice and morality. Unfortunately, the Applicant did not demonstrate that there was a violation of public policy herein.

34. The court had no jurisdiction to make a finding and holding contrary to what the Arbitral Tribunal had arrived or to interfere with the exercise of its discretion to award interest in the manner that it did bearing in mind that the court had found hereinabove that the Statement of Claim must have

been filed by the time the matter came up for hearing on 8th February 2008.

35. 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.
36. Granting the orders sought by the Applicant would be tantamount to the court sitting on appeal when in fact the Applicant did not appeal against a point of law arising out of the decision of the Arbitral Tribunal. If the Applicant had wished to have the issues of the award of interest re-visited by this court, it ought to have filed an appeal to enable the court determine that question of law.
37. It is, however, important to note that under Section 39 of the Arbitration Act, the court can only consider questions of law that arose in the course of the arbitral proceedings if the parties had consented to the lodging of appeals or if the Court of Appeal was of the opinion that there was a point of law of general importance due to the final and binding nature of arbitrations.
38. As the court stated hereinabove, the court has no jurisdiction to re-open findings of fact that have already been made by an arbitral tribunal. Once an arbitrator makes a finding of fact, the court cannot review it even it is of the view that it would have arrived at a different conclusion. In this regard, the court associated itself with a similar holding that was made in the case of **Geogas S.A. vs Tammo Gas Limited *("The Baleares")* 3 All ER 554** that was relied upon by the Respondent herein.
39. Accordingly, having considered the pleadings, the affidavits, the written submissions and the case law in support of the respective parties' cases, the court was more persuaded by the Respondent's arguments that the Applicant did not demonstrate that any of the ground under Sections 35 (2) (a) (iv) and (b) (ii) of the Arbitration Act existed so as to persuade it to set aside the Final Award herein.
40. The court found and held that the Applicant had not placed before the court, any evidence to support its assertion that awarding the interest from 1st December 2007 or that the assessment of value by the Arbitral tribunal was contrary to public policy. Indeed, the assessment that had been addressed in Paragraph 17.3 of the Final Award was a matter of fact that this court had no jurisdiction to determine afresh. This was therefore not a suitable case which the court could intervene.
41. It is indeed in the interest of justice that litigation be brought to an end in this long standing dispute. As is stipulated under Section 32 A of the Arbitration Act, an arbitral award is final and binding upon the parties to it and no recourse is available to it otherwise than in the manner provided in the said Arbitration Act.

DISPOSITION

42. For the foregoing reasons, this court's ruling is that the Applicant's Notice of Motion application dated 26th June 2012 and filed on 3rd July 2012 was not merited and the same is hereby dismissed with costs to the Respondent.
43. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **23rd** day of **April** 2015

J. KAMAU

JUDGE